EMPLOYMENT TRIBUNALS

Claimant: Mrs B A Hall

Respondent: Let's Explore Ltd

Heard at: London South via CVP **On: 18, 19 and 20 May 2022**

Before: Employment Judge Khalil (sitting with members)
Mr Singh
Mr Mardner

Appearances

For the claimant: in person
For the respondent: no appearance

JUDGMENT WITH REASONS

Unanimous decision:

Liability:

The claim for the respondent's failure to make reasonable adjustments contrary to S.20 Equality Act 2010 is well founded and succeeds.

The claim for victimisation contrary to S.27 Equality Act 2010 is not well founded and fails.

Remedy:

Injury to feelings:

The claimant is awarded £14,000 for injury to feelings.

Loss of earnings:

- For the period 8 October 2018 to 29 April 2019, the claimant is awarded £4,060 for loss of earnings.

- For the period 29 April 2019 to 20 March 2020, 48 weeks, the claimant is awarded £11,376 for loss of earnings

- For the period 20 March 2020 to 5 October 2020, 28 weeks, the claimant is awarded £4,709 for loss of earnings.

- The total loss of earnings claim is £20,145.

The total compensation awarded is £**34,145**.

Reasons

Claims, appearances and documents

1. This was a claim for disability discrimination. The claimant confirmed it was a claim for reasonable adjustments and victimisation.

2. The respondent was not in attendance.

3. The claimant appeared in person assisted by her husband.

4. The claimant had produced a handwritten witness statement (12 pages). The claimant had also produced a Bundle of 218 pages.

5. The claimant also produced on day 2 an OH letter dated 11 October 2019.

Findings of Fact

6. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by the claimant during the Hearing, including the documents the Tribunal was directed to read/referred to by the claimant and taking into account the Tribunal's assessment of the witness evidence.

7. Only findings of fact relevant to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was a document the Tribunal was directed to read or was taken to.

8. The respondent is a children's soft play area.

9. The claimant commenced employment as a receptionist on 4 October 2017. She worked 30 hours per week, Monday to Thursday.

10. The claimant presented a claim form on 14 January 2019, having commenced early conciliation on 20 November 2018 which concluded on 20 December 2018.

11. The claimant was made redundant in October 2020 when the centre shut down because of covid. There is no claim before the Tribunal in relation to that redundancy.

12. The claimant was paid some furlough pay from March 2020 to October 2020, which she estimated to be about £100 per month. She was by then on zero pay by reason of sickness. Other employees of the respondent received furlough pay at 80%.

13. The claimant's role required her to admit children and parents into the centre and take payment. The claimant also had to take photographs of the children when they entered. Occasionally, the claimant would also need to clean/tidy up tables etc where users would sit/eat.

14. Although a chair was provided, the job was mainly a standing role. The claimant estimated that there would be between 50 to 100 admissions daily.

15. The reception desk was designed as a boat. The claimant says she mentioned ergonomic concerns about the desk from the commencement of her employment. She said she did so to various individuals – her manager Hayley Gardner, the General Manager Stuart Duncan and the Operational Manager Ben Stephenson. This was in relation to the counter of the desk being too low (on which the monitor sat) and the till sitting in an even lower position. In addition, the claimant complained about the PDQ machine (used to take card payments) was not fixed in a cradle and thus the claimant was required to pick it up and process the payments by handing it to the customer and then collecting it from them for each transaction.

16. Other employees complained about the set-up of the desk, including the other receptionist, Natalie Payne, who worked 15 hours a week.

17. The claimant had had double hand surgery because she has carpal tunnel syndrome ('CTS'). (The Tribunal at a previous Hearing found the claimant to be a disabled person under S.6 Equality Act 2010). The claimant said she had made the respondent aware of this at the outset of her employment. The Tribunal accepted that she had told the respondent about it (Sylvia Stefani, H&S Manager) but in a conversation about why she could not help with the coffee machines.

18. The Tribunal was not satisfied that the claimant had raised her CTS with the other individuals as alleged. The claimant said that she had experienced pain and discomfort because of the desk (related to her CTS) throughout, yet nothing had been conveyed in writing to the respondent until August 2018 in circumstances where the claimant was saying nothing had been done.

19. The Tribunal accepted that concerns about the desk were raised by the claimant and others but this was a generic concern about its design/ergonomics but without specific reference to CTS and reasonable adjustments.

20. The Tribunal was supported in reaching this finding by the absence of any specific reference to CTS or a disability in her review meeting in February 2018 (page 149) or in the 9-month review meeting in July 2018 (pages 2-3). There were specific concerns raised about the desk but it was generic in relation to the height of the shelf/screen/till.

