



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4106898/2020

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Remedy Hearing held at Glasgow on 9 September 2022

Employment Judge D Hoey  
Members: N Eliot and S Currie

10 **Ms M Mackay**

**Claimant**  
**Represented by:**  
**Mr Cobb -**  
**(Counsel)**  
**[Instructed by**  
**Messrs Ammar**  
**Anwar and Co]**

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**Taylor Wimpey UK Limited**

**Respondent**  
**Represented by:**  
**Mr Hughes -**  
**Counsel**  
**[Instructed by**  
**Messrs**  
**Greenwoods]**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant is awarded the total sum of £7,500 (**SEVEN THOUSAND FIVE HUNDRED POUNDS**) with interest in the sum of £1,538.63 (**ONE THOUSAND FIVE HUNDRED AND THIRTY EIGHT POUNDS AND SIXTY THREE PENCE**) as compensation following the respondent's failure to comply with its duty to make reasonable adjustments pursuant to section 20(5) of the Equality Act 2010 as set out in the judgment dated 3 June 2022.

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### REASONS

1. By judgment dated 3 June 2022 the Tribunal unanimously found that the respondent failed to comply with its duty to make reasonable adjustments pursuant to section 20(5) of the Equality Act 2010 in respect of (1) the respondent's failure to provide auxiliary aids, namely a specialist keyboard, specialist mouse and laptop stand from 17 February 2020 until 18 June 2020

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and (2) the failure to provide the auxiliary aid of a headset from 17 February 2020 until the end of the claimant's employment (29 September 2020, following notice having been given on 31 August 2020).

2. This hearing had been fixed to determine remedy, the parties having been  
5 unable to agree upon a figure. The issue for the Tribunal to determine is what compensation should be awarded in respect of the unlawful discrimination found. The claimant was seeking an award of injury to feelings only and the agreed issue was the appropriate level of award.
3. The hearing took place in person with the parties referring to facts as found by  
10 the Tribunal with the claimant giving some additional evidence.

### **Facts**

4. The Tribunal's judgment is referred to for the facts as found, as summarised below, supplemented by the evidence from the claimant.
5. The respondent is a national housebuilder. The claimant began employment  
15 on 2 October 2017 as sales executive. She would have discussions with customers and managers in her role.
6. The claimant had been diagnosed as having fibromyalgia in around September 2019, the diagnosis being confirmed in October 2019. The claimant experienced widespread musculoskeletal pain throughout her body, stiffness,  
20 fatigue, numbness and had difficulty gripping objects with her hands. Due to the pain personal care was difficult and driving anything other than short distances caused challenges.
7. The respondent was told at a meeting with the claimant on 7 October 2010 that the claimant had fibromyalgia and she experienced severe pain, tingling and  
25 numbness. At times she said she was unable to hold a bag, phone or drive and there was no warning which part of her body would be affected. She was taking pain killers.
8. Following a meeting the claimant, a letter was sent to the claimant dated 9 January 2020 stating that a risk assessment of the claimant's workstation

would be arranged. The adjustment would be reviewed by the respondent to ensure appropriate support was provided

9. On 13 January 2020 the claimant's manager requested an ergonomic assessment for the claimant's workstation. The assessment took place on 11 February 2020 at the claimant's workstation on site.
10. A Report was produced following the ergonomic assessment. The Report noted that the claimant had experienced pain throughout her body with her hands, wrists, torso and hips worst affected. She had good and bad days with her fibromyalgia and her working posture could aggravate the pain and sitting can be painful.
11. The workstation had been observed and it was recommended that certain adjustments be made. Adjustments to be made included a chair for spine and lumbar support.
12. Another adjustment was a number slide keyboard which is narrower and allows more space for arms when typing and reduced shoulder strain, which would reduce the pain the claimant experienced
13. Another adjustment was a special mouse which would alleviate upper limb disorders and reduce elbow strain and thereby reduce the pain the claimant experienced.
14. Another adjustment was a laptop stand which allowed variable heights and reduced neck strain reducing the pain the claimant experienced.
15. Finally it recommended a Bluetooth headset which would allow the claimant to be hands-free when on a calls reducing the pain the claimant suffered in lifting and holding a phone.
16. On 18 February 2020 the claimant's line manager erroneously believed she ordered all the adjustments that had been recommended.
17. The pandemic hit the country around March 2020. Guidance had been issued to allow home working on occasion. On 19 March 2020 the claimant had made

suggestions as to operational matters in relation to pandemic working and asked about the equipment which she said was adversely affecting her.

