EMPLOYMENT TRIBUNALS

Claimant: **Ms F Wilkinson**

Respondent: **Sea Sanctuary**

Heard at: Bodmin (via video (VHS)) **On: 22 May 2023**

Before: **Employment Judge Cuthbert**
Mrs V Blake
Mrs P Skillin

Representation:

Claimant: In person
Respondent: Mr Mahmood (Consultant)

JUDGMENT (REMEDY)

The respondent is ordered to pay the claimant the total sum of **£14,573.31**, the reasons for which are set out below.

REASONS (REMEDY)

Introduction

1. These written reasons have been provided following a request made at the conclusion of the remedy hearing on behalf of the respondent, in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

2. The case came before the Tribunal for a remedy hearing on 22 May 2023. The heard was via video (VHS) by agreement, as it was reasonably practicable to hear it in this was and was in accordance with the overriding objective. There were no issues arising from this during the hearing.

3. At the liability hearing on 20 and 21 February 2023, the Tribunal had found that the claimant had been discriminated against, contrary to section 15 of the Equality Act 2010, namely discrimination arising from disability.

4. We found, in summary, that the claimant's dismissal arose from her disability and was not objectively justified. The respondent had a non-discriminatory alternative to dismissing the claimant in the circumstances. It should have run a written disciplinary process which would have enabled the claimant to participate in that process, rather than dismissing her on grounds of her ongoing ill health.

The issues

5. The issues to be determined at the remedy hearing were agreed as follows:

    a. What financial losses has the discrimination (i.e. the dismissal) caused the claimant?
    b. Had the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? The burden on proving an unreasonable failure by the claimant to replace lost earnings (failure to mitigate) lies on the respondent.
    c. If the claimant had not done so, for what period of loss should the claimant be compensated?
    d. What injury to feelings has the discriminatory dismissal caused the claimant and how much compensation should be awarded for that?
    e. Is there a chance that the claimant's employment would have ended in any event had she not been discriminated against? Should her compensation be reduced as a result?
    f. Should interest be awarded? How much if so?

The law

6. Section 124 of the Equality Act 2010 states as follows (insofar as is relevant):

> *124 Remedies: general*
>
> *(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
>
> *(2) 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) …*
>
> *…*

> *(6) 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.*
>
> *…*

7. Section 119(4) states that an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

8. The purpose of compensation for discrimination is to provide proper compensation for the wrong which the respondent is found to have committed. The purpose is not to provide an additional windfall for the claimant and is not to punish the respondent.

9. For financial losses, the Tribunal must identify the financial losses which actually flow from complaints which were upheld. This must not include financial losses caused by any other events, or losses that would have occurred anyway.

10. For injury to feelings, the Tribunal must not simply assume that injury to feelings inevitably flows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether an injury to feelings has been sustained. Some persons who are discriminated against may feel deeply hurt and others may consider it a matter of little consequence and suffer little, if any, distress.

11. When making an award for injury to feelings, the Tribunal should have regard to the guidance issued in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318, CA, and taking out of the changes and updates to that guidance to take account of inflation, and other matters.

12. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified and have subsequently been uplifted, given the passage of time since *Vento* was decided.

13. This claim was issued in December 2021. The relevant guidance applicable to this claim is as follows (the fourth addendum) which states: In respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows:

    a. a lower band of £900 to £9,100 (less serious cases);
    b. a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and
    c. an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

14. The basis of compensation for financial losses in discrimination cases is that *'as best as money can do it, the claimant must be put into the position*

she would have been in but for the unlawful conduct of [her employer]' (*Ministry of Defence v Cannock* [1994] IRLR 509, EAT, per Morison J at 517, [1994] ICR 918, EAT).

15. In assessing financial loss, there are a broad range of possible approaches to the exercise for the Tribunal.

    a. In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the Tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.

    b. In other cases, the Tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).

    c. If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: for example, award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

16. There is no one single "one size fits all" method of carrying out the task. The Tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the Tribunal must also bear in mind that when asking itself questions of the type *"what are the chances that the claimant have been dismissed if the process had been fair?"*, it is not asking itself *"would a hypothetical reasonable employer have dismissed"?* As was held in *Abbey National plc v Formoso* [1999] IRLR 222, EAT, the question to be asked is *"what were the chances that the individual would have kept their job, absent discrimination?"* It is this figure that has to be used in calculating the amount of any award made under this heading. It is an error of law to decide this issue based upon what a hypothetical reasonable employer may have done. The question to be assessed is what **this actual employer** would have done.

