THE EMPLOYMENT TRIBUNALS

Claimant: Mrs L Cook
Respondent: The Department for Work and Pensions

Heard at: Newcastle Hearing Centre **On:** 12, 13, 14, and 15 July 2022

Before: Employment Judge Morris
Members: Mr J Adams; Mr S Wykes

Representation:
Claimant: Mr P Morgan of counsel
Respondent: Mr M Brien of counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that the respondent discriminated against her contrary to sections 15 and 39 of the Equality Act 2010 by treating her unfavourably because of something arising in consequence of her disability is well-founded.

2. The claimant's complaint under section 21 of the Equality Act 2010 that the respondent failed to comply with its duty under section 20 of that Act 2010 to make adjustments is well-founded.

3. The claimant's complaint under Section 111 of the Employment Rights Act 1996 that her dismissal by the respondent was unfair contrary to Section 94 of that Act, by reference to Section 98 of that Act, is well-founded.

REMEDY

1. For reasons including lack of time and the need to make calculations as to pension loss, by consent, the Tribunal heard evidence and submissions relating to the matters set out below in respect of which it then gave its opinion to the parties with the intention that agreement could be reached between them regarding remedy thus rendering it unnecessary to convene a formal Remedy Hearing; that according with rule 3 of the Employment Tribunals Rules of Procedure 2013.

2. The representatives agreed that an update of progress in this respect would be sent to the Tribunal by no later than 8 August 2022. If no agreement has been achieved by that date, appropriate case management orders will be made in preparation for a Remedy Hearing to be fixed.

3. The matters that were thus considered were as follows:

3.1. The chance that the claimant would have been dismissed fairly in any event ("Polkey").

3.2. Injury to feelings ("Vento").

3.3. Mitigation.

4. Each of these matters is addressed in turn below.

Polkey

5. The Tribunal is conscious of the fact that the decision in Software 2000 Ltd v Andrews [2007] IRLR 568 EAT was made at a time when the statutory Dismissal and Disciplinary Procedures were in force but elements of that decision remain good guidance for this Tribunal. In that decision the EAT suggested that, having considered the evidence, a tribunal may determine five possible outcomes one of which being as follows:

> "That employment would have continued but only for a limited fixed period."

The Tribunal is satisfied that that is the likely outcome that would have applied in this case.

6. Thus, the claimant's employment would have continued beyond the date of her dismissal on 18 October 2019. No evidence has been given as to the precise date upon which the claimant intended to return or would have returned to work but, having considered all of the evidence before it, the Tribunal adopts a period of three months; therefore, a return to work on, say, Monday, 20 January 2020.

7. The Tribunal considers, however, on the evidence presented in relation to remedy, particularly the letter dated 28 November 2019 from a consultant orthopaedic surgeon (which indicates some reversal of the claimant's condition and prognosis from his previous letter dated 5 September 2019) and the letter dated 13 March 2020 from the claimant's general practitioner (which the Tribunal notes is timely in this respect as it is one week before its assumed date of the claimant's return) that the claimant would not, in fact, have returned to work on 20 January 2020.

8. If the claimant had failed to return to work, some process would have been invoked by the respondent such as, perhaps, an initial meeting or telephone call with the claimant and a referral to occupational health followed by a referral to a Decision Maker in accordance with the respondent Attendance Management Procedure and the Decision Maker's decision. All probably being concluded within three weeks.

9. Such calculations can be relevant in many cases such as this but, in the particular circumstances of this case, they are less relevant than the norm as they do not impact on the claimant's loss of earnings given that, first, she would not have been receiving any salary or sick pay from the respondent and, secondly, she had already received a payment in lieu of the notice of the termination of her employment to which she was entitled.

Mitigation

10. In the above circumstances, it is unnecessary for the Tribunal to consider further the issue of mitigation.

Vento

11. The Tribunal had found two acts of discrimination (the referral to the Decision Maker and the claimant's dismissal), which could be said to be so closely linked as to be a "one-off occurrence", as described in the guidance in Vento v Chief Constable of West Yorkshire Police (No 2), and, in any event, the claimant has only claimed injury to feelings arising from the dismissal and not the referral. That said, the Tribunal accepts the submission of Mr Morgan that, in the circumstances of this case (such as the claimant having lost the only employment that she had had throughout her 34 years' working life and which she had intended to continue), this was a serious case sufficient to come within the middle band referred to in the Vento guidance. Thus, as updated, £8,800 to £26,300.

12. Apart from what the claimant stated in paragraph 32 of her witness statement, as supplemented in her oral evidence on the last day of the hearing, the Tribunal did not have before it evidence of matters that might be relevant in this respect such as the extent to which the claimant experienced feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress or depression, the impact on relationships or any other particular difficulties caused by the discrimination.

13. Considering all the evidence before it in the round, however, the Tribunal considers an award of £10,000 would be fair, reasonable and just.

EMPLOYMENT JUDGE MORRIS
JUDGMENT SIGNED BY EMPLOYMENTJUDGE
ON 18 July 2022

Notes:

Remote hearing

This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

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