



EMPLOYMENT TRIBUNALS

Claimant: Mr J Lock

Respondent: Bryn Afon Community Housing Ltd

Heard at: Cardiff (Hybrid) On: 15 December 2022

Before: Employment Judge R Brace
Members: Mrs M Humphries and Mr A Fryer

Representation
Claimant: In person
Respondent: Ms A Johns (Counsel)

JUDGMENT having been sent to the parties on 16 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Reasons

1. This was a remedy hearing, following the liability hearing which had been heard over the course of nine days on 13, 14, 19, 20, 22, 25, 26, 27 and 28 April 2022. A reserved judgment had been sent to the parties on 6 May 2022.
2. The Claimant had been successful in his specific complaint that the Respondent had failed to comply with the duty to make a reasonable adjustment in relation to the PCP of requiring employees to carry out their contracted role in failing to adjust the Claimant's role by assigning him tasks that did not involve heavy manual handling in line with PHA recommendations; and or by failing to deploy the Claimant to undertake miscellaneous tasks and/or as an electrician with a 'buddy' alongside him to assist with any tasks he struggled with; and /pr failing to provide the Claimant with an auxiliary aid of a step-ladder and/or a hop-up platform¹.

¹ Liability Judgment §255-270

3. The Tribunal had also concluded that it would have been reasonable to take these steps by, at the latest at the welfare meeting on 24 August 2018².
4. No other complaints of disability discrimination brought by the Claimant had been successful.
5. An application for reconsideration of the judgment was made by the Claimant on 20 May 2022 and on 9 June 2022, a copy of the Reconsideration Judgment was sent to the parties.
6. The Claimant has appealed the liability judgment and on 18 October 2022 the Employment Appeal tribunal concluded that the Claimant's appeal did not have reasonable prospects of success. The Claimant has sought permission to amend his grounds of appeal and a hearing has been listed for 12 April 2023.
7. Neither party applied for a stay of the remedy hearing pending that hearing and this remedy hearing proceeded as a hybrid hearing with the parties, the Judge and the clerk participating in person and non legal members participating remotely.
8. Directions for the remedy hearing had been given on 17 August 2022 , which included directions for:
 - a. An updated Schedule of Loss;
 - b. A Counter- Schedule of Loss identifying any issues of disagreement;
 - c. For the parties to try and agree gross and net weekly pay;
 - d. Remedy disclosure and inspection;
 - e. Agreed Remedy bundle;
 - f. Remedy Witness statements

Evidence Schedule of Loss and Submissions

9. The Claimant had submitted an impact statement for the purposes of the remedy hearing which was taken as read. The Respondent chose not to cross-examine the Claimant and the Tribunal had no additional questions of the Claimant.
10. The Tribunal also had a Bundle before us of some 230 pages and some additional pay-slips provided by the Respondent were also permitted to be added.

² Liability Judgment §268

11. The parties agreed that the Claimant's gross annual pay at the relevant time was £32,317.
12. Within the Bundle the Claimant had provided a Schedule of Loss [223]. This was based on a gross weekly pay of £125.97 (calculated by dividing the annual gross salary by 52 (weeks) and again by 5 (days)). The Claimant had not prepared a Schedule of Loss based on net pay. He claimed loss of earnings from May 2018 to November 2018 (135 days) at a gross sum of £8,188.05 and also claimed for pay for 30 days in circumstances where he had used annual leave for his return to work. This amounted to £3,779.10
13. The Claimant's Schedule of Loss included what was referred to as 'a sum exceeding the upper band of Vento' as the Claimant considered his to be an exceptional case, capable of exceeding £44,000. He also claimed aggravated damages and personal injury believing that the Respondent has acted in a particularly malicious, insulting, high handed or oppressive manner in the sum of £150,000.
14. In total the Claimant seeks compensation in the sum of £205,967.15.
15. The Respondent had submitted a Counter-Schedule [227] reflecting £1,592.11 financial losses, being loss of net salary from 24 August 2018 – 19 October 2018) and a sum of £1,000 for injury to feelings only. On the morning of the remedy hearing, the Respondent's Counsel confirmed that the Respondent had amended its position particularly in relation to injury to feelings, as reflected within their Written Submissions on Remedy on behalf of the Respondent, which are incorporated into these written reasons by reference.
16. The Respondent's position was now that they asked the Tribunal to award:
 - a. financial losses in the sum of £3,640.34, now conceding that the Claimant was entitled to be awarded a sum of money not just for the differential between full pay and half pay during the period of sick leave but also an amount in respect of 21 days annual leave used by the Claimant on his phased return to work between 18 October 2018 and 19 November 2018; and
 - b. injury to feelings in the sum of £5,000.

