EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms Rebecca Owen	**v**	**1. Mr Paul Wright**
		2. London Borough of Enfield

Heard at: Watford (by CVP) **On**: 11 May 2023
Before: Employment Judge Alliott (sitting at Watford)
Members: Mr D Bean
Mr A Scott

Appearances
For the Claimant: In person
For the Respondent: Mr Fergus McCombie (counsel)

RECONSIDERATION JUDGMENT

The judgment of the tribunal is that:

1. It is not in the interests of justice to reconsider the judgment and the original decision is confirmed.

JUDGMENT

The judgment of the tribunal is that:

2. The respondent is ordered to pay the claimant compensation for injury to feelings in the sum of £4,500 plus £882.90 interest thereon, total £5,382.90.

REASONS

1. Following the decision and reasons being sent to the parties both the claimant and the respondents have made applications for reconsideration

2. The applications have been dealt with at a hearing with submissions from both sides.

The claimant's application

3. The claimant's application relates to her reasonable adjustments claim concerning the provision of a printer and a large monitor. In or judgment the claimant's application is seeking to re-argue issues that have already been decided in this case.

4. In paragraph 74, 109, 110 and 153 we have found that the non-supply of printers was not a failure to make a reasonable adjustment and was indeed justified.

5. As regards the provision of a large monitor, in paragraphs 140 and 152 of the reasons we have found that there was no failure to provide a large monitor.

6. Consequently, in our judgment, it would not be in the interests of justice to reconsider the judgment on the grounds advanced by the claimant.

The respondent's application

7. At the outset of the hearing we granted permission for the claimant to characterise the matters complained about in the context of her unfair dismissal (constructive) claim as s.15 disability discrimination. Two of the allegations of unfavourable treatment were as follows-

> "6.1.6 Mr Wright dismissing questions the claimant asked about the new way of working and the forms and protocols, and in response to her queries threatening to put the claimant on a formal performance process
>
> 6.1.7 Mr Wright setting unrealistic tasks for the claimant to finish each day and saying he was going to go to HR and put the claimant on a formal performance process if the task was not done."

8. In our findings of fact we made the following findings:-

> "132 As regards the collective process, as recorded above, in the supervision record of 11 November 2020, the claimant felt that she "got" the collective process by then. We find that Mr Wright did not dismiss the claimant's questions about the new way of working and the forms and protocols.
>
> 133. We find that Mr Wright did not set unrealistic tasks for the claimant to finish each day. We find that Mr Wright was broadly supportive of the claimant albeit in the context where she was clearly struggling to perform in an optimum manner."

9. Consequently, as regards the factual issues 6.1.6 and 6.1.7, we found in favour of the respondent as regards the first part of both allegations.

10. However, we went on to make the following findings:-

> "137 What we do find is that the claimant had been put on an informal performance improvement plan on 3 June 2020 and that throughout this period Mr Wright was indicating that the matter may be escalated to a formal performance process unless there was improvement. Informal and formal performance improvement plans are staging posts towards capability dismissals. We find that that was unfavourable treatment and that, in part, it was because of something arising in consequence of her disability."

11. In our judgment, we have therefore found the second part of issues 6.1.6 and 6.1.7 in the claimant's favour. The fact that we used the word indicated rather than threatened is immaterial in our judgment.

12. Mr McCombie complains that our findings that actually placing the claimant on an informal performance improvement plan and later indicating that she would be placed on a formal performance improvement plan (which he accepts may well be a more common sense approach) were nevertheless not specified as issues in the s.15 disability discrimination claim. There is some force in his argument but, in our judgment, the claimant has succeeded in the essence of her claim that for a period of time between June and November 2020 she was told that unless her performance improved she would be placed on a formal personal improvement plan.

13. We have found that that unfavourable treatment was, in part, because of something arising in consequence of her disability. Mr McCombie goes on to say that our reasons are deficient in that we have not identified what it was that constituted the part of the something arising in consequence of her disability. In that context we have revisited some of the evidence that there was before us. In paragraph 37 of the witness statement of Mr Wright he says as follows-

> "I did seek to place the claimant on formal performance as her work required improvement following informal performance and advised her of this in supervision on 27 November 2020 (pages 383-392, 420-423)."