18. The next day the claimant's line manager called the claimant and said she would continue to chase the provider of the equipment as she understood how important it was to provide the adjustments. The claimant noted that she knew the respondent had been chasing the equipment and it was much appreciated. The claimant's line manager continued to chase the equipment.
19. From 23 March 2020 the claimant began to work from home as a result of the pandemic. The claimant's line manager had seen a mat online that was stated to help those with fibromyalgia and out of concern for the claimant, her manager sent an email about it.
20. The claimant and her line manager discussed how best to effect delivery. The parties were focussing upon the chair and how it would be delivered and assembled.
21. On 3 April 2020 the claimant had told her line manager that she had ordered an adjustable laptop stand herself.
22. On 9 April 2020 the claimant was placed on furlough which ended on 31 May 2020.
23. On 9 June 2020 the chair was delivered to the claimant's home. The claimant noticed from the paperwork that the other items had not been included and she asked Ms McDonald, her line manager, about this.
24. Ms McDonald had understood that all the items had been ordered and she contacted the provider. The claimant had purchased a laptop stand herself. Ms McDonald discovered that in fact it was only the chair that had been ordered. She undertook to order the additional items (the specialist keyboard, laptop stand and specialist mouse). Due to oversight Ms McDonald omitted to include the headset in the order.

25. On 18 June 2020 the recommended keyboard, mouse and laptop stand were delivered to the claimant's home. The Bluetooth headset was not included as this had been omitted in the second order.
26. In mid to late July 2020, the claimant experienced a flare up of her fibromyalgia. She was stressed as result of how she perceived she had been treated and she contacted her GP. The claimant advised Ms McDonald on 17 July 2020 that she had experienced a flare up of her condition. Ms McDonald tried to call the claimant but the claimant did not wish to speak with her.
27. On 23 July 2020 the claimant was signed off unfit for work as a result of another flare up of her fibromyalgia and was signed off until 5 August 2020.
28. On 6 August 2020 the claimant was signed off unfit for work until 19 August 2020 and then signed off unfit for work until 1 September 2020.
29. On 31 August 2020 the claimant resigned. Her resignation letter stated that she felt she had been required to choose between her health and her career against a background of the handing of her grievance and diagnosis of fibromyalgia and the "ongoing adverse and discriminatory treatment towards" her.
30. The Tribunal dismissed the claimant's claims for constructive unfair dismissal , harassment, direct disability discrimination and victimisation. It partially upheld her claim in respect of the failure to comply with the duty to make reasonable adjustments.
31. The Tribunal found that the claimant had begun to interpret how the respondent was acting in a very negative way. She had a perception the respondent was treating her differently and adversely because of her disability.
32. With regard to the successful reasonable adjustment claims, the respondent accepted the claimant was put to substantial disadvantage in comparison to persons who were not disabled in having to work on a laptop without keyboard. Mouse and laptop stand. The failure to check that these items had in fact been ordered was a failure to comply with the duty to make reasonable adjustments.

The failure occurred on 17 February 2020 and was complied with on 18 June 2020 when the mouse, laptop stand and keyboard were delivered.

- 5 33. The failure to order the headset was due to oversight. Nevertheless it would have been reasonable to have taken steps to order the headset on 17 February 2020. That had not been done at all during the claimant's employment.
- 10 34. On 10 September 2021 a medical report was provided in respect of the claimant. This was prepared by a consultant physician whose specialist fields were rheumatology and general internal medicine. The instruction the physician received had been to "provide an expert report on the current condition, future prognosis and the extent, if any, to which the alleged discriminatory treatment exacerbated the condition, increased the severity of symptoms and affected future health and employment prospects". It was obviously prepared prior to the Tribunal's judgment.
- 15 35. The claimant had advised the physician as to her employment position which was confirmed in his report. He stated that "following the diagnosis of fibromyalgia she required a 2 month period off work. She attended occupational health as driving had become problematic due to residual neuralgic pain from shingles and she was located at a site nearer her home. Sitting for longer periods was also difficult as she was required to speak to customers by telephone for long periods and whilst some modifications were made to the workstation this did not resolve the problem. Widespread pain was worsening at this time.... By June 2020 she highlights that her mental health was suffering due to the work environment which produced anxiety, depression and palpitations... She felt the working environment was such that it was worsening her physical pain and mental well being and therefore resigned."
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- 25
- 30 36. The physician noted that in general terms fibromyalgia is a chronic condition lasting many years sometimes decades but tends to improve with time. Most patients have episodic flares of their symptoms with a degree of unpredictability. He opined that "on balance of probability several of these effects were triggered by the alleged work stressors she experienced. Some physical impairments of fibromyalgia were heightened in their effect".

