EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Destiny Bright	**v**	**Chokar and Co**

Heard at: Watford Employment Tribunal (by C.V.P.)
On: 7 November 2022 and 25 November 2022 (in chambers)

Before: Employment Judge George
Members: Mrs L Thompson
Mr D Bean

Appearances

For the Claimant: In person
For the Respondent: Mr J Tidy, Solicitor

RESERVED REMEDY JUDGMENT

This has been a fully remote hearing, which was not objected to by the parties. The method of hearing was by C.V.P. A face to face hearing was not held because it was not practicable and the purposes of the hearing could be achieved at a remote hearing.

1. The respondent is to pay to the claimant compensation for disability discrimination of £7,825.52, calculated as follows:

    1.1. An award for injury to feelings of £7,000.

    1.2. Interest on the award for injury to feelings at 7% from 1 October 2021 to 25 November 2022, in the sum of £642.92.

    1.3. Loss of earnings of £182.60 for the period 1 October 2021 to 22 October 2021. This is calculated as 3 weeks @ £60.87 p.w. (£263.76 p.c.m.).

REASONS

1. At the hearing on 7 November 2022 we gave our oral judgment with reasons on liability by which we found that the decision of the respondent to

withdraw a job offer to Ms Bright on 1 October 2021 was an act of discrimination arising from disability and that they had failed to make reasonable adjustments by arranging for induction to happen at a later date as an alternative to withdrawing the job offer. The consequence of them not arranging for induction to happen was the loss of the job and therefore the loss of the losses flowing from both of these two acts are identical.

2. The written judgment was sent to the parties on 18 November 2022 and written reasons have not been requested. We had the benefit of a bundle of 86 pages which are referred to as pages 1 to 86 in these reasons. We were also provided with a supplementary bundle of 81 pages which is referred to as SB pages 1 to 81 in these reasons. The claimant and Mr Chokar of the respondent gave evidence by adopting written statements on which they were cross examined. The claimant and the respondent had also provided written submissions which are referred to in these reasons as CWS and RWS respectively. After hearing all evidence and submissions on whether the claimant should succeed in principle, we took time to discuss our decision and gave oral judgment with reasons. By then it was 4.00 pm. The parties agreed that all relevant remedy evidence and/or questions in cross-examination had been covered so were content to make further submissions on the remedy issues and for judgment on remedy to be reserved.

3. The claimant had provided a provisional schedule of loss as at 24 June 2022 by which she claimed that an appropriate award for injury to feelings would be £8,000. She also claimed financial losses. There is an entry on the schedule of loss to indicate that a claim of notice pay was to be confirmed. The offer of employment at page 61 of the bundle does not stipulate a particular contractual period of notice. The right to minimum notice under s.86 of the Employment Rights Act 1996 only applies to people who have been continuously employed for one month or more. There is therefore no loss under this head and we make no award in respect of notice pay.

4. By her schedule of loss the claimant claimed 38 weeks loss of basic salary at the net rate of £241.90. The respondent agrees that had the claimant remained in employment she would have been paid a gross weekly basic pay of £307.69 which equates to a net weekly basic pay of £241.90. In addition to that the claimant claims the sum of £7,392.20 as losses in respect of the Universal Credit benefit payment that she says she would have been entitled to while in full time work. She then says that she should give credit for Universal Credit received over the period to 24 June 2022 meaning that she had suffered a total loss of £2,284.62.

5. The claimant found alterative employment. This is stated in the provisional schedule of loss to have started on 5 October 2021 but the claimant's evidence was that her new job did not in fact start until 22 October 2021. We accept that evidence. Unfortunately, her new employer has not paid her the sums that were due to her in respect of that employment which did not last very long.

6. The respondent's primary argument was that the claimant had fully mitigated her loss because she had received in Universal Credit in the period from 1 October 2021 onwards – more, they argues, than she would have received had she been in employment. The respondent argues that the claimant has failed to prove that she would have been in receipt of Universal Credit notwithstanding her employment and had failed to prove the amount of any such benefit.

7. The issues that we had to decide in relation to remedy therefore seemed to us to be as follows:

    7.1 What compensation for injury to feelings should be awarded?

    7.2 Should interest be awarded on that sum?

    7.3 What income would the claimant have had had she remained in employment with the respondent?

    7.4 What income did she in fact receive?

    7.5 What is the period of the loss?

8. At the outset of the hearing the respondent was asked whether they argued that employment would have ended in any specific period of time had the discriminatory act not taken place in the alternative to their primary argument that there was no discrimination. Mr Tidy confirmed that this was not an argument that was being run. The respondent was specifically asked whether they argued that the claimant's employment would have terminated during or at the end of the probationary period and it was confirmed that they were not running that argument.

