EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MRS A WHITTALL	**V**	**CITY FACILITIES MANAGEMENT (UK) LIMITED**

HELD REMOTELY ON: 5 JULY 2022

BEFORE: EMPLOYMENT JUDGE S POVEY
MS A BURGE
MS T LOVELL

REPRESENTATION:
FOR THE CLAIMANT: MS COLLINS (COUNSEL)
FOR THE RESPONDENT: MS BEATTIE (SOLICITOR)

REMEDY JUDGMENT

The Respondent must pay the Claimant the sum of £19,700, calculated as follows:

		£
Injury to feelings award		15,000.00
Interest on injury to feelings award (3 years & 11 months at 8%)		4,700.00
	Total	19,700.00

REASONS

1. At the Remedy Hearing on 5 July 2022, the Tribunal provided its reasons orally. Our written Remedy Judgment was sent to the parties on 18 July 2022. By an email dated 25 July 2022, the Claimant's solicitors asked for written reasons. These are those reasons.

2. In our Liability Judgment of 3 February 2022, the Tribunal unanimously found in favour of the Claimant in respect of some but not all of her claims for discrimination arising from a disability. We dismissed her reasonable

adjustments and unlawful deduction claims. Our reasons for allowing the claims which succeeded was set out at [20] – [105] of the Liability Judgment.

3. At the relevant time, the Claimant was still employed by the Respondent. It follows that there was no claim for reinstatement or re-engagement. Bringing matters up to date, following a TUPE transfer on 2 February 2022, the Claimant took voluntary redundancy with effect from 5 April 2022.

4. Our task was to determine what level of compensation, if any, to award to the Claimant by reason of the proven discrimination.

The Hearing

5. We heard oral evidence from the Claimant and received submissions from Ms Collins for the Claimant and Ms Beattie for the Respondent. We were also provided with a further bundle of documents, in addition to the documents already provided to date.

6. It was agreed at the outset of the hearing that the Tribunal was required to determine the following issues, based upon the Claimant's Schedule of Loss:

    6.1. What award, if any, to make in respect of Company Sick Pay.

    6.2. What award, if any, to make for injury to feelings.

    6.3. Interest on any of the awards.

The Relevant Law

7. Section 124 of the Equality Act 2010 ('EqA 2010') gives the Tribunal the power, where it upholds a discrimination claim, to order the Respondent to pay compensation to the Claimant. The aim of any compensation is to put the Claimant, as far as money is able to so, into the position she would have been but for the unlawful discrimination (Ministry of Defence v Wheeler [1998] IRLR 23 and Chagger v Abbey National plc [2010] IRLR 4). In other words, the Tribunal must require the Respondent to compensate for the loss caused to the Claimant by the discrimination.

8. By reason of section 119 of the EqA 2010, the Tribunal may award compensation for injury to feelings. The general principles that underlie such an award are set out in Prison Service v Johnson [1997] ICR 275, EAT. These include ensuring that for injury to feelings compensate the Claimant without punishing the Respondent. Further guidance on the financial levels of such awards was given in Vento v West Yorkshire Police (No.2) [2003] ICR 318, CA.

9. The Tribunal has the power to award interest in respect of compensation awarded by reason of discriminatory conduct. It is to be calculated on a daily basis, at a rate of 8%. The relevant dates for calculating interest differ. For injury to feeling awards, the period for any award of interest is from the date of the discriminatory act until the date on which the Tribunal calculates any interest (i.e. the remedy hearing). For financial loss awards, the period runs from halfway between the date of discrimination and the date of calculation up to the date of calculation (the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, as amended by the Employment Tribunals (Interest on Awards in Discrimination Cases)(Amendment) Regulations 2013)

Findings of Fact & Conclusions

10. As indicated above, the Claimant pursued two heads of damage – unpaid Company Sick Pay ('CSP) and injury to feelings.

CSP Claim

11. The Claimant claimed CSP based upon her annual entitlement of 60 days per year, which she says she was entitled to be paid in respect of the two days she did not work for the duration of her phased return from August 2018 to the end of employment with the Respondent (following the TUPE transfer) in February 2022.

12. We found that the central discriminatory act was the Respondent's failure to make the Claimant's reduced hours permanent. We found that, contrary to what was claimed, this was not a phased return and it was clear that it was not so from August 2018 (see, in particular, [32], [37] & [41] of the Liability Judgment). That fact was at that core of the fundamental finding that the failure to make the Claimant's part-time working pattern permanent was discriminatory. It was also the operative reason for why the Respondent, applying its CSP policy, did not allow the Claimant to build up her entitlement to CSP when she returned to work in August 2018 (since under the policy, once exhausted, CSP entitlement only began to accrue when an employee had returned to their contracted hours for a period of four consecutive weeks) (at [34] & [45] – [57] of the Liability Judgment). As we found, whilst her contracted hours remained at 40 per week, the Claimant was never going to return to full-time employment and, as matters stood, would never be able to accrue CSP entitlement again (at [32] of the Liability Judgment).