37. The impact of the failure to provide the claimant with a specialist keyboard, mouse and laptop stand from 17 February 2020 until 18 June 2020 was relatively minimal in itself but when taken with the failure to provide the headset led to greater pain for the claimant. She was upset as a result of the failure and suffered as a consequence of the lack of the adjustments during the period when she working (bearing in mind the furlough period).
38. The claimant suffered more as a result of the failure to provide the headset. This was particularly difficult for the claimant given her difficulty in holding a phone and making calls. The pandemic had resulted in increased remote working which meant the claimant was using and relying upon the telephone for greater periods of time. She was required to operate the telephone without the headset which significantly impacted the claimant. The pain of her condition increased. On some occasions the pain was extreme and she was numb. While it was not possible to say to what precise extent the pain was a direct result of the failure to make reasonable adjustments (as opposed to the other stressors in her life, real and perceived), the failure in particular to provide a Bluetooth headset did have an appreciably adverse impact upon the claimant. The anger, distress and upset as a result of this failure was substantial for the claimant.

## Law

39. In the context of a breach of the Equality Act 2010 compensation is considered under section 124, which states:
- (1) *This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
- (2) *The tribunal may—*
- (a) *make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
- (b) *order the respondent to pay compensation to the complainant;*
- (c) *make an appropriate recommendation.*

(3) *An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate ...*

5 (4) *Subsection (5) applies if the tribunal—*

(a) *finds that a contravention is established by virtue of section 19, but*

(b) *is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.*

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(5) *It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).*

(6) *The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.....*

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40. Section 119 states:

(3) *The sheriff has the power to make any order which could be made by the Court of Session –*

(a) *in proceedings for reparation*

(b) *on a petition for judicial review.*

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(4) *An award of damages may include compensation for injured feelings(whether or not it includes compensation on any other basis).....”*

25 41. In considering remedy the Tribunal should consider an award for injury to feelings. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 in which the Court of Appeal gave guidance on the level of award that may be made noting that the award is compensating subjective feelings of upset, frustration, worry,



anxiety, mental distress, fear, grief and humiliation. The three bands were referred to as being lower, middle and upper, with the following explanation:

5           *“i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.*

10           *ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.*

15           *iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.”*

42. In **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be  
20 calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2021, the Vento bands include a lower band of £900 to £9,100, a middle band of £9,100  
25 to £27,400 and a higher band of £27,400 to £45,600.

43. The higher band applies to “the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment”, the middle band “for serious cases which do not merit an award in the highest band” and the lower band “for less serious cases, such as where the act of discrimination is an  
30 isolated or one-off occurrence”.

44. General principles that apply to assessing injury to feelings awards were given in **Prison Service v Johnson** 1997 IRLR 162 where it was noted that such awards are compensatory and should be just to both parties. They should compensate fully but not punish any party. Awards should not be too low to diminish the policy of the legislation. Awards should have some broad general similarity to the range of personal injury awards and Tribunal should take into account the value in everyday life of the sums in question and the need for public respect for such awards.
45. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (made pursuant to section 139(1) of the Equality Act 2010) interest is simple and accrues from day to day. The judicial rate (fixed per the Sheriff Courts (Scotland) Extracts Act 1892) is presently 8%. Interest on an award for injury to feelings is awarded from the date of the act of discrimination until the date of calculation (Regulation 6(1)(a)).

