



EMPLOYMENT TRIBUNALS

Claimant: Dr C Mallon
Respondent: AECOM Limited
Heard at: East London Hearing Centre
On: 18 November 2022; 3 January 2023 (without the parties)
Before: Employment Judge Gardiner
Members: Mr J Quinlan
Mr J Webb

Representation

Claimant: In person
Respondent: Ms Talia Barsam, counsel

REMEDY JUDGMENT

The judgment of the Tribunal is that:-

The Claimant is awarded the sum of £2,000 for injury to feelings, together with accrued interest of £700. No remedy is appropriate for financial loss.

REASONS

Introduction

1. The Tribunal has been asked to decide the remedy to award to the Claimant for a single act of disability discrimination. Following a hearing in November 2021, this Tribunal decided that the Respondent had failed to make a reasonable adjustment in failing to provide the Claimant with further assistance in registering his job application in August 2018 for an advertised role. As a result, the Claimant was not considered for this role. We need to consider what award to make for injury to feelings and whether to make an award for any financial loss resulting from the discrimination.

2. The Remedy Hearing took place on 16 November 2022 by Cloud Video Platform. The Claimant represented himself. Miss Barsam of counsel represented the Respondent. She had submitted a written skeleton argument in support of her client's position. The Claimant had submitted examples of injury to feelings awards previously made in cases involving disability discrimination.
3. Oral evidence was given by the Claimant and by her witness, Ms Newport. Mr Timothy Jackson, Director and Head of Fiscal Incentives, was called as a witness by the Respondent. The Tribunal was referred to an electronic bundle of 207 pages prepared by the Respondent and a further bundle prepared by the Claimant, 29 pages long. At the end of the evidence and submissions there was insufficient time to deliver an oral judgment. As a result, the decision was reserved and is now sent to the parties together with our written reasons.

Findings of fact

4. We have re-read the reasons given for our decision on liability, noting the factual findings that are potentially relevant to the remedy issue. Relevant findings are repeated here. In addition, based on the evidence called by both parties at the Remedy Hearing, we make further findings of fact.
5. The Claimant had worked in about twenty-five previous job roles before working for the Respondent in 2017. In previous jobs, the Claimant had been prepared to work a considerable distance away from where he lived, including at one point in Aberdeen.
6. For many years, the Claimant has lived in Cannock in Staffordshire. He has lived there throughout the period with which this claim is concerned.
7. During 2017, he had commuted from Cannock to the Respondent's Birmingham office to perform the role of Associate in the Research and Development Team of the Fiscal Incentives Service Line ("the 2017 role"). Other roles in the same team, which was about 10 strong, were based in either Birmingham or London. Mr Jackson provided different details about the 2017 role, its contrast with the 2018 role, and the relationship between those in the Birmingham and London offices than Ms Parker had given at the liability hearing. We accept that the evidence of Mr Jackson is likely to be more accurate, given his closer involvement in the day to day running of the R&D work than Ms Parker. The role had three main aspects. The first required a strong technical capability; the second required business development skills. The final element was a leadership dimension, aiming to expand the R&D capability in the Birmingham office. The Claimant's salary in the role was £65,000 a year, together with a car allowance of £3,250 per annum.
8. He had started this role on 10 April 2017. It was subject to the satisfactory completion of a six-month probation period. Towards the end of his first six months, his performance had not been assessed to be satisfactory. As expressed in an email sent by Mr Jackson to the Claimant on 15 September 2017, he was noted to have made a slow start to developing the service. As a result, his probation period

was extended by a further three months. The new date on which his probation ended was 10 January 2018. Because his performance was still considered unsatisfactory by December 2017, he was dismissed. His last day was 18 December 2017.