14. In his witness statement Mr Wright is referring to the supervision records which began in June 2020 and run through to 27 November 2020. It would appear that he is justifying the progression of the claimant on to the formal performance process by reference to the claimant's performance at work throughout the whole of this period. We have already found in our reasons that the performance issues raised in relation to the claimant were both non-dyspraxia related and dyspraxia related or at the very least potentially dyspraxia related.

15. Further, by reference to the supervision record of 27 November 2020, it is quite clear to us that some of the specific issues raised did or may well have related to the claimant's dyspraxia. For example, there is a failure to close a case down. In addition, there is the assertion that six assessments are out of time or have recently been completed out of time. In our judgment, this justifies our finding that, in part, the unfavourable treatment was because of something arising in consequence of the claimant's disability.

16. Consequently, in our judgment, the interests of justice do not require us to reconsider this decision.

17. I should go on to deal with the fact that Mr McCombie claims that the recasting of the case to include an allegation that the unfavourable treatment included the actual placing of the claimant on an informal and formal capability process prejudiced the respondent in that it did not or could not have presented the evidence that it wanted to. In our judgment, we do not agree with this contention. The actual placing of the claimant on the informal and formal personal improvement plans was the end product of the indication that that was likely to happen. As indicated in our judgment, the claimant has succeeded in the essence of her claim in so far as the contingent possibility that she would be placed on such plans. That alleged threat was in the list of issues and was a matter that the respondent would

have to meet in answer to these claims. Consequently, we do not find that the respondent was prejudiced in the way it presented its defence.

Injury to feelings

18. In arriving at its figure for injury to feelings the tribunal has taken into account the matters raised by the claimant in her schedule of loss and in her witness statements.

19. Further, the tribunal had submissions from the claimant and Mr McCombie today.

The law

20. The tribunal has taken into account the following matters:-

21. As per the IDS Employment Law Handbook on Discrimination at Work at paragraph 37.63:

> "In Prison Service and others v Johnson [1997] ICR 275, EAT (a race discrimination case), the EAT summarised the general principles that underlie awards for injury to feelings:
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> - Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.
> - An award should not be inflated by feelings of indignation at the guilty party's conduct.
> - Awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.
> - Awards should be broadly similar to the range of awards in personal injury cases.
> - Tribunals should bear in mind the value in everyday life of the sum they are contemplating, and
> - Tribunals should bear in mind the need for public respect for the level of awards made."

22. Further, that we are to focus on the effect not the gravity of the discriminatory act.

23. Further, that in order to be compensated for discrimination, it is necessary for the court or tribunal to be satisfied, on the basis on the evidence and its findings of fact, that the harm or injury suffered by the claimant was caused by the act of discrimination – see Essa v Laing Ltd [2004] ICR 746 CA."

24. In our assessment of this case we have taken into account the following matters:

    24.1 The conduct of the respondent was not deliberate or intentional. We accept that the conduct of the respondents was motivated by the

need for public protection in childcare cases and to secure the optimum performance of the claimant as its employee.

24.2 The discriminatory conduct was the threat and imposition of personal improvement plans, both informal and to become formal, as far as the claimant is concerned. We do not find that the discriminatory conduct extended to the degree of supervision that the claimant was experiencing. In our judgment, it was entirely warranted for the respondent to manage the claimant broadly in the way she was being managed but not with the threat of the formal capability process, which, of course, has dismissal as its potential ultimate end.

24.3 We have taken into account that there is a high degree of probability, in our judgment, that once the claimant had concluded her training she would have been subjected to the capability process in any event due to the problems she was experiencing in her delivery of best care.

24.4 On the other hand, the period which we are dealing with covers approximately six months from June to 27 November 2020 and so this was not a one off incident but conduct that covered a period of time. Further, the treatment has clearly had some effect on the claimant, albeit that the effects on the claimant may have been exacerbated by issues that we have not found in her favour.

24.5 Consequently, in our judgment, this case falls within the less serious cases band of the Vento guidelines which at the time was £900–£9,000. In our judgment, taking everything into account, an appropriate figure for injury to feelings would be £4,500. That equates very roughly to two months net earnings for the claimant. In addition, by reference to personal injury litigation, that represents in excess of one years suffering from, for example, a whiplash injury.

24.6 The claimant is entitled to interest on her award. We have taken the 27 November 2020 as the start date. To todays date that is 2 years 165 days At 8 % that would add 19.62%, which is a total figure of £882.90.

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Employment Judge Alliott

Date: 31 May 2023

Sent to the parties on:
20 June 2023
GDJ
For the Tribunal Office