



EMPLOYMENT TRIBUNALS

Claimant

L Whitehead

Respondents

The Governing Body of
North Downs Primary School(1)
J Douglass(2)

v

Heard at: London South by CVP

On: 12 December 2022

Before: Employment Judge Anderson
N O'Hare
H Carter

Appearances

For the Claimant: In Person

For the Respondents: A Peck (counsel)

JUDGMENT ON REMEDY

1. The first respondent is ordered to pay the claimant the sum of £22,475.80 in compensation for unfair dismissal and failure to make a reasonable adjustment, calculated as follows:
 - a. A basic award of £1415.14;
 - b. An award to compensate for loss of earnings, including pension loss, of £9698.08 plus interest of £1268.99 (calculated at 8% from the mid-point between the dates of 4 September 2019 and 12 December 2022).
 - c. An award for injury to feelings of £8000 plus interest of £2093.59 (calculated at 8% from 4 September 2019 until 12 December 2022).
2. Payment should be made by the first respondent, to the claimant, within 28 days from the date that this judgment is sent to the parties.

REASONS

The hearing

1. A liability hearing took place from 6 to 9 September 2022. The tribunal found that the first respondent had failed to make a reasonable adjustment and that the claimant had been unfairly dismissed by the first respondent.

2. A hearing took place on 12 December 2022 to determine remedy. The parties supplied an agreed supplementary bundle with index. Mr Peck filed a skeleton argument. During the hearing the tribunal was taken to the liability hearing bundle and to the claimant's witness statement. The claimant gave oral evidence.
3. At the outset of this hearing Mr Peck raised that the tribunal had not expressly set out in its judgment dated 16 September 2022 that it found the claimant's dismissal to be discriminatory. The tribunal confirmed that its finding was that the dismissal was discriminatory.

Decision

Basic Award for Unfair Dismissal

4. It has been agreed between the parties that the basic award following the tribunal's decision that the claimant was unfairly dismissed on 18 September 2019 is £1415.14. As the dismissal was discriminatory and there was no offer of reinstatement, no reductions are made to the basic award.

Compensatory Award

5. Under s124(2)(b) of the Equality Act 2010 the tribunal can order a respondent to pay compensation where it has been found to have contravened Part 5 of the Equality Act 2010.
6. Compensation is to be assessed on the basis of putting the claimant in the position she would have been in had the discriminatory conduct not taken place (*Ministry of Defence v Cannock [1994] ICR 918*). Past financial loss is calculated from the date the loss arises until the date of a remedy hearing. In *Abbey National plc & another v Chagger [2010] ICR 397* the court stated that where there is a chance that dismissal would have occurred in any event (or in this case that the claimant would have left the employment of the first respondent in any event) then that must be factored into the calculation of loss. A reduction to any award can also be made if the claimant has failed to mitigate her loss. The burden of proof is on the respondent to show a failure to mitigate.
7. Considering first whether the claimant would have left the employment of the first respondent before the remedy hearing.
8. Mr Peck said that the claimant had told the second respondent that she was planning to leave, probably in December 2019, or at the end of the academic year. The claimant had notified Ms Douglass of her intention to move house to relocate nearer to the school that her daughter would be attending from September 2020. The tribunal finds that at the point that she resigned, the claimant had taken her house off the market due to problems with a garden wall, and that subsequently, although some time later, the requirement for the claimant to move was removed because the local authority agreed to provide transport for the claimant's daughter to the new school. The tribunal finds that the claimant was unlikely to have left the employment of the first respondent due to the school move though it accepts that this was in her mind in

September 2019. No deduction is made to any compensatory award for this reason.

9. Mr Peck said that the claimant may have left the employment of the first respondent due to childcare problems. The claimant had not been offered a place in breakfast club for her children and needed wrap around childcare in order to work as her husband worked abroad. She made several references to this in correspondence with the respondents in September 2019. The claimant said that she had begun to research alternative childcare provision at the time she resigned, and it would not have caused her to resign. The tribunal accepts the claimant's evidence that she would not have resigned due to childcare issues and makes no deduction to any compensatory award for this reason.
10. Mr Peck submitted that there was a break in the chain of causation when the claimant decided to pursue a different career to teaching. This decision was made by the claimant in July 2020, as she sets out in her chronology. Mr Peck said that this was a personal decision made for personal reasons and/or as a result of the claimant's view that due to the adoption of technological advances by primary schools she would be unable, due to her disability, to continue her teaching career. In cross examination the claimant admitted that the decision was personal and that she could have applied for and obtained a teaching job if she chose to do so. She also acknowledged that losses arising as a result of that decision could not be attributed to the first respondent.
11. The tribunal finds that from the point at which the claimant made the decision to change careers, a decision that may have been influenced by her experiences with the respondents, but which was not directly attributable to it, the chain of causation in relation to loss resulting from the claimant's failure to make a reasonable adjustment was broken. Financial losses relating to employment are not attributable to the first respondent after this date, which for lack of specificity in the documents, the tribunal has put at 15 July 2020.