9. When deciding what income the claimant would have had had she been confirmed in and remained in employment with the respondent, we need to address her argument that she would have received social security benefits in any event. Specifically would she have received Universal Credit during employment? In her case, Universal Credit includes an element of housing support and an award in respect of limited capability for work and work related activity. The documents that she has provided in the bundle at pages 64 to 84 evidence the notifications from the Department of Work and Pensions to the claimant of the amount that her Universal Credit will be in particular months. The first month in time is from 26 September 2021 to 25 October 2021 at page 83. The last month in time is between 26 August and 25 September 2022 at page 70.

10. Her statement evidence from paragraph 36 to 38 was that, prior to her employment with the respondent, she was entitled to Universal Credit and that entitlement would have continued during her employment with the respondent albeit at a reduced rate. She says based on the calculators available on the government website that she would have received £7,392.20 between 1 October 2021 and 24 June 2022 had she been in receipt of a gross salary of £16,000 per year. It is this figure that the

respondent argues should be rejected as being uncorroborated by documentary evidence.

11. It is possible that the claimant could have taken a screen shot of the calculation to which she refers and that is not in the bundle. However, the question for us as a fact finding body is whether we accept that the claimant received Universal Credit before the job was due to start and would have continued to receive Universal Credit even if she was receiving a salary. The notification of entitlement at page 83 shows that she was awarded Universal Credit for a period that pre-dated the start of the employment. This supports the claimant's oral and statement evidence that she was entitled to Universal Credit before she was successful in her job application with the respondent.

12. Our own general Knowledge of the operation of Universal Credit supports her evidence that Universal Credit is reduced by a certain amount when the benefit claimant obtains work and that this reduction is calculated on a sliding scale. The claimant's oral evidence was that she believed it to be a reduction of 55 pence of benefit for every £1 of income earned. We find this to be plausible evidence based on our own knowledge of the background of the benefits system. We think if we take a simplistic view that the claimant has failed to prove her loss because she has not produced a screenshot of the calculation on which she relies, there is a significant risk that she would not be compensated in full for her loss. In general, we found her to be a credible witness in relation to the substantive matters. We accept that she received Universal Credit prior to her successful job application with the respondent.

13. In order to test her evidence that she has done a calculation that suggests she would have received £7,392.20 in Universal Credit between 1 October 2021 and 24 June 2022, we have done a calculation that seeks to compare that with her oral evidence that a benefit claimant loses 55 pence of benefit for every £1 of earnings received. We have added together the sums that she actually was awarded for each pay period from 26 September 2021 to 25 June 2022. Those are the pay periods in chronological order on pages 83, 81, 79, 77, 68, 75, 73, 66, and 64. A total of those sums is £14,647. An average over those nine monthly periods (i.e. £14,647 ÷ 9) is £1,627.44. It therefore appears that in that time period the claimant actually received an average of £1,627.44 in Universal Credit. If she lost 55 pence for every £1 she earned, she would have lost .55 x the monthly gross salary of £1,333.3. This amounts to a monthly reduction of benefit of £733.33.

14. If one deducts £733.33 (the suggested amount of a reduction) from the average credit that she did receive of 1,627.44, one reaches a figure of £894.11. If the claimant's evidence that she would have lost 55 pence in benefit for every £1 earned is correct, then it would seem she might stand in line to receive an average of £894.11 in Universal Credit every month over that period which would amount to more than £8,000. We have calculated this not in order to provide a definitive calculation of what benefit the claimant would have received but as a stress test of her actual evidence which was that based on the calculations she has done online; her

entitlement would have been £7,392.20. Having done this stress test and based on our understanding of the Universal Credit benefit, we accept her evidence that she would have received £7,392.20 between 1 October 2021 and 24 June 2022. Although there is an error in the schedule of loss where it appears to say that that would be a weekly sum of £842.97, it seems to us that it is probable that that was intended to be a monthly sum. We therefore accept the claimant's evidence that the Universal Credit that she has received since the withdrawal of the job offer has not fully mitigated her loss and we reject the respondent's argument in this respect.

15. Had the claimant remained in employment with the respondent, the amount of income that she would have had, would therefore have been a net figure of £1,048.23 per calendar month to which would also have been added Universal Credit and other benefits of £842.97, making a total income of £1,891.20 per month. Tax and National Insurance had already been deducted from the wages element.

16. The amount that she actually received over that nine month period was an average of £1,627.44 meaning that her income was reduced by £263.76 net per calendar month (£1,891.20 - £1,627.44) because of the withdrawal of the job offer.