21. At the 9-month review meeting on 29 July 2018, some concerns were expressed in relation to the claimant about ensuring the scanning cards of users as they left, ensuring membership monies were up to date, the taking of messages and cleaning tables with the reception area in view.

22. The Tribunal found a separate meeting occurred between the claimant and Ms Stefani and another Manager on 1 August 2018 about the amount of member money outstanding and member photos not being taken and broken glass in the car park (pages 4 to 8).

23. The claimant wrote to the respondent on 8 August 2018, in relation to her 9-month review and requested a risk assessment because of her CTS. She explained that an adjustable chair was not a solution as it was not a sitting job. She said she was continuing to experience pain and discomfort and said she had been asking since October 2017 when something was going to be done. She said something had to be done rather than the possibility of this and asked for input from the H&S Officer. She said her concerns had not been acted on despite her having a well-documented health issue (pages 9 to 17).

24. Following receipt of an undated letter in August 2018 from the respondent, which referred to the 9-month review discussions, the claimant wrote 2 letters on 21 August 2018. In one, she referred to “discrimination on health grounds – you are not addressing what is making me experience pain – with my CTS”. In the other, she raised a grievance referring to her bilateral surgery and CTS and the desk not being put right.

25. A grievance investigation meeting took place on 4 September 2018. The minutes were at pages 45 -47. All the height related matters were discussed in the meeting. Mr Stephenson said he had only first become aware of the claimant’s CTS when she had mentioned it in her grievance letter. The output from this meeting was for photos to be taken to be sent to CSC (risk assessors) for recommendations. The claimant was advised she could send in a doctor’s letter about the effect of her CTS at work.

26. On 5 September 2018, Mr Stephenson said to the claimant that if she had a letter saying she had CTS and the desk had not been out right, then she could ‘have them’ for DDA. This was noted by the claimant at the time and the Tribunal found a contemporaneous note was made (page 44).

27. A letter from the claimant's doctor dated 17 September 2018 recommended an assessment of her workstation because of her CTS (page 63).

28. A risk assessment was carried out on 5 October 2018. The claimant was on holiday, thus not in attendance. The conclusions and recommendations from the assessment were that the desk the respondent had, provided a safe and easy to use reception desk to be used by various users, not a single user, to be used standing up, not when seated. A mouse was also recommended. However, crucially, the report concluded that if any user experienced pain or difficulties, they should be recommended to Occupational Health ('OH') for a direct assessment so that any existing medical conditions can be reviewed and recommendations made. It was quite apparent from this conclusion, that the claimant's specific condition or circumstances had not been factored in at all.

29. Although Mr Stephenson said he was happy to re-arrange the risk assessment for a day when the claimant would be able to attend, he did not do so.

30. On 10 October 2018, the claimant requested a OH assessment with specific regard to her CTS and her reception desk (pages 70-71).

31. A letter dated 25 October 2018 provided the claimant with an outcome to her grievance. It summarised the risk assessment findings but in the further action section it omitted, crucially, any reference to the involvement of OH (having regard to the claimant) (pages 76-77).

32. The claimant was given a right of appeal which she duly exercised. The appeal hearing took place on 28 November 2018 before Mr Bayly, Director. The output from this meeting was that the respondent suggested OH were called in once the claimant had returned to work (pages 99-100).

33. An outcome letter dated 28 November 2018 concluded by asking the claimant to sign off a request for the respondent to contact her doctor about how best to go about getting her back to work (pages 101-103). The claimant said in oral testimony this had been done. This was accepted.

34. Whilst the claimant remained off sick thereafter and raised pay/leave related queries with the respondent, no OH assessment was undertaken until 11 October 2019. The outcome of that review in any event recommended a further bespoke assessment and provisionally recommended 4 areas of concern and/or adjustments:

    - A cradle for the card machine to stop the repetitive occasions to pick it up (about 50 to 100 times a day)

    - Repeat use of the trigger on the scanner (when scanning cards of people arriving)

    - When photographing new members, the desk space for the laptop she uses to do this was very cramped. This was happening up to 20 times a day contributing to pain in her wrists.

- The lack of desk space was contributing to her ability to hold the cordless telephone and take notes at the same time. She would cradle the phone between her ear and shoulder to free up use of both hands to support the paper on the desk. An adjustment was suggested to have use of a headset.

35. There was no evidence before the Tribunal that any of these adjustments or other adjustments were ultimately implemented or even explored throughout the claimant's remaining employment. The claimant was signed off from beginning of October 2018 and was paid SSP for 28 weeks, thereafter she was on zero pay. When Covid-19 hit the business in March 2020, the staff (at work) were furloughed on 80% pay. The claimant was off sick then but said in oral testimony that she received about £100 per month furlough pay until October 2020.