13. At the same time, the Respondent was actively looking to recruit a job share to the Claimant's post (at [35] & [38] of the Liability Judgment).

14. All those factors led us to find that this was not a phased return, as claimed by the Respondent. The Claimant was never returning to work 40 hours per week because of her disabilities.

15. Putting the Claimant in the position she would have been in but for discriminatory act means, in our judgment and on the facts as we have

found them in the Liability Judgment, focussing on the operative discriminatory act, the one which, in reality, underpinned and caused all the others. That act was the failure of the Respondent to recognise that from August 2018, this was not a phased return but a genuine reduction in working hours which should have been made permanent.

16. The answer to that discriminatory act was to make the Claimant's reduction in hours permanent (at [50] – [52] and [55] of the Liability Judgement). The Respondent's failure to do that was at the heart of all of the discriminatory acts we found made out. If the Respondent had made the Claimant's part-time hours permanent in August 2018, her CSP entitlement would have been available to her but on the basis of her part-time hours. As such, the Claimant would not have been entitled to CSP for any non-working days. On that basis, putting the Claimant in the position she would have been but for operative discriminatory act (namely, the failure of the Respondent to make her part-time hours permanent) would have resulted in her incurring no lost CSP entitlement.

17. In the alternative, even if the Claimant claimed she was still on a phased return, that suggested she would have eventually returned to her full-time contractual hours of 40 per week. In that scenario, the CSP policy was applied correctly by the Respondent, as the Claimant could only begin accruing CSP entitlement once she returned to those full-time contractual hours.

18. For all those reasons, the CSP claim was not made out.

Injury to Feelings

19. The parties agreed that as the discriminatory acts occurred over a period of time, the Claimant was entitled to an award in the middle Vento band. What, if anything, pushes it up from the bottom of the middle band?

20. The medical evidence adduced was minimal and somewhat lacking (consisting of a print out summary of the Claimant's GP records). It did not, in itself, particularly support the Claimant's oral and written evidence. As such, we were unable to find that the Respondent's conduct made the Claimant's existing disabilities any worse.

21. Being disabled does not elevate the award in itself and we were unable to accept the description advanced in submissions of the Claimant being vulnerable. This was in contrast to the resilience she has shown over the years challenging the Respondent and dealing with what were a number of interlinked discriminatory acts.

22. We considered the submission that the Claimant did not take any sick leave from August 2018 onwards because she would not be paid for it (having exhausted her CSP entitlement) However, there as a lack of evidence from the Claimant herself that she didn't take time off for that reason. No other reasons were advanced by the Claimant in her evidence for why she did not take sick leave, other than she wasn't sick.

23. In contrast, the acts of discrimination were interlinked – the failure to make the Claimant's part-time hours permanent impacted on her CSP entitlement; the failure to provide her with adequate support by relaying too much of recruitment, which was linked to the failure to give her a permanent part-time contract; raising concerns with performance in her appraisals, when failing to provide adequate support. We found those are aggravating factors in assessing the injury to feelings claim.

24. The Claimant contended for an award in the middle of middle Vento band (£20,000). The Respondent suggested an award at the lowest end of middle band (£10,000). We concluded that the award should be higher than the lowest end of the middle band because of the period of time over which the acts were commissioned and the aggravating fact of the way they were interlinked. But we were not satisfied that the award reached the figure contended for by the Claimant. We found that an award between the two was more appropriate on the evidence we had seen and heard and the findings we made in the Liability Judgment.

25. For those reasons, we awarded £15,000 for injury to feelings. That award was not subject to taxation as it is not made in connection with the termination of employment nor was it subject to recoupment.

<u>Interest</u>

26. The Claimant was entitled to interest on her injury to feelings award at the rate of 8% per annum.

27. The interest calculation for the injury to feelings award runs from the date of the start of the discriminatory acts (6 August 2018, per [42] of the Liability Judgment) up to the assessment of remedy (5 July 2022). That equated to three years and 11 months and produced interest of £4,700 on the award of £15,000, calculated as follows:

    Interest at 8% per annum on £15,000 = £1200
    £1200 x 3 (6/8/18 – 5/8/21) = £3600
    £1200/12 x 11 (6/8/21 – 5/7/22) = £1100
    £3600 + £1100 = £4700

<u>Conclusion</u>

28. By reason of the above, we awarded the Claimant total compensation of £19,700.

EMPLOYMENT JUDGE S POVEY
Dated: 4 August 2022

Order posted to the parties on 17 August 2022

For Secretary of the Tribunals Mr N Roche