Issues on remedy and the law

17. The list of issues on remedy had been set out by me at the case management preliminary hearing that had taken place on 17 August 2021.

18. The Tribunal's powers in relation to remedy in a discrimination claim is set out in s.124 Equality Act 2010 which provides that 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.
19. 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
20. 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.
21. Any recommendations we make should be practicable and should be capable of being implemented and for that to be assessed.
22. Further, s.119 Equality Act 2010 confirms that compensation is awarded on a tortious basis and may include compensation for injured feelings. That is, so far as possible to put the Claimant into the position that he would have been had the act of discrimination not occurred (**Ministry of Defence v Cannock [1984] IRLR 509, De Souza v Vinci Construction UK Ltd [2017] EWCA Civ 879.**)
23. Financial compensation for discrimination is uncapped but the Tribunal is required to consider the question of the Claimant's loss.
24. In terms of injury to feelings in respect of the discrimination claim, the onus is on the Claimant to establish the nature and extent of the injury and guidance has been given in **Vento v Chief Constable of West Yorkshire Police (No2)** 2003 ICRR 318 CA which identifies three bands which have subsequently been updated to reflect inflation.
25. The Court of Appeal have confirmed that there is considerable flexibility within each band, allowing Tribunals to fix what they consider to be fair and reasonable and adjust compensation in the particular circumstances of the case. We are also reminded that an award for injury to feelings is intended to compensate for hurt and humiliation suffered by the Claimant and not on the seriousness of the discrimination.

26. **Hatton v Sutherland** [2002] ICR 613 **BAE Systems (Operations) Ltd v Konczak** [2017] IRLR 893 are relevant with regard to cause and material contribution to harm suffered.
27. Finally, as a Tribunal we are obligated to consider in interest on such awards and to state why an award has not been made even if the parties do not draw our attention to it.

Conclusions

Financial Losses

28. The Claimant's salary at the relevant time was agreed to be £32,317 (gross).
29. It was also agreed that the Claimant's pay was as follows:
- a. Gross monthly pay amounted to £2,693.08, with net monthly pay amounting to £1,960.10;
 - b. Gross weekly pay amounted to £621.48, with net weekly pay amounting to £487.62; and
 - c. Gross daily pay amounted to £124.30 with net daily pay amounting to £97.53.
30. From 30 October 2017, the Claimant had been absent from work on sick leave with full pay reducing to half pay 6 months later and nil pay on 19 October 2018. The tribunal had concluded in its liability judgment that the Respondent had failed to make reasonable adjustments for the Claimant to enable him to return to work from 24 August 2019, a period of time when the Claimant was receiving half pay only.
31. From 24 August 2018 to 18 October 2018, the Claimant was therefore receiving sick pay of half his full time salary. From 18 October 2018 to 19 November 2018, the Claimant's pay did not reduce to nil pay however, as the Claimant instead used his annual leave allowance, not physically returning to work until 19 November 2018.
32. The Claimant then returned to work on a phased return from 19 November 2018 using further annual leave to support that phased return.
33. The Tribunal did not accept that the Claimant should have compensation in respect of his gross pay from May 2018 as had been claimed. Rather, it concluded that that the Claimant should be awarded compensation to put the Claimant into the position that he would have been had the act of discrimination not occurred (**Ministry of Defence v Cannock**).