Mitigation

12. The questions for the tribunal when considering a failure to mitigate are:
 - (a) what steps were reasonable for the claimant to have to take in order to mitigate her loss;
 - (b) whether the claimant did take reasonable steps to mitigate loss; and
 - (c) to what extent, if any, the claimant would have actually mitigated her loss if she had taken those steps (*Gardiner-Hill v Roland Berger Technics Ltd* [1982] IRLR 498).
13. The burden of proof is on the respondent.
14. Mr Peck said that the claimant had applied for only two jobs in the period 18 September 2019 to July 2020. The applications were made in April and June 2020. The claimant had provided no evidence of ill health or reasons why she could not look for work. The first respondent had provided evidence that there were suitable jobs available. The claimant had set out in her ET1 she was

looking for reinstatement and stated in her chronology that she was hoping to be re-employed and was willing to work at North Downs Primary School or other schools in the area, so was clearly available and able to work in December 2019 by her own account.

15. The claimant said that her treatment by the respondents has caused her stress and affected her mental health. She said that there were fewer jobs advertised in the relevant period because of COVID and that not all jobs advertised were suitable, as she had childcare considerations and only wanted part time work.
16. The tribunal accepts that during the period from the claimant's dismissal until the end of December 2019 when the respondents filed their response to the claim there was no failure to mitigate on the part of the claimant. It accepts that she believed there may be an attempt on the part of the first respondent to re-employ her or that there would be alternative employment with a school in Surrey. It is also accepted that she was distressed by the discriminatory treatment she received from the first respondent. From January 2020 the claimant cannot have been under any misapprehension about a forthcoming offer of re-employment, and she has not provided any clear answer to the first respondent's claim that she could have obtained employment as a teacher to commence work in the summer term beginning April 2020. As noted above, the claimant admitted in cross examination that she could have found employment as a teacher, and the claimant's chronology is silent as to attempts to find work between January and April 2020. The tribunal notes and accepts that COVID may have had an impact on jobs being advertised but notes also that the lock down commenced in the latter half of March 2020, so this would not explain a failure to look for jobs from January 2020 to March 2020. The first respondent has provided evidence of the availability of jobs in that period, and while the tribunal accepts that not all jobs in Surrey would be suitable, it finds on the evidence that it is likely that the claimant could have obtained a teaching job for the commencement of the summer 2020 term, i.e. from April 2020, and she has failed to mitigate her loss from that period onward. Any award for compensation for loss of earnings is therefore limited to 15 April 2020, being the midpoint of April 2020 where no specific date was specified by the parties.

Injury to Feelings

17. The claimant puts her loss at £40,000 which is at the upper end of the highest Vento band. Mr Peck said that £5000, being the midpoint of the lower Vento band is more appropriate. Mr Peck said that the claimant claimed £5000 for injury to feelings when her claim was first submitted and this increased in later schedules of loss to £20,000 and then £40,000. The claimant said that she is a litigant in person and took some advice.
18. Mr Peck said that the claimant was disappointed at most by the first respondent's actions, as set out in her letter to Mr Rode of 26 September 2019. The claimant said that she did not know Mr Rode, he was a governor, and this was written correspondence. She pointed to the witness evidence of Ms Knapp who noted her distress. The tribunal accepts that the behaviour of

the first respondent caused the claimant significant distress and has found that its discriminatory act caused her to resign. It accepts that she was more than disappointed. It also notes that the claimant was a dedicated teacher who had spent four years at the school and had thought that her colleagues understood and wanted to work with her to obviate difficulties related to her disability. The tribunal accepts that she was shocked and distressed to find that this was not the case. However, this was a single act of a failure to make a reasonable adjustment. It was not a concerted campaign of discrimination against the claimant, and although it led to her resignation, the tribunal does not accept that the magnitude of the discrimination, and the effect that it had on the claimant's feelings was such that the injury falls into the top, or the middle Vento band. The tribunal notes that whether or not an act is a single incident is not the only factor in determining the band in which to place a loss, however the tribunal awards a sum of £8000 for injury to feelings, being at the top of the lowest Vento band, recognising the seriousness of the first respondent's failure but also that it was a single incident and the claimant has indicated that she was content to return to the employment of the first respondent a few months later.

Loss of statutory rights

19. The claimant claims £500 for loss of statutory rights. The claimant has decided to pursue a career in which she is self-employed and therefore the tribunal does not agree that such a loss has arisen.

Interest

20. Interest is awarded at the usual rate of 8% on injury to feelings and compensation for financial loss, to run from 4 September 2019 to 12 December 2022 for injury to feelings and from the midpoint between 4 September 2019 and 12 December 2022 for compensation.

21. The tribunal considered Mr Peck's submission on the rate of, and period of, the interest award but saw no reason to depart from the usual basis on which interest is calculated.

Employment Judge Anderson

Date: 31 December 2022