



EMPLOYMENT TRIBUNALS

Claimant: Mr Y Mahmood
Respondent: Rotherham Metropolitan Borough Council

Heard at: Sheffield Employment Tribunal via CVP
Before: Employment Judge Deeley, Mrs Anderson-Coe and Mr Fields

On: 23 September 2022

Representation
Claimant: In person
Respondent: Mr K Ali (Counsel)

REMEDIES JUDGMENT AND COSTS JUDGMENT

1. The Claimant is awarded £4,881.11 for injury to feelings, which consists of:
 - 1.1 an award of £2000 in respect of injury to feelings for the claimant's complaints of discrimination arising from disability and harassment related to his own disability;
 - 1.2 an award of £2000 in respect of injury to feelings for the claimant's complaint of harassment by association with his son's disability; and
 - 1.3 total interest on the awards for injury to feelings of £881.11 (calculated on the basis of 1013 days between 16 December 2019 and today's hearing at the rate of 8%).

2. The Claimant's application for a cost award under Rule 76 of the Employment Tribunal Rules of Procedure is dismissed.

EXTENDED REASONS

Background and evidence

1. The claimant brought complaints of disability discrimination which were considered at the liability hearing of this claim on 14-22 June 2022. The Tribunal's reserved judgment from the liability hearing dated 13 July 2022 was sent to the parties on 13 July 2022 (the "**Liability Judgment**"). The Tribunal stated in the Liability Judgment that:

"1. The claimant's complaints relating to the meeting on 16 December 2019 and the letter of 16 December 2019 (recording the outcome of his flexible working request appeal) succeed in respect of his claims of:

1.1 Discrimination arising from disability;

1.2 Harassment related to disability; and

1.3 Harassment by association (in relation to his son's disability, but not in relation to the disabilities of his wife and mother).

The allegations relating to these successful complaints are set out at:

(a Allegation 1 (the factual complaints at paragraphs 1(iii), 1(iv), 1(v) and 1(vi), 5(iv), 5(v), 5(vi) and 5(vii)); and

(b Allegation 7 (in its entirety)..."

2. The claimant's remaining complaints of disability discrimination, unfair dismissal and a failure to provide a written statement of employment particulars were either withdrawn or dismissed (as set out in the Liability Judgment).
3. The Tribunal's findings at this remedy stage must be read and viewed alongside its reasons set out in the Liability Judgment.
4. The remedies hearing of this claim took place on 23 September 2022 with the parties attending via CVP. We considered the following additional evidence during the remedies hearing:
 - 4.1 a remedy witness statement and oral evidence from the claimant; and
 - 4.2 the claimant's psychiatric report, GP letter and GP records.
5. We also heard oral submissions from the claimant and considered oral and written submissions from the respondent's representative during the hearing.

Remedy issues

6. The claimant sought the following award, as set out at paragraph 16 of his remedies witness statement:
 - 6.1 £27,400 injury to feelings award;

- 6.2 £4000 personal injury award; and
- 6.3 10% ACAS uplift which the claimant stated related to the respondent's failure to act reasonably during the appeal hearing.

FINDINGS OF FACT

- 7. These findings of fact are in addition to and should be read alongside the Tribunal's findings of fact set out in the Liability Judgment.
- 8. The claimant's successful complaints related to part of the outcome of the claimant's flexible working request appeal, which consisted of the meeting between Mr Lal and the claimant on 16 December 2019 and the appeal outcome letter dated the same date (the "**December Complaint**").
- 9. Our factual conclusions relating to the December Complaint were summarised at paragraphs 223 and 224 of the Liability Judgment:

"223. Mr Lal stated in the outcome letter of 16 December 2019:

"Whilst I have sympathy for the long commute you undertake, you knew how far this was at the point of applying for and accepting the role. As you suggest your condition is deteriorating, that is something that you need to consider going forward.

We also discussed your own responsibility for managing your disability and supporting your family, the obligation of the authority is with regards to the role you occupy and ability to conduct that role."