9. In that role, the Claimant's line manager was Tim Jackson. Mr Jackson was based in the London office but would communicate with the Claimant on a regular basis, including a weekly email and a conversation about every three weeks. He was the person who had decided to extend the Claimant's six-month probation period and who had decided to dismiss the Claimant before the end of the further three month extended probation period. Although the Claimant had been hired because he had claimed to have lots of contacts in the Birmingham area and lots of experience, he did not engage new clients and grow those relationships.
10. There was an evidential dispute as to whether there were any documents recording the Claimant's poor performance whilst working for the Respondent. There is an email noting that the Claimant's probation would be extended, but no contemporaneous records showing his performance during the first six months. In an email sent to HR on 26 September 2017, Mr Jackson accepted:

"It's taken some time to get the necessary support for Christian in terms of suitable external marketing material but that has now materialised and Christian has all he needs to make a success of the role. We therefore feel it is only fair to give Christian a further three months to make a success of the role but, as we have discussed, if he does not do so we will not approve his probations and will have to think again"

11. The Tribunal finds that Mr Jackson had not paid as close attention to the Claimant's role in the first six months and was recognising he needed further support to make it a success. It was only at the six month point that the Claimant was given specific targets to achieve in his role. These were to secure one meeting a week with a potential client or gatekeeper; and to secure four appointments to provide R&D services to new clients.
12. As the Claimant himself accepted in oral evidence, he had not achieved either of the core business goals set by the middle of December 2017. This point had been made in the dismissal letter, written by Mr Jackson. He wrote:

"there has been no effective progress to date against the targets we set and I concluded that, despite the support provided to you, you have not met the required standards to successfully pass your probation period". [114]

13. Mr Jackson fairly accepted that he had limited knowledge of the Claimant's technical abilities. He did have concerns about the Claimant's knowledge of the relevant legislation based on the Claimant's approach when viewing the Respondent's own claim for R&D tax relief. Whilst there was a factual dispute about the extent of the Claimant's technical abilities, with the Claimant insisting that he

- was fully capable in this field, we accept that Mr Jackson had doubts about the Claimant's technical abilities based on his limited experience.
14. The Claimant's position in relation to that employment is that he had not been given suitable contact details for prospective clients. Most of AECOM's existing clients, who were landlords, did not employ staff. As a result, it was difficult for them to claim R&D tax relief on the staffing costs. As a result, the Claimant had not been able to arrange meetings with key individuals to market the Respondent's products. We accept that the Claimant had had limited contact with prospective clients. There appears to have been a misunderstanding between the Claimant and Mr Jackson as to who would take the lead in sourcing new business opportunities. We accept that Mr Jackson expected the Claimant to be showing leadership in this area, using his own initiative to find new business.
 15. Following this dismissal, the Claimant sought an assurance from the Respondent that he would be able to apply for future vacancies with the Respondent. He was told he was not prevented from applying for future vacancies. This indicates the Claimant had not abandoned hope that he might be employed by the Respondent in the future. We accept his evidence that he had enjoyed working for the Respondent and hoped to work for them again.
 16. The Claimant issued employment tribunal proceedings following his dismissal alleging that it was an unfair dismissal and an act of disability discrimination. The Tribunal was not told of the alleged disability relied upon in those proceedings. That claim was settled in June 2018 for a total payment of £6,800 including a payment of £800 for expenses, with no admission of liability.
 17. In August 2018, the Claimant applied for another role with the Respondent. The role for which the Claimant was applying was that of a Research and Development Consultant within AECOM's UK Fiscal Incentives Team. It was based at the Respondent's London office. Had the Claimant been successful in his application, this would have required the Claimant to commute for at least an hour and a half each way, each day. Although there were significant similarities between this role and the role the Claimant had been performing for AECOM in the Birmingham office, this was a more junior role. It was more focused on technical delivery rather than business development, but still had a business development element. The evidence given by Sarah Parker at the liability hearing (her witness statement para 25) stressed the business development side of the role. We prefer the evidence of Mr Jackson that this was a subsidiary aspect of what was essentially a technical role. This is confirmed by the bullet points set out in the Job Profile for the 2018 role [80-81]. Only one of the many bullet points could be interpreted as business development. This contrasts with the much clearer focus on business development in the equivalent document for the 2017 role [76-77].
 18. The hiring manager for this London role was Tim Jackson. He would have considered the Claimant's application had it been properly submitted. He would inevitably have been influenced in his assessment of the Claimant's potential for

the role by his own assessment of how the Claimant had performed in the 2017 role.