34. In this case we considered what the Claimant would have earned had the Respondent complied with its duty to make reasonable adjustments from 24 August 2018. We concluded that he would have returned to work on a phased return but that he would have returned to work from 14 August 2018 not 18 October 2018.
35. On that basis, we concluded that it was appropriate to make an award to the Claimant in respect of financial losses for the following periods:
- a. The difference in half pay and full pay (net pay not gross pay,) from 24 August 2018 to 18 October 2018, a total of in the sum of £1,592.11 [218]; and
 - b. A sum in respect of the 21 days annual leave that the Claimant had used in the period from 19 October 2018 to 19 November 2018, when his pay would have otherwise reduced to nil pay. This amounted to £2,048.13 (net pay of 21 days x £97.53 net pay per day).
36. We did agree with the Respondent's submissions that it was more likely than not that after a period of absence from work from 30 October 2017, even if a reasonable adjustment had been put in place on 24 August 2018 which would have enabled the Claimant to return to work at that point, that it was more likely than not that the Claimant would have had a phased return to work in any event and would have again made use of accrued annual leave to accommodate that phased return.
37. The Tribunal therefore made no further award of compensation in respect of the additional annual leave taken for the phased return.

Personal Injury and injury to feelings

38. The Claimant has suffered from anxiety, depression and stress since 1989 but there was no medical evidence within the Bundle (whether referred to by the Claimant from pages [42] onwards or otherwise) that enabled us to reach the conclusion that the:
- a. Claimant had either suffered a personal injury at all; or, in any event
 - b. That the failure to make reasonable adjustments in the period from 24 August 2018 had caused the Claimant any psychiatric injury.
39. The Tribunal was therefore not satisfied that there was any medical evidence before us to make any award for personal injury and on that basis, we decline to make an award for personal injury.
40. In terms of injury to feelings, we reminded myself that prior to the welfare meeting in October 2018, whilst the Claimant had expressed frustration at the

length of his sickness absence³ in the August 2018 welfare meeting, he also was unconcerned at that time – essentially, he was not concerned at the failure to make reasonable adjustments to enable him to return to work.

41. This seemed to have changed by the October 2018 welfare meeting and we accepted the Claimant's evidence that at that welfare meeting, the Claimant was 'extremely upset' and that from that point he was frustrated by the Respondent's interpretation of the occupational health reports.
42. At that meeting the Claimant was also presented with the Ill Health Retirement ("IHR") forms (a matter which we did not find was a discriminatory act) and it was this, we concluded, that triggered a reaction in the Claimant which caused him to be extremely upset.
43. What we did not conclude however, was that the presentation of the forms caused *all* the upset. Rather, we concluded that this caused the Claimant to reflect on the failure to make reasonable adjustments and that too caused his upset; it hurt his feelings that the Respondent was not making adjustments to enable him to return, but rather that they were suggesting an exit from the business.
44. The Tribunal accepted that these were the injured feelings and upset that the Claimant suffered as a result of the reasonable adjustments failure.
45. We then considered whether those feelings extended beyond the Welfare meeting in October 2018. What happened next was also relevant. Within a few short weeks of that meeting, the Claimant made a complete recovery, that he was telling the Respondent that he was fit to return to work and that his physical impairments had improved to such an extent that he had received reports from his managing clinicians and GP that he was fit to return⁴. He did in fact physically return to work on 19 November 2019.
46. Whilst the Claimant has indicated that he was made to feel an outcast and unwanted and that this left to many months of deteriorating mental health, we had found within our liability judgment that the Claimant had not reported as sick with stress until 6 March 2019 [57], following the outcome of his Grievance Appeal report; a report into his complaint regarding the failures from August 2018. A mixed bag of issues was evident in the contemporaneous emails sent by the Claimant at the time however, which referred to his '*hurt mentally*', but also referred to matters which we had not found to be discriminatory acts, such as the treatment at the ARM meeting and how his grievance had been handled [44-46]. He also appeared to be still aggrieved that the Respondent had not let

³ Liability Judgment §93

⁴ Liability Judgment §139

him return to work when the prognosis had come through [54], an act which the tribunal had not found to be an act of unlawful discrimination⁵.