224. We concluded that at the meeting on 16 December 2019, Mr Lal:

224.1 did state that, with regard to the claimant's son and wife, he needed to "manage your own life"; and

224.2 did state that, with regard to looking after the claimant's son and wife, "it's not the organisation's responsibility";

for the reasons set out at paragraphs 131 to 137 of this Judgment."

- 10. We went on to conclude at paragraphs 225 to 253 of the Liability Judgment that Mr Lal's written and spoken comments amounted to:
 - 10.1 Discrimination arising from disability;
 - 10.2 Harassment related to disability; and
 - 10.3 Harassment by association (in relation to the claimant's son's disability, but not in relation to the disabilities of his wife and mother).

Medical evidence

- 11. The claimant's solicitors instructed Dr White (consultant psychiatrist) on 15 June 2021 to prepare a psychiatric report regarding the claimant's claim for compensation for

injury to feelings and personal injury (i.e. psychiatric injury). The report was prepared around a year before the final hearing of this claim. The respondent did not seek to challenge Dr White's report.

12. Dr White notes in his report that his report was based on the following information:

12.1 over 300 pages of documents relating to the claim, including:

12.1.1 the Tribunal pleadings and further particulars;

12.1.2 both parties' witness statements;

12.1.3 the claimant's GP's letter of 23 April 2021 and his GP records from 8 July 2016; and

12.2 his meeting with the claimant on 15 June 2021.

13. Dr White noted at paragraph 7 of the Instructions Section of the report that:

"The details of his complaint are outlined in his statement but, essentially, he explained to me that he felt that his requests were dismissed out of hand and, indeed, they were very dismissive towards him. He was greatly upset by the fact that at one interview he had to roll up his trouser leg and show his leg to prove that he was disabled and he generally felt humiliated and undervalued. He was in fact dismissed from his job on 21st May 2020. He was told that he was being made redundant but commented that he was the only person made redundant and that there were 6,000 employees for Rotherham Council and he believed that he was made redundant because he complained about his disability and a request for them to make reasonable adjustments."

14. Dr White also noted that:

14.1 the claimant had no previous psychiatric history;

14.2 the claimant had counselling during Summer 2020 (paragraph 11);

14.3 he had difficulties in his employment with Derby University, but was performing well in his new employment (which we understand refers to the claimant's current role with Leeds Teaching Hospitals); and

14.4 the claimant's GP records state that as at 12 March 2021, the claimant had been prescribed sertraline tablets for the first time.

15. Dr White's opinion (set out with separately numbered paragraphs at the end of his report concluded):

"1. I am of the opinion that he has suffered a mild adjustment disorder, probably dating between October 2019 and the end of 2020.

2. Although he is still at times irritable and ruminates about what has occurred, I no longer feel that he suffers from any form of psychiatric disorder.

3. I am asked specific questions. I am asked:

• *Whether Mr Mahmood's mental health suffered as a result of the discriminatory treatment that he was allegedly subjected to whilst working with RMBC.*

4. *I clearly cannot say whether he was discriminated against but I do feel he suffered from an adjustment disorder, ICD classification which includes stress/depression/anxiety. I am of the view that this was suffered between October 19 and the end of 2020. I do feel this affected him on a day-to-day and would vary from day to day, however I cannot say that the degree of adjustment disorder was severe enough to prevent him working to a satisfactory level at Derby University. Mr Mahmood may well have resigned from Derby University because he was upset but I do not feel that his adjustment disorder was sufficient of its own to cause him to resign or to cause his work to be of such a low standard that he could not have worked at the university.*

5. *It is impossible for me to say whether on the 11th May 2020 his behaviour at the grievance meeting was seriously affected by his adjustment disorder. I did gain the impression that he is very sensitive about his disability and when it was discussed that he might well have reacted badly, that is he reacted badly because of his sensitivity about the matter rather than reacted badly because he was suffering from an adjustment disorder. I do not feel the adjustment disorder on its own affected his ability to a great degree when he presented himself during the grievance investigation and I do feel that he could answer questions when under cross examination at trial.*

6. *As far as reasonable adjustments at trial are concerned, I do not feel he needs to be given special treatment other than sensitive discussion about his disability."*

16. The claimant stated during his oral evidence at the remedies hearing that he disagreed with Dr White's opinion. The claimant stated that Mr Lal's written and spoken comments on 16 December 2019 were "*the straw that broke the camel's back*". He stated that he was coping "really well" until the meeting on that date. However, the claimant was unable to provide any medical evidence to contradict Dr White's report or which suggested that Dr White's report was based on inaccurate information.