17. Under the Equality Act 2010, Tribunals apply the same rules concerning the duty to mitigate loss as apply to damages recoverable under the common law. Where the employee has mitigated, a tribunal should give credit for sums earned. When assessing the amount of any deduction for the employee's failure to mitigate their loss, the correct approach is to make a decision about the date on which the employee would have found work had they been acting reasonably to seek to mitigate their losses, and then make an assessment of what income they would have had from such work. It is for the respondent to prove that a claimant has unreasonably failed to take appropriate steps, and that – on balance of probabilities - had those steps been taken, then the losses would have been mitigated.

18. Pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, a Tribunal making an award in a case involving discrimination is obliged to consider awarding interest, whether or not any party raises the issue, but is not obliged to award interest. Interest awarded is calculated as simple interest, accruing from day to day, at the rate fixed by section 17 of the Judgments Act 1838, which is currently 8%. The period over which interest is calculated differs for awards for injury to feelings and awards for all other sums. Generally, interest is calculated:

    a. on awards for injury to feelings, for the entire period from the date of the relevant act of discrimination giving rise to the injury to feelings up until the calculation date

    b. on other awards, from the 'mid-point date' (generally the date half way between the date of the act of prohibited conduct and the date of calculation) to the calculation date

Evidence and Findings

19. We heard oral evidence from the claimant who also produced a witness statement.

20. During cross-examination, the respondent's representative focused mainly on issues around mitigation and financial losses and did not challenge the claimant's evidence about the effect of the respondent's actions upon her.

21. Some of the claimant's witness evidence about her upset concerned matters which were not part of her discrimination claim. The claim related **only** to the claimant's dismissal, arising from the respondent's failure to deal with the disciplinary process in writing. The matters in the witness statement which did describe upset relating or likely to relate, in the view of the Tribunal, to the discrimination, were as follows:

    a. The claimant's mental health issues had declined during late 2020 and 2021 because of the earlier events in the workplace. She had long-standing mental health issues. She was therefore particularly liable to experience distress and upset (the 'eggshell skull' principle) by the point in time when she was dismissed.
    b. She was very frustrated at not having the opportunity to prove her innocence of the disciplinary charges.
    c. She had lost trust in employers (this was likely to be due to a combination of feelings about of her earlier treatment (non-discriminatory) and the dismissal itself).
    d. She was experiencing ongoing feelings of anxiety and depression and was unable to drive past the respondent's address because of this.
    e. She had experienced symptoms of high blood pressure, excessive ongoing worry and tension, restlessness/edginess, muscle tension, headaches, nausea, negative feelings about herself.

22. She also gave oral evidence to the Tribunal to explain that she had not sought new employment because of her feelings of being unable to trust a new employer, given her treatment by the respondent. She said that she had "bad days" sometimes and felt that on such days she would be unable to attend work.

23. The Tribunal had also previously noted in the liability hearing, that the claimant, in her letter of appeal against dismissal, described her upset that the respondent, as a mental health charity had not shown a greater understanding of the claimant's mental health and had discriminated against her. She said in the same letter that she had been shocked by her dismissal and it would affect her detrimentally. In a subsequent email, she said that her anxiety was too acute for her to attend an appeal meeting and so the appeal was dealt with in writing.

24. In terms of mitigation, the claimant had run two businesses after her dismissal on a self-employed basis – a wedding planning business which had also been in existence during her employment for the respondent, and a removal business (using a van). There was very limited

25. The claimant was pressed during cross examination about why she had chosen to go self-employed rather than seeking new employment.

26. There was very limited evidence indeed before the Tribunal about the claimant's earnings from both businesses. She had disclosed her self-assessment tax returns from 2021/2022. Her oral evidence was to the effect that things had been much the same subsequently. These disclosed a profit of £3,973 from the wedding business but no profit in the other business. They did not evidence what drawings the claimant had made from either business.