36. The claimant was not permitted to attend the staff Christmas parties in December 2018 and 2019 owing to the claimant being on sick leave and the respondent's insurers position that as such she should not be permitted to attend the parties.

Applicable law

37. *S. 20 Equality Act 2010 ('EqA'): Duty to make adjustments:*

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to

(a)removing the physical feature in question,
(b)altering it, or
(c)providing a reasonable means of avoiding it.

S. 27 EqA: Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Conclusions and analysis

38. The Tribunal concluded that the respondent had actual knowledge of the claimant's disability at least from 8 August 2018 and they knew or ought to reasonably be expected to know at least from when a risk assessment was undertaken, about the substantial disadvantage of the desk and related activities having regard to the CTS.

39. Further, that the physical feature of R's reception desk did put the claimant at a substantial disadvantage by reason of her CTS because of the height of the shelf on which the monitor rested and because of the height at which the till was positioned and/or because of inadequate design or space within the desk, causing pain and discomfort in the claimant's hands, compared to a person without that disability. The Tribunal further concluded that the height of the shelf, or the height at which the monitor or till was positioned could have been adjusted to remove the disadvantage, alternatively, more space could have been created within the design of the desk area. There was no evidence before the Tribunal to suggest this could not be done or why this could not be done. They were reasonable adjustments.

40. In relation to the use of the card machine and the cordless phone, the Tribunal concluded that the PCP of using those devices manually and repetitively for payment and scanning respectively, did substantially disadvantage the claimant because of her CTS as the repetitive nature of those tasks caused her pain and

discomfort, compared to a person without that disability. The Tribunal further concluded that the use of the card machine could have been adjusted by being located/fixed in a secure cradle and in relation to the phone, a headset device could have been provided to free up use of both hands. There was no evidence before the Tribunal to suggest these adjustments could not be done or why this could not be done. They were reasonable adjustments.

41. In relation to the use of trigger on the scanner, the Tribunal concluded that the PCP of using the scanner to scan cards, did substantially disadvantage the claimant because of her CTS as the repetitive nature of those tasks caused her pain and discomfort, compared to a person without that disability. The Tribunal was unable to reach a conclusion however about an adjustment to remove the disadvantage as none was forthcoming by the claimant or OH and the Tribunal did not consider it to be a reasonable adjustment for this not to be done by the claimant or, to be done by another person on her behalf because of a lack of evidence before it to so conclude.

42. These adjustments ought to have been considered and implemented within a reasonable period of the claimant raising her grievance on 21 August 2018. The Tribunal assessed that period to be 3 months.

43. The claim for victimisation fails as, the Tribunal concluded that the claimant did not do a protected act (i.e. raise a reasonable adjustments discrimination grievance) before being subjected to the alleged detriment of shortcomings in her performance being formalised. The causal link between the protected act on 8 August 2018 and the subsequent omission from the Christmas events in December 2018 and 2019 was not made out. The Tribunal was satisfied that the respondent did so based on the recommendation of its insurer, it was not a decision it came to of its own volition.

44. As the Tribunal has upheld the reasonable adjustments claim, it assessed the claimant's injury to feelings. The Tribunal noted that the claimant had experienced pain and discomfort as a result of the adjustments not being carried out. The claimant had soldiered on because she loved and needed her job particularly due to her husband's poor health at the time. The Tribunal noted the claimant was on sick leave for a long time as a result too. Further, that the claimant had been deprived from attending 2 social events with her colleagues as result. The period of non-action by the respondent was substantial. The Tribunal, in the light of the foregoing, assessed injury to feelings at the lower end of the mid-***Vento*** band and awards **£14,000**.

45. In relation to loss of earnings, the Tribunal concluded that had the respondent made the reasonable adjustments, the claimant would not have been absent on sick leave and/or would have returned to work. The suggestion that the respondent intended to look at the possibility of adjustments when the claimant returned to work was nonsensical – it required proactivity and even unilateral decision making by the respondent to facilitate/enable a return to work, not the other way round.

46. For the period 8 October 2019 to 29 April 2019, the claimant got SSP at £92.00 per week. That is £2,576. Her weekly pay was £237. For the same period, the claimant would have earned £6,636. The difference is £**4060.**

47. For the period 29 April 2019 to 20 March 2020, 48 weeks, the claimant would have earned **£11,376.**

48. For the period 20 march to 5 October 2020, 28 weeks, the claimant would have earned 80% of £6,636 i.e. £5,309, less 600 of furlough pay the claimant said she earned in this period making a total of £**4,709.**

49. The total loss of earnings claim is £**20,145.**

50. The total compensation awarded is **£34,145.**

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Employment Judge Khalil
15 July 2022

Sent to the parties on:
18 July 2022
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For the Tribunal:

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