GP records

17. In relation to the claimant's GP records, we note that:

- 17.1 the claimant did not have any recorded contact with his GP between 1 March 2019 and 10 July 2020;
- 17.2 the claimant's records in the latter half of 2020 relate to the results of Covid tests;
- 17.3 the claimant's next contact with his GP was on 12 March 2021 (as noted in Dr White's report).

Claimant's counselling (employee assistance programme)

18. The claimant stated in his oral evidence at the remedies hearing that he contacted the respondent's employee assistance programme after 16 December 2019 in either late 2019 or early 2020. He said that he received ad hoc counselling sessions from them on a weekly or fortnightly basis, which continued until Summer or Autumn 2020. He was unable to provide any specific dates for those sessions.

19. However, the claimant stated at paragraph 158 of his liability hearing witness statement that:

“In May 2020, shortly before my dismissal, I began using one of the respondent’s employee assistance schemes, whereby I was able to access a free confidential telephone counselling service. I continued to use this service even after my employment with the respondent terminated as I was finding it impossible to get an appointment with a GP. In theory, I was not supposed to continue using the respondent’s counselling service once my employment had terminated, but nobody ever checked whether I was employed by the respondent, and so I continued to use the service because I had need of it.”

20. In addition, Dr White noted that the claimant told him that the claimant had accessed counselling in Summer 2020.

21. We concluded that it was more likely that the claimant’s recollection in his liability hearing statement was correct, given that his statement was prepared at an earlier stage in proceedings and was supported by the information that he provided to Dr White in June 2021. We therefore concluded that the claimant did not seek counselling support from the respondent’s employee assistance programme until May 2020.

APPLICABLE LAW

224 Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the Tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts.

225 The purpose of an award for injury to feelings is to compensate the Claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with *Ministry of Defence v Cannock* [1994] ICR 918, the aim is to award a sum that, in so far as money can do so, puts the Claimant in the position he or she would have been had the discrimination not taken place. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that he would have been in had the discrimination not occurred – essentially a “but for” test in causation when assessing damages flowing from discriminatory acts.

226 The EAT held in *Corus Hotels Plc v Woodward* [2006] UK EAT/0536/05 that an Employment Tribunal should not allow its feelings of indignation at the employer’s conduct to inflate the award made in favour of the Claimant. The EAT reiterated in *Komeng v Creative Support Ltd* that the Tribunal needs to consider the impact of the discriminatory behaviour on the individual affected, rather than the seriousness of the conduct of the respondent.

227 The Tribunal was referred to the *Vento* guidelines (derived from *Vento v Chief Constable of West Yorkshire* [2003] ICR 318) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band should be used for

serious cases which did not merit an award in the highest band. Awards in the lower band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The decisive factor is the effect of the unlawful discrimination on the Claimant.

228 The bands originally set out in *Vento* have increased in their value due to inflation and, a further uplift of 10% given to general damages pursuant to the case of *Simmons v Castle* [2012] EWCA Civ 1039. The Presidential Guidance stated that the bands for claims brought between 6 April 2020 and 5 April 2021 were as follows:

228.2 Lower band: £900 - £9,000;

228.3 Middle band: £9,000 - £27,000; and

228.4 Higher band: £27,000-£45,000.

229 The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 sets out the Tribunal's power to award interest for injury to feelings awards. Regulation 3(1) states that interest is to be calculated as simple interest which accrues from day to day. The current rate of interest is 8% and is to be calculated from the date of the act of discrimination complained of until the date on which the award is made (Regulation 6).