#### 15 **Claimant's submissions**

46. Counsel for the claimant produced a written submission to which he spoke. He noted that the periods of breach in question amounted to four months and seven and a half months respectively and argued that interest on the award should be calculated with effect from 17 February 2022.
47. He argued that the award for injury to feelings in this case should fall within the lower end of the middle Vento band Scale and invited the Tribunal to make an award of £15,000. He noted that the Tribunal had found the failure amounted to a substantial disadvantage from 17 February 2020 until either 18 June 2020 or 29 September 2020. The purpose of the Headset was to avoid a "substantial disadvantage" of the pain caused by lifting a telephone by which time she had returned from furlough. At a period when there can be no dispute that a greater reliance on telephone contact occurred during the early stages of the Pandemic, continuation of this situation for a further three months would have had significant effect upon the claimant.
48. In assessing what might be an appropriate level of the Vento Bands, it was acknowledged that cases are fact sensitive, and accordingly comparable cases

are difficult to identify, owing to their fact sensitive nature. Counsel referred to an Employment Appeal Tribunal judgment (**Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley** (UKEAT/0417/11)) where a Radiographer who had sustained an injury to her arm, which left her unfit for work for around 5 4 months. A period of 8 months passed in which the NHS Trust failed to complete the processing of the Application for the Benefit, partly as the result of misunderstanding the Regulations. At the end of this period, it was established that the claimant had no reasonable prospect of returning to work. The Tribunal assessed the facts as falling within the top Vento Band and 10 awarded the claimant £30,000 which was overturned on appeal to £10,000 for injury to feelings, which at that time was towards the centre of the middle Vento band which then ran between £6,000 - £18,000. In current terms, that would fall between £9,000 - £27,000.

49. It was submitted the current case has crossed the threshold for a middle Vento 15 band award. This case cannot be viewed as comprising a one – off incident. The respondents had known since November 2019 that the claimant’s condition met the criterion of a “disability”, and following the ergonomic assessment, the claimant had complained regarding the failure to supply the recommended equipment.

20 50. Most significantly, the ergonomic report highlighted the effects of the claimant’s Fibromyalgia on her day to day work in terms of the pain and discomfort she was experiencing, and which never was fully addressed before her resignation took effect. It had also been recognised by the Tribunal that the claimant’s line managers were not fully trained in handling matters relating to disabled staff, 25 which reasonably may be seen to have exacerbated the effect on her of their continuing breach of the duty to supply the reasonable adjustments.

51. It was submitted that the facts were similar to Newcastle NHS where the claimant was let down by her managers who failed to address the issues arising from her disability, in considerable measure because its internal 30 systems either operated in a misdirected or unresponsive manner.

52. The failure in this case was not a one off incident. Ms Ross advised that a Risk Assessment would be arranged for the Claimant at the start of January 2020. The Ergonomic Assessment did not take place until 17th February 2020, and at one point nearly did not take place at all. The gap between the completion  
5 of the Ergonomic Assessment and implementation predated the COVID Lockdown and still had not been implemented by the time the claimant returned from Furlough.
53. On any view, an employee who had been seeking the effects of her disability to be addressed as the law required for a substantial period was left with the  
10 stress of these not being fulfilled, and additional to any other issues she was experiencing with her managers.
54. In short the failure to made the adjustments which was found to be unlawful had a significant impact upon the claimant. She had repeatedly chased the adjustments and was in pain. While counsel for the respondent accepted there  
15 was no evidence as to the precise impact of each failure upon her condition, it was submitted this could be ascertained from the evidence, with the Tribunal making a judgment.
55. Accordingly, an award for Injury to Feelings within the middle Vento band of £15,000, with an award of Interest at 8% running from 17th February 2020  
20 should be made.

### **Respondent's submissions**

56. Counsel for the respondent argued that this case fell within the lower end of the lowest Vento band. This was a one off failure, as a result of oversight. While the effect continued over a number of months, the claimant knew that the  
25 matter had been ordered and that her line manager was chasing the items. This was not a case where the failure had been absolute. The working environment had been supportive and the remaining claims had been dismissed.
57. One of the key difficulties was identifying what the unlawful acts caused by way  
30 of injury to feelings. Counsel was unable to say what the outcome should be

as he was not a medical specialist and there was a lack of clarity as to the precise impact or the medical position. There were a number of potential causes of the pain the claimant suffered. The medical report relied upon was general and repeated what the claimant had told the physician.

5 58. Ultimately it was an exercise of perception and feeling and it is very difficult to say how much compensation should be awarded. Counsel referred to a first instance decision, **Blyth v BR Fastfood** 4110611/2021, which had been undefended where an award of £6,000 was made in a case of discrimination against a pregnant woman where the breaches had been more serious. It was argued the current case was less serious.

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59. Counsel noted that the claimant had initially sought £25,000 for solatium in respect of all of her claims, the majority of which had been dismissed and now was seeking £15,000 when the failure was not deliberate.