19. Mr Jackson made the decision as to who to appoint to this role. The salary range advertised for the 2018 London role was £30,000 to £50,000. It was not the higher range given by Sarah Parker in her witness statement at paragraph 9. The successful candidate started on a salary of £36,000 [207]. That person had three years of working with HMRC scrutinising research and development tax rebate claims, particularly in their last six months. This put him in a good position to be able to assess the requirements of an effective R&D tax-relief claim. The Claimant was not able to offer equivalent HMRC experience. To this extent, the successful candidate had more applicable technical experience than the Claimant. The successful candidate was appointed to the London office, as had been advertised. They were not appointed to the Birmingham office as Ms Parker had said in her witness statement at paragraph 9.
20. The Claimant accepted in oral evidence that he was not depressed; nor did he say he was suffering from low mood in the aftermath of his unsuccessful job application in 2018.
21. At the same time in 2018 that the Claimant was applying for the role with AECOM, he was also applying for other jobs with other employers. One such role was a position with Baldwins accountants. He was successful in this application and started work on 17 September 2018. In this role, his annual salary was £50,000. The Tribunal was not provided with any documents recording the Job Description or even the title of this role. It was described by the Claimant as that of Tax Manager. It is clear it had an R&D focus. It was based in Tamworth which was about 15 miles from his home in Cannock. This salary was substantially lower than the salary he had earned whilst working for AECOM in 2017. He resigned from that role on 3 May 2019 because he did not see his long-term future in that position. Before his resignation and based on the salary he was earning at the time, he had been able to re-mortgage his house. He described this role as “the worst R&D job that [he] had been in”.
22. The Tribunal finds that the salary in the role he accepted with Baldwins was at least the same as, or was higher than, the salary he would have received in the 2018 AECOM role for which his application was unsuccessful. The successful candidate was paid £36,000 pa.
23. In 2019, the Claimant made a further application for a role with the Respondent. The role was the same role as the role for which he applied in 2018, which is the subject of these proceedings. It had an identical or almost identical Job Profile to the 2018 role. On that occasion, the Claimant was permitted to make an oral application. As a result, the application was accepted. It was considered by Tim Jackson. Mr Jackson reviewed the Claimant’s CV. He considered that the Claimant’s activities in this field are “fairly generic and non-specific about relevant abilities or skills”. He noted in a contemporaneous email that his career

achievements were in the field of engineering which was not relevant to the position for which the Respondent was recruiting. He also considered that the Claimant lived too far from east London to make it practicable to commute to the Respondent's office. None of the candidates who applied for the position in 2019 were successful. The position was not filled.

24. The Claimant has applied unsuccessfully for about 60 different jobs since being dismissed from AECOM in December 2017. In relation to several of these roles, he has issued disability discrimination proceedings. He has received a little over £35,000 in settlement of these claims.

Legal principles

25. When assessing the remedy to award in a discrimination claim, a Claimant is entitled to receive a sum in damages which puts him in the same financial position as if the discrimination had not occurred. Where, as here, the act of discrimination relates to an unsuccessful job application, the Tribunal must assess:
- a. the percentage chance that the application would have been successful if there had been no discrimination;
 - b. the likelihood that the Claimant would have accepted the role if offered, given the potential alternative roles available elsewhere; and
 - c. the difference in salary (if any) between the role in question and any alternative role secured by the Claimant.
26. The approach is to assess matters of chance in a broad and sensible way (*Ministry of Defence v Cannock* [1994] ICR 918).
27. Where a replacement role has ended before the date of the Tribunal remedy hearing, the Tribunal must assess whether any subsequent losses have been caused in part by the discriminatory act or are instead entirely caused by the circumstances in which that replacement role ended. There must be a direct causal link between the act complained of and the loss being claimed. A resignation from mitigating employment can break the chain of causation from an earlier discriminatory act, just as can a voluntary resignation (absent repudiatory breach) from the employment in issue (*Ahsan v Labour Party* UKEAT/0211/10).
28. So far as the injury to feelings award is concerned, we remind ourselves that the relevant *Vento* bands were as follows:
- (1) Lower band of £900 to £8,600 (less serious cases);
 - (2) Middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band)

