



EMPLOYMENT TRIBUNALS

Claimant: Miss M Rodrigues De Carvalho
Respondent: Aspers (Stratford City) Limited
Heard at: East London Hearing Centre (via CVP)
On: 10 & 11 August 2023
Before: Employment Judge John Crosfill
Members: Ms S Barlow
Ms B K Saund

Representation

Claimant: Laura Redman of Counsel
Respondent: Ms Jo Laxton of Counsel

Corrected REMEDY JUDGMENT

Non pecuniary loss

1. The Claimant is awarded the sum of £35,000.00 in respect of the psychiatric injury suffered as a consequence of the unlawful treatment found by the Tribunal. The said award is inclusive of any additional pain or discomfort associated with the fact that the Claimant had Irritable Bowel Syndrome.
2. The Claimant is awarded £5,000.00 to compensate her for any additional injury to feelings not falling within the award above to reflect the Tribunal's finding that prior to and after the period covered by the General damages above the Claimant had/will suffer[ed] injury to feelings falling short of a clinical condition.
3. Insofar as it is necessary to apportion the awards made above to the causes of action that succeeded before the Tribunal the Tribunal apportion 30% to the claim brought under sections 