27. The respondent adduced two-page written witness statements only, from:

    a. Martin Storer, Trustee and Director. He explained about the financial position of the respondent and the closure of the children's home in late 2021 and subsequent redundancies amongst the staff. He said that the claimant would also have been dismissed for redundancy in January 2022.
    b. Jospeh Sabien, CEO. He also explained about the redundancies and asserted that the claimant would have been dismissed, had the disciplinary hearing proceeded. He said the claimant would in any event have been dismissed for redundancy in January 2022.

28. Neither witness attended the remedy hearing to be questioned. The respondent did adduce evidence from the redundancy process from late 2021/early 2022 to the effect that colleagues in the claimant's team were put at risk of redundancy and dismissed – there were letters of termination for "Amy" and "Bianca". Most of the staff were made redundant. This was evidence was put to the claimant by Mr Mahmood during cross-examination. The claimant did not dispute the closure of the home in which she worked, but asserted that there were other roles within the respondent into which she could have been redeployed.

Oral Closing Submissions

29. Mr Mahmood submitted as follows on behalf of the respondent:

    a. The claimant had limited financial losses. She had committed a breach of confidentiality, he alleged, and the respondent had not been able to identify any other link to the source. It had been left with no option but to discipline the claimant.
    b. After a fair process, it was likely that the claimant would have been dismissed.
    c. If she had remained in employment, it was likely that she would have remained on SSP until her eligibility expired.
    d. The claimant would have returned on phased return had she come back.
    e. Even if she had returned to work, due to financial constraints, the home in which she had worked had since ceased operating. She would have been subject to redundancy as her fellow support workers had been.
    f. He submitted that the claimant had failed to take reasonable steps to replace her lost earnings. She had not looked for any other job but had engaged in self-employment due to the flexibility this gave her.
    g. The claimant said she had survived on £3,973 profits per year and had received no assistance from the welfare benefits system – this was not credible evidence, he said.
    h. The respondent submitted that the relevant period of financial losses was from October 2021 to January 2022. He said, had the claimant not been dismissed for misconduct, her employment would have terminated by reason of redundancy in any event.
    i. In terms of injury to feelings, the claimant had experienced medical issues prior to her employment – the respondent had exacerbated the condition but had not caused it.
    j. He said that an award should be in the lower band of *Vento* as it was a one-off termination.
    k. He referred to the case of *Mr Y Mahmood v Rotherham Metropolitan Borough Council*, 1803889/2020, ET, which he suggested contained an award of injury to feelings on analogous facts.
    l. He submitted that the Tribunal should not grant interest.

30. The claimant submitted as follows:

    a. During the time she was employed by the respondent, her mental health had declined and her medication had increased. The treatment had a profound effect and made her fearful of working again.
    b. She set her business up due to having *"no other choice"* – she did not feel able to work for someone else. She had no funds and used assets she already had
    c. She placed her claim towards the higher end of the middle band of *Vento*.

d. She submitted (on the redundancy risk) that the respondent did still exist in another form and was *"not completely gone"*.

Discussion and Conclusions

Injury to feelings

31. The Tribunal firstly considered an award for injury to feelings. This award was based on the discrimination as found, namely the respondent's decision to dismiss the claimant on the basis of her health issues, rather than to carry out a disciplinary process in writing.

32. We took account of the fact that the respondent's decision involved the dismissal of the claimant, which we considered to be a very serious step to take. There was no dispute that the claimant had known underlying mental health issues, which we accepted were likely to have been exacerbated by such a step. The respondent must, as the caselaw requires, take its victim as they find them.

33. We also considered the claimant's feelings of frustration at not having a chance to prove herself innocent of the misconduct alleged. It was evident that she suffered shock and considerable stress and anxiety due to her dismissal. She also experienced a significant loss of trust in any potential employer.

34. On the other hand, we also took account of the fact that some of the claimant's hurt and upset feelings were linked to her broader treatment by the respondent (the underlying disciplinary allegations which surfaced in late 2020 and the protracted attendance management process) and were not simply about the discriminatory dismissal. It was not possible to divide the claimant's feelings, but in any event the most serious consequence for her (namely dismissal) **was** discriminatory.