CONCLUSIONS

22. It was clear from the claimant's witness statement and his oral evidence at the remedy hearing that the claimant's evidence of his upset and distress goes beyond matters relating to the December Complaint. For example:

22.1 The claimant stated at paragraph 1 of his remedies witness statement: *"It was not one specific incident that caused my depression; rather it was the cumulative effect of the incident combined with the context and circumstances that I outlined to the tribunal."*

22.2 This echoed paragraph 152 of the claimant's liability hearing witness statement which referred to all of his discrimination complaints and which stated: *"The treatment I was subjected to by the respondent was offensive, humiliating and degrading and left me feeling severely depressed. It was not one specific incident that caused my depression; rather it was the cumulative effect of the various incidents that I have described in this statement. I now feel stigmatised – not just because of my disability but because of my son's disability as well."*

22.3 Dr White's report records the key issues raised by the claimant regarding his treatment by the respondent as consisting of his flexible working request meeting in October 2019 and his dismissal (see paragraph 13 above). The claimant did not highlight the December Complaint specifically to Dr White, although Dr White has recorded this as part of his review of the claimant's further and better particulars (see paragraph 21 of Dr White's report).

23. Dr White's report concluded that the claimant suffered from a mild adjustment disorder that probably started in October 2019 (i.e. at the time that the claimant submitted his flexible working request, the consideration of which we found did not amount to

disability discrimination). Dr White states that this disorder continued until the end of 2020.

24. Dr White's opinion does not comment on whether Mr Lal's written or spoken comments on 16 December 2019 exacerbated the claimant's mild adjustment disorder. In addition, the GP's letter of 23 April 2021 does not provide any opinion on whether the December Complaint caused or exacerbated any psychiatric condition.
25. We note that the claimant did not seek medical treatment in the period following immediately after 16 December 2019. He contacted the respondent's employee assistance programme and obtained counselling from them in early May 2020. He also started taking sertraline (which he informed us he still continues to take) in March 2021, i.e. some months after Dr White stated that the claimant's mild adjustment disorder probably ended.
26. We have therefore concluded that the December Complaint did not cause or exacerbate the claimant's mild adjustment disorder.
27. We note that the claimant provided other evidence regarding injury to feelings, including:
 - 27.1 that he felt the respondent had 'mocked' him and that he felt that he and his family were treated like a 'freak show';
 - 27.2 that he had 'lost trust' in public bodies, as set out in his remedies witness statement;
 - 27.3 that Mr Lal did not express any regret for the December Complaint until the liability hearing of this claim (around 2.5 years after the relevant events);
 - 27.4 that he and Mr Lal live in Derby and that he was constantly worried about bumping into Mr Lal. He said that he saw Mr Lal across the street in Derby town centre and that this caused him to feel "*like my stomach had just swallowed a large molten rock*" due to the fear that he felt on seeing Mr Lal.
28. We have concluded that:
 - 28.1 the claimant conceded during the liability hearing that Mr Lal did not make the written and spoken comments that formed the December Complaint with the purpose of harassing the claimant, although he stated (and we concluded) that it had that effect on him. The claimant's suggestion that Mr Lal 'mocked' him or his family was not correct;
 - 28.2 the claimant had not in fact lost trust in public bodies, because he proceeded to work for Derby University and for the Leeds Teaching Hospitals, both of which are public bodies;
 - 28.3 the claimant has only seen Mr Lal on one occasion since he left the respondent's employment, around 2.5 years ago from across the street. This suggests that the claimant's constant concern that he may bump into Mr Lal appears not to be well founded.

29. We have concluded that an award in the lowest band of *Vento* would be appropriate in this claim because:

29.1 We recognise that the claimant was upset and distressed as a result of the things that he states happened during his employment with the respondent. However, the reasons for his distress were not solely related to the 16 December 2019 Conduct, but also included:

29.1.1 other matters relating to his employment with the respondent (and its termination) that formed part of his disability discrimination claim, but which were not upheld by the Tribunal as acts of unlawful discrimination. These centred principally on a meeting between the claimant's flexible working request in October 2019, the respondent's restructure process from January to March 2020 and the claimant's redundancy in May 2020; and

29.1.2 the claimant's difficult personal circumstances at that time. The claimant told us that he had to balance work with caring for his severely disabled son, his mother (whose health was deteriorating) and his wife (who was undergoing operations for carpal tunnel syndrome) as well as dealing with the deterioration in his own physical health. In addition, the claimant stated during the liability hearing that he had returned from a family holiday in Asia around the time of the start of the Covid-19 pandemic and was concerned that his son was showing Covid symptoms.