- (3) Upper band of £25,700 to £42,900 (the most serious cases)
29. The injury to feelings caused by the loss of a good chance of securing a role will be greater than the loss of a slim chance of securing a job role.
30. In relation to any ongoing financial losses, interest is payable from the midpoint of the period over which the loss has been suffered at the rate of 8% per annum until the date of assessment. Interest on injury to feelings is calculated at 8% per annum from the date of the discriminatory act to the date of assessment.

CONCLUSIONS

31. The act of discrimination relates to a single application for a job role. The discrimination prevented him from being considered for the role.
32. There was a protracted series of emails between the Claimant and AECOM in which AECOM persistently refused to grant the Claimant the opportunity to make an oral application, without providing a convincing reason why this could not be offered. That would have been inevitably distressing.
33. Whilst we have found that the Respondent should have done more to assist the Claimant in lodging his application, the Claimant could have done more to explain the particular problem he was experiencing with the online form, either on the telephone or in an email.
34. We need to consider the percentage chance that the Claimant would have secured the role. This does impact on the size of an award for injury to feelings relating to discrimination in the application process.
35. We do not consider that the Claimant had any realistic prospect of securing the role for which he was applying. Even though it was a more junior role, the recruiting manager was Tim Jackson. He had been the Claimant's line manager when the Claimant had been employed by AECOM during 2017. He was the person who had decided to extend the Claimant's initial six-month probation period because he was dissatisfied with the Claimant's performance. He was the person who had decided not to extend the probation period further three months later, with the result that the Claimant was dismissed. He did not consider that the Claimant had the skillset required for the 2017 role. The Claimant had not achieved the objectives set at the six-month probationary review hearing, focusing on business development. Mr Jackson's negative perception of the Claimant's abilities would inevitably have impacted on how he evaluated the Claimant's application. The Claimant's CV did not identify any further experience gained in the period since his dismissal to enable Mr Jackson to see the Claimant's candidacy in a stronger light. There were other candidates applying for the same role who had more relevant experience, including the successful candidate.

36. Mr Jackson had considered a further application from the Claimant in 2019 for the same role as the 2018 role. He had rejected him on paper without offering him an interview. We find that this was because he did not consider that the Claimant had the necessary skills to do the role. He would inevitably have taken the same decision for the same reasons had the Claimant submitted an application in 2018. In 2018, the Claimant would have had less experience than he had in 2019.
37. There was therefore a 100% chance that the Claimant's application would have been unsuccessful.
38. Before the Claimant had been told that the 2018 role had been filled, he had secured and started an equivalent role with a firm called Baldwins. This role was based in Birmingham, which was closer to the Claimant's home. The Tribunal finds that any job offer from the Respondent would have post-dated the start of his employment with Baldwins. We think it very unlikely that he would have chosen to resign from the role with Baldwins to take up a role with the Respondent. It is reasonable to assume the Claimant's salary offer with the Respondent would have been the same as the successful candidate, namely £36,000. This was £14,000 less each year than he was receiving with Baldwins. In addition, it was substantially lower than the salary he had been receiving from the Respondent during the 2017 role. The Baldwins role was located far closer to his home in Cannock within easy commuting distance, unlike the Respondent's role. If the Claimant had opted for the role with the Respondent, he would have inevitably incurred substantial additional expense in commuting costs. He was motivated by money considerations to the extent that he needed to have a sufficient salary to enable him to achieve a suitable re-mortgage of his property at the end of the fixed term.
39. In the very unlikely event he would have chosen to accept the Respondent's role, he would not have suffered any loss of earnings. The Respondent's role would have paid substantially less than the role with Baldwins.
40. He chose to resign his Baldwins employment seven and a half months later because he was dissatisfied with the quality of the work. At the time of his resignation, he had not secured another job. Although he had occasional income from his eBay business and from consulting work, the lack of a full-time role caused financial difficulties for him and his family. It was those financial difficulties which impacted on the state of his mental health and led to many of the problems he records in his witness statement. These are also detailed in the evidence from the Claimant's partner Miss Newport. These problems flow from his decision to resign from his role at Baldwins, not from the failure of his 2018 application to the Respondent. As a result, his financial loss from mid-2019 onwards was caused by this, rather than by the Respondent's discrimination in relation to the 2018 application.