35. We also took account of the fact that the claimant did not adduce any medical evidence to support her claim for injury to feelings.

36. The *Mahmood* case cited on behalf of the respondent involved a first-instance award of £4,000 for injury to feelings to a successful claimant. The successful disability discrimination claims in that case related solely to a single meeting and a subsequent letter about a flexible working request. Although the claim had also been about a dismissal, that part of the claim did not succeed or was withdrawn. The case did not therefore assist in the present circumstances and was not analogous.

37. We agreed that the appropriate award in the present case was **£12,000** for injury to the claimant's feelings arising from her dismissal, based on the 2021/22 Vento bands, namely the lower end of the middle band. We did not consider that the hurt occasioned to the claimant's feelings as a result of her discriminatory dismissal warranted an award in the lower band.

Financial losses

38. In terms of financial losses, the main factual issues we needed to assess were the likelihood of the claimant being dismissed in any event, and the impact of the same on her financial losses. There were **two** significant risk factors for the claimant here, in looking at what may have happened but for the discrimination:

    a. Firstly, a risk that she may have been dismissed for misconduct following a written disciplinary process; and
    b. Secondly, a risk of dismissal for redundancy when her former place of work closed down in early 2022.

Consideration of financial losses and discounts applied

39. We firstly considered what the likely outcome of the written disciplinary process would have been, based on the evidence before us.

40. We were **not** giving any view on whether or not the claimant was guilty of the misconduct alleged – we were simply assessing what the chances were of **this particular respondent** having done, if the disciplinary process had gone ahead in writing.

41. We did not consider that the claimant's dismissal was inevitable given what was said by the respondent in correspondence (noted in the previous liability decision) about the outcome not being a foregone conclusion and the claimant being a valued member of the staff team. We were also mindful that the claimant may have been able to rebut the allegations to the satisfaction of the respondent's management.

42. On the face of it, the allegations of breach of confidence were serious, and this respondent had considered it had a sufficient case for the claimant to answer to take it to a disciplinary hearing.

43. In assessing the likelihood of dismissal, we also took account of the fact that the claimant had less than two years' service (having commenced employment in January 2020) and so would not have had the legal right to claim unfair dismissal had she been dismissed for misconduct by the respondent at any point during 2021.

44. We concluded that the chance of the claimant being dismissed by this particular respondent was reasonably high, **75%**, and that accordingly the claimant's financial losses were to be limited to 25% going forwards, to reflect the risk of dismissal, from when those disciplinary proceedings would have concluded. A **75%** discount was therefore applied to those losses to reflect that risk.

45. We decided that a written disciplinary process would have taken this respondent around one month to complete in writing (from the point when it dismissed her at the end of August 2021), running until 1 October 2021 (which coincided with the claimant's paid notice period in any event, so there was no loss).

First period - Losses 1 Oct 2021 to 12 Nov 2021 (6 weeks) – phased return

46. From 1 October 2021 until 12 November 2021, had she not been dismissed, we considered that the claimant would have undertaken a phased return for a period of six weeks, receiving 50% of her net salary plus SSP during this period.

47. Her average weekly net salary (based on the period from March to November 2020 (when she was last at work normally) was £276.19 and her average weekly employer pension contributions were £5.79.

48. The claimant's loss of earnings in this period was therefore assessed as follows:

    Earnings: 6 x (50% x £276.19) = £828.57

    Plus approximated amount of SSP 6 x (50% x £96.35) = £289.05

    Sub-total before discount: £1,117.62

    £1,117.62 x 25% = £279.41 (applying the 75% discount)

    Loss of employer pension contributions: 6 x £5.79 = £34.74

    £34.74 x 25% = £8.69 (applying the 75% discount)

49. The discounted loss of earnings and pension in this period: £279.41 + £8.69 = **£288.10**

Second period - Losses 13 November 2021 to 10 January 2022 (8 weeks)

50. During this period, had she not been dismissed, the claimant would have been back at work for the respondent. From 13 November 2021, had she not been dismissed earlier in 2021, the claimant would have been working during this period on a full-time basis.