29.2 Dr White's report, the GP's letter and the GP's records do not suggest that Mr Lal's written or spoken comments caused or exacerbated the claimant's adjustment disorder. In addition, we concluded that the claimant was mistaken in stating that his counselling through the respondent's employee assistance programme started in late December 2019. The claimant's own witness statement at the liability hearing (supported by the information provided by the claimant to Dr White) suggest that he did not seek that counselling support until nearer the time of his dismissal in May 2020.

30. The Tribunal considers a total injury to feelings award of £4,000 (plus interest) to be a fair assessment of an amount which is aimed at compensating the Claimant rather than punishing the Respondent. This award reflects the significant degree of upset suffered by the claimant and also the Tribunal's finding as to the actual act of discrimination which caused or contributed to it.

31. We note that the respondent submitted that the interest on the award should be limited to the period ending in April 2021 (i.e. the date on which the liability hearing was originally scheduled to take place). The respondent noted that the April 2021 hearing was postponed on the claimant's application due to his mother's recent death and his ill health in March 2021. The rescheduled liability hearing in November 2021 was postponed due to a lack of Tribunal resources. Neither of these postponements were the fault of the respondent.

32. However, we concluded that it would not be appropriate to limit the interest awarded in this case. We appreciate that neither of the postponements were the fault of the respondent, but neither were they due to any fault on the part of the claimant.

ACAS uplift

33. We have concluded that there should be no uplift of compensation under the ACAS Code of Practice on disciplinary and grievance procedures in this claim. The claimant did not provide any submissions on this issue and this point has not been pursued.

34. In any event, we note that when the claimant did raise a grievance in May 2020 (which included the December Complaint), the claimant's grievance was investigated in detail by the respondent.

TOTAL COMPENSATION

35. We have awarded £4,811.11 to the claimant in respect of injury to feelings. The breakdown of the award as follows:

Injury to feelings award (relating to discrimination arising from disability and harassment related to the claimant's disability): £2000

Injury to feelings award (relating to harassment by association): £2000

Calculation dates: 16 December 2019 (i.e. the date on which the act of discrimination started) – 23 September 2022 (i.e. the date of the Remedies Hearing)

Number of days: 1013 days

Interest rate: 8%

Interest calculation: $£4000 \times 0.08 \times 1013/365 = £881.11$

36. We have not made any award to the claimant in respect of his claim for personal injury.

37. **The compensation payable to the claimant by the respondent is therefore £4,881.11.**

COSTS APPLICATION

38. The claimant applied for his total costs of £38,920 (inclusive of VAT), representing all of the legal fees incurred by him and his insurers in bringing the claim up to and including the remedies hearing.

39. We explained to the parties that the Tribunal does not normally make costs awards to successful parties, unlike the civil courts. The Tribunal has a limited discretion to award costs, as set out in Rule 76 of the Employment Tribunal's Rules of Procedures.

40. The claimant submitted that the respondent's conduct had been unreasonable in that they:
- 40.1 had the opportunity to review the evidence and evaluate the prospects of successfully defending his claims, given their legal team and resources;
 - 40.2 they were aware that the claimant was backed by his insurers initially; and
 - 40.3 they had refused to engage with the claimant's six attempts to settle these matters.
41. The Tribunal concluded that the respondent's conduct had not been unreasonable for the following key reasons:
- 41.1 the respondent had pursued arguable defences in respect of the December Complaint – the outcome of the claimant's successful complaints depended in large part on the evidence provided during the liability hearing;
 - 41.2 the claimant had pursued multiple unsuccessful allegations as part of his claim, many of which were withdrawn before the liability hearing. The claimant had also withdrawn certain allegations during the liability hearing itself;
 - 41.3 the liability and remedies hearings of this claim took nine days in total. If the claimant had only pursued the December Complaint, the likely length of the hearing time would have been around two to three days.
42. The Tribunal therefore rejected the claimant's application for a costs award under Rule 76.

Employment Judge Deeley
Date: 28 September 2022

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