Injury to feelings award

41. As the Claimant himself accepted in evidence, although he was sad that his application with AECOM was not progressed, he did not suffer any particular reaction, given he was fully engaged in the role for Baldwins. This role continued for a period of seven and a half months.
42. In all the circumstances, we consider that the appropriate sum to award for injury to feelings is **£2000**. This is within the lowest *Vento* band for injury to feelings. It is appropriate that the award is in the lowest third of the lowest *Vento* band. The sum we have chosen reflects the additional burden on the Claimant in repeatedly emailing the Respondent to request he be permitted to make an oral application. It reflects the fact he had previously worked for the Respondent, an organisation for which he had enjoyed working. It recognises that the role for which he was applying was a more junior role than the role he had previously performed at the Respondent, and therefore one which would not necessarily reflect his career aspirations. It also reflects our conclusion that he had no chance of being accepted for the role and was very unlikely to have accepted the role if it was offered. It reflects the reality that he had started in an alternative role before the Respondent's application process had concluded. Once in that employment, from 17 September 2018 onwards, we do not accept that his failure to secure the role at the Respondent continued to cause any significant ongoing injury to feelings. The period in which any injury to feelings lasted is therefore limited to a few weeks at most.

Interest on injury to feelings

43. Interest on this sum is calculated at 8% from the date of the act of discrimination. We consider that the Respondent ought to have taken one of the two alternative courses of action identified at paragraph 73 of the Liability Judgment and Reasons by 20 August 2018 at the latest. This was a week after the Claimant had first requested a change to the standard application process, and several days after there had been correspondence on this topic. We take this date – 20 August 2018 - as the date from which interest runs. To 3 January 2023, this is a period of 1598 days, which equates to total interest of $1598/365.25 \times 8\% = 35\%$. Applied to the sum of £2000 for injury to feelings, this is therefore a sum of **£700** for interest.

Financial loss

44. As to financial loss, because we do not find that the Claimant had any realistic prospect of securing the advertised role with AECOM and is most unlikely to have accepted such a role in any event, we do not consider that the discrimination has caused the Claimant any financial loss. Furthermore, the role he secured with Baldwins paid the Claimant a salary of £50,000. This was substantially higher than he would have been paid had he secured the role with AECOM. The successful candidate started on a salary of £36,000. As a result, he has not suffered any financial loss in the period immediately after his application. Any financial loss from

May 2019 onwards was the result of his decision to resign his employment with Baldwins. It did not flow from the act of discrimination.

45. Therefore, there is no award for financial loss.

Recommendations

46. There was a discussion at the end of the closing submissions as to whether the Claimant was seeking a particular recommendation, and whether this is something that the Tribunal should consider. The Claimant was unable to identify any specific recommendation he was seeking. We do not consider that a recommendation is appropriate in this case.

Summary

47. The total award is therefore:

a. Injury to feelings	£2000
b. Interest on ITF	£700
c. Financial loss	<u>£0</u>
Total	£2,700.

**Employment Judge Gardiner
Dated: 3 January 2023**