### **Discussion and decision**

15 60. The Tribunal carefully assessed the evidence that had been led throughout this case carefully together with the parties' written and oral submissions in detail. It also considered the legal position mindful that the purpose of injury to feelings is to compensate the claimant for the anger, distress and upset caused by the unlawful treatment. It is compensatory and not punitive. The Tribunal was careful to focus its enquiry upon the actual injury suffered by the claimant in respect of the unlawful acts only. The injury to be considered is the injury to feelings (and not other injuries) and only in respect of the acts found to be unlawful. It is the impact upon the claimant which is to be considered.

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25 61. The context in which the failures occurred was important. Firstly this happened during lockdown and the period in question included a period the claimant was on furlough and not working. Nevertheless the impact of the failure to take the relevant steps clearly and materially affected the claimant. It is the effect of the unlawful conduct that should be considered and the Tribunal was careful to consider this from the evidence presented.

62. Secondly the claimant was kept abreast of the situation by her line manager (who had made a genuine error). However, the respondent had failed to order the headset and this was not known by the claimant who required to continue to work on the telephone on a regular basis, believing it had been ordered, which contributed to increased pain (a matter known by the respondent given the information communicated to them).
63. There was no clear medical evidence setting out the impact of the specific failures (which were unlawful). The Tribunal did, however, have the evidence of the claimant and was able to assess the impact upon the claimant of the relevant failures which were unlawful, within the context in which they occurred.
64. The Tribunal must ensure that the award is compensatory and fair to both parties, compensating the claimant fully without punishing the respondent. The Tribunal ensured the award it reached bore a similarity to the award that could be made in a personal injury claim, taking account of the value of the sum in everyday life whilst seeking to ensure public respect on the level of award is maintained.
65. The Tribunal found that the impact of the failure was greatest in respect of the failure to provide the headset. The failure to do so lasted for a greater period of time and gave rise to significant adverse effects for the claimant, effects that were known to the respondent. It had been made clear that the claimant struggled with lifting the telephone and making calls. The failure to provide the Bluetooth headset required the claimant to continue to make calls during a period of the pandemic which more calls required to be made.
66. The Tribunal considered the parties' submissions carefully and the authorities. The Tribunal was satisfied that the failures in this case, taken together, merited an award in the upper quartile of the lower band. The Tribunal was not satisfied that the unlawful acts merited an award in the middle band in light of the authorities in this area and given the unlawful conduct, the failure to comply with the duty to make reasonable adjustments.

67. The Tribunal assessed the position as a whole from the evidence before it and concluded that it was fair and just to award the sum of £7,500 in respect of the unlawful actions.
68. In concluding that the injury to feelings award fell within the lower band, the Tribunal took account of the nature of the discrimination and impact from the evidence before it. This was a “less serious” case, compared to, for example, the position had the claimant been successful in respect of each of her claims of harassment, direct discrimination and victimisation (which would have merited an award in the middle Vento band). The failures in this case were significant but did not merit an award in the middle or higher band on balance.
69. In assessing compensation, the Tribunal took account of the subjective feelings of upset, frustration, worry, anxiety, mental distress, unhappiness, stress and depression exhibited by the claimant, and considered by the Tribunal to stem from the unlawful acts. It was not appropriate to consider each failure individually given the evidence and consequence of the failures. It was in the interest of justice to make the award the Tribunal has from the evidence presented given the impact of the failures upon the claimant in respect of injury to feelings.
70. The Tribunal has concluded that given the main impact of the failures stemmed from the failure to provide the claimant with the Bluetooth headset, it is just to award interest upon the sum awarded from the date of that failure.
71. Interest is awarded as follows. The award is £7,500. The relevant date is 17 February 2020. The calculation date is 9 September 2022. That is 936 days. The judicial interest rate is 8%. Interest is therefore  $936 \times 0.08 \times \frac{1}{365} \times 7500$  which is £1,538.63.

### Summary

72. The unanimous judgment of this Tribunal is that it is just and equitable to award the claimant the sum of £7,500 as compensation for the failure to comply with the duty to make reasonable adjustments (in breach of the Equality Act 2010)

plus interest of £1,538.63, from the evidence presented to the Tribunal in light of the authorities in this area.

5      **Employment Judge:      D Hoey**  
**Date of Judgment:      9 October 2022**  
**Entered in register:      13 October 2022**  
**and copied to parties**