47. We accepted that the grievance that the Claimant had submitted indicated that he was still aggrieved and upset, although whether it was upset from the proposal for IHR, the unsuccessful grievance outcome (which the Tribunal had also found did not involve any act of unlawful discrimination⁶) or the failures to make adjustment, was less than clear.
48. The March 2019 occupational health report again referenced the grievance process and appeal indicating that the Claimant was still expressing that he was aggrieved and upset⁷ [84]. During this period we also accepted that the Claimant was receiving counselling and was continuing to receive a dosage of anti-depressant.
49. We considered it impossible to divide the issues relating to the failure to make the reasonable adjustments and the grievance and its outcome and concluded that it was likely that the Claimant was still deeply upset about the failures to make a reasonable adjustment from October 2018.
50. The Claimant had only a short period off work, from 6 March 2019 – 12 March 2019 [111] and remained in work until 17 May 2019⁸. During this period of time, the Claimant was again expressing unhappiness with the Respondent's failures to make adjustments but the issues again were more mixed such that the Claimant was complaining of breach of duty of care following his 2016 back operation [71].
51. The Claimant was off again in May 2019, having presented as distressed and was off for a short period until 12 June 2019 after the June 2019 occupational health assessment [118], which referred to his grievance and stresses from his employment tribunal claim which, by that time, he had brought. He was considered medically fit to return on 12 June 2019 [148, 150].
52. The Tribunal did not consider that it had any medical evidence before it after that June 2019 report, or evidence by way of contemporaneous documents, to conclude that the Claimant continued to feel aggrieved or to conclude that any further deterioration on the Claimant's mental health, that could be said to be directly caused by the failure to make the reasonable adjustments in the period from 24 August 2018-18 October 2018 when the Claimant was fit to return to work.

⁵ Liability Judgment §286-288

⁶ Liability Judgment §303, 306-307

⁷ Liability Judgment §170-173

⁸ Liability Judgment §174-187

53. We did not consider that the Claimant's mental health issues in August 2019 could be said to have been caused by the failure to make a reasonable adjustment in August 2018 [187]. Rather, in relation to mental health, that report referred to the allegations regarding bullying and did not reference the previous matters that were the subject of the claims before us.
54. We do however take into account that the length of time from the Welfare meeting in October 2018 to June 2019, at the latest, as being the period of upset and frustration for the Claimant over that time that could be said to be caused by the failure to make reasonable adjustments and that these feelings of upset, grievance and frustration continued until around June 2019.
55. We concluded that itself would have led to an award in the middle of the lower band as the failure to make a reasonable adjustment was over a short period and the Claimant returned to work once he voiced frustration over the failure in October 2018.
56. Whilst the Tribunal may have been inclined to award a figure of the middle of the lower band, it makes an award of £5,000 as appropriate, taking into account the concession made by the Respondent.

Aggravated Damages

57. The Tribunal has not awarded an amount for aggravated damages. The Tribunal repeats its findings in its Liability Judgment (§116). We had not found that there had been anything in the manner in which the discrimination was committed, we had not found that there had been any ulterior motive for the failure and the Claimant had returned to work as soon as he had raised concerns about failure to make reasonable adjustments (a time when he had also recovered).
58. We concluded that there had been no deliberate preventing of the Claimant's return to work and in those circumstances did not consider that the Respondent had behaved in any 'high-handed, malicious, insulting or oppressive manner in committing the act of discrimination (**Alexander v Home Office** [1998] 2 All ER 118) of failure to make reasonable adjustments that would warrant an award of aggravated damages.

Interest

59. We have calculated and added interest on the Claimant's compensation running from the midpoint between the date of the welfare meeting of 24 August

2018⁹ (§268 Liability Written Reasons) and today for the financial losses and from the 24 August 2018 (act complained of) for the injury to feelings.

60. The period from 24 August 2018 to 15 December 2022 is 1574 days

$$787 \text{ days} \times 0.08 \times \text{£}3,640.24 \times 1/365 = \text{£}627.92$$

$$1574 \text{ days} \times 0.08 \times \text{£}5,000 \times 1/365 = \text{£}1,724.94$$

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit and Income Support

61. The Claimant was not in receipt of such benefits and therefore no Recoupment Notice has been made.

Employment Judge Brace
Dated: 22 December 2022

REASONS SENT TO THE PARTIES
ON 4 January 2023

FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS
Mr N Roche

⁹ Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996