    Earnings: 8 (weeks) x £276.19 = £2,209.52 (before discount)

    £2,209.52 x 25% = £552.38 (applying the 75% discount)

    Loss of employer pension contributions: 8 x £5.79 = £46.32

    £46.32 x 25% = £11.58 (applying the 75% discount)

51. The discounted loss of earnings and pension in this period: £552.38 + £11.58 = **£563.96**

Third period - Potential loss from 10 January 2022 onwards – redundancy risk

52. In late 2021, the respondent considered closing the part of the charity in which the claimant was employed, which closed in early 2022. Most of the

staff who worked within it were made redundant. Some were redeployed elsewhere in the charity.

53. By 10 January 2022, we considered that, if the claimant had still remained in employment on this date and not been dismissed for misconduct during 2021, there was a 75% chance that the claimant (who would have been one of 14 support workers at risk of redundancy) would have been dismissed for redundancy. 10 January 2022 was the date on which her former colleagues who were dismissed were given notice.

54. We considered that there was a 25% chance that the claimant may have secured alternative employment as a well-being practitioner, 20 hours per week assumed at the same hourly rate of £8.75 per hour (one of the possible alternative roles at that time, the most likely to have been suitable).

55. In terms of the claimant's financial losses, by this stage, two 75% discounts now needed to be applied one after the other, as a result of, firstly, the risk of the initial misconduct dismissal, and secondly the risk of a redundancy dismissal. In essence, after 10 January 2022, we considered there was only a **very** limited prospect that the claimant would still have been in employment for the respondent due to these two consecutive risks she would have faced, absent the discrimination.

56. Possible earnings from 10 January 2022:

    20 hours x £8.75 = £175 per week

    75% discount for first dismissal risk (misconduct) (175 x 25%) = £43.75

    Further 75% discount for second dismissal risk (redundancy) (43.75 x 25%) = **£10.94** (gross) per week (doubly-discounted potential loss).

57. We did consider that there was, however, any actual loss from this point onwards after the discounts. The claimant focused upon two self-employment businesses after her dismissal. We had very limited evidence about what income the claimant was drawing from her two self-employment businesses (for example, no bank statements) to sustain her from mid-2021 to date. We only had copies of self-assessment returns for the 2021-22 tax years. The wedding business was in "profit" overall for 2021-22, in the sum of £3,973.

58. We found it likely on balance that by this point in time (10 January 2022 onwards) the claimant was drawing some income from the two businesses which was in excess of the heavily discounted loss arising by this same stage, namely £10.94 per week. She did not claim any state benefits.

59. We concluded that her very limited, doubly-discounted loss of earnings from 10 January 2022, £10.94 per week, to take account of the two significant risks of dismissal above, was on balance less than the claimant must conceivably have drawn per week from her two self-employment

businesses. So, we found that there was no ongoing financial loss, arising from the discrimination, after 10 January 2022.

60. Given the limited period of losses, we did not consider that the claimant had failed to mitigate in that period.

61. The total financial loss awarded was therefore **£852.06**[1], namely the total arising from the first two periods above.

Interest

62. We decided to exercise our discretion and award interest to the claimant, calculated as follows.

    Date of discrimination 29 August 2021
    Date of hearing 22 May 2023
    Days in period: 632
    Mid-point: 11 July 2022 (316 days to hearing)
    Interest on injury to feelings: (£12,000 x 8%)/365 = £2.63 per day
    632 x £2.63 = **£1,662.16**

63. Total financial loss: £852.06
    (£852.06 x 8%)/365 = £0.187 per day
    316 x £0.187 = **£59.09**

64. Total interest: **£1,721.25**

Grand total

65. £12,000 (ITF) + £852.06 (financial loss) + £1,721.25 (interest) = **£14,573.31**

66. **The respondent is ordered to pay to the clamant the total sum of £14,573.31.**

Employment Judge Cuthbert
Date: 12 June 2023

Judgment & Reasons sent to the Parties: 26 June 2023

FOR THE TRIBUNAL OFFICE

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[1] We have corrected an error of calculation in the oral judgment in which this figure was given incorrectly as £840.48, slightly increasing the interest and total sum due.