17. The next question is that we have to consider what is the period of the loss. The claimant was fortunate to obtain a new job with effect from 22 October 2021. However, she was unfortunate in that those employers did not pay her and she is pursuing them for sums apparently owed by them through other proceedings. She did not say in her witness statement that there was any ongoing loss comparing the income that she would have earned with the Cancer and Dementia Awareness and Support for Africa (CADASA) Limited. Although in paragraph 41 of her witness statement she says that she was offered the role on 22 October 2022, she confirmed in oral evidence that the date was wrong and it was in fact the previous year. She did not in the witness statement or in oral evidence say the amount that she should have earned in that role. It appeared to be her argument that since they had not paid her it should not be regarded as offsetting her losses.

18. The respondent argued that they should not be penalised for the failure of an intervening employer to pay what was due under that employment contract. We agree with that submission. It seems to us that the claimant has a right to claim against that employer and is pursuing them as she is entitled to do.

19. It was only in closing submissions that the claimant referred to the amount of the wages that she was due to be paid with CADASA and suggested that there would have been an ongoing loss in any event. She has been assisted most ably in these proceedings by a charity and if there were ongoing loss in any event, that could and should have been included in the schedule of loss. It seems to us, in fairness to the respondent, that the claimant should not be entitled to rely upon something that she mentioned in closing submissions but had not put in evidence at a point when she would have been able to be challenged and cross examined about it.

20. As we have already said, the respondent did not argue any other non-discriminatory reason why the job would have come to an end. The claimant did not advance evidence that there was an ongoing loss from the date of the new job and we reject her argument that this new job did not amount to something capable of affecting her losses because the employer did not in fact pay what they were obliged to pay under the contract. We therefore consider that the period of loss is 1 October 2021 to 22 October 2021. This is a period of three weeks which falls to be compensated at £263.76 per month at the rate of £60.87 per week. Three weeks at that rate is £182.60 and this is the amount of loss of earnings.

21. The law in relation to injury to feelings is well established. We remind ourselves of the case Armitage, Marsden and HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

22. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved: MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604.

23. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

24. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually.

25. This claim was presented on 23 December 2021 and is therefore to be decided with reference to the level of bands set out in the Fourth Addendum to the Presidential Guidance which was issued on 26 March 2021. This

provides that the lower band is between £900 and £9,100 for less serious cases and the middle band is between £9,100 and £27,400. The claimant argues for an award in the lower band of £8,000.

26. We make the following findings about the impact on her of the withdrawal of the job offer. She told us, and we accept, that she was quite enthusiastic about the job. That is evident in the responses she gave for strategy improvements in the email at page 41. We consider that this was a job that she considered she could bring value to and she was looking forward to starting.

27. Broadly speaking, we accept her description of the impact on her of the withdrawal of the job in paragraphs 25 to 30 of her witness statements. She describes feeling really upset by Mr Chokar's treatment. She has a serious health condition and has an admirable attitude which makes her determined to succeed notwithstanding that. She does not wish to be regarded as and does not consider herself to be disabled. She told us that she is sufficiently ambitious that she does not wish to live on benefits and describes herself as "having" to go out to work. We took her to mean that this was what she wanted for a sense of personal fulfilment.

28. In her oral evidence she emphasised that she wanted to work and be a normal member of society and that there was more to working than the money, it was about a sense of belonging. We accept that the loss of this opportunity to join a team was a really upsetting blow for her. Nevertheless, she has, as she says, the resilience to go out and look for work despite these setbacks.

29. We are also mindful that there is an additional burden that the claimant bears as a person with disability, of deciding whether to disclose the effect of a health condition when making a job application. She was candid that she thought it was important to make that disclosure but an experience of this kind must make, and did make, her question whether she should be as open in the future. We are of the view that some of the matters that she describes such as lethargy and struggling to sleep properly and getting confused may flow from the underlying health condition and should be disregarded when assessing injury to feelings compensation. However, we accept that she does often recall this experience and has, on occasions, cried as a result of it. We think that she lost self-confidence but that the recent success in obtaining work which, if the temporary contract is converted to a permanent role, will be at a significantly improved income will have done much to improve that. We do not accept that there are any specific psychological effects of this withdrawal of a job offer.

30. Taking into account the real world value of awards in money's worth, we think that the £8,000 that she is claiming is slightly on the high side. However, we accept that this was the loss of the opportunity to do well in a job that she was enthusiastic about and has caused her to fear what will happen in the future if she is open about her health conditions for which she is entitled to expect some support. An appropriate award is the sum of £7,000. Interest should be awarded on that at the rate of 8% for a period of

421 days from 1 October 2021 to 25 November 2022, the date on which the assessment is made. That totals £645.92 making a total award, including interest for injury to feelings of £7,645.92.

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Employment Judge George

Date: …21 February 2023 ……..

Sent to the parties on: 22 February 2023

For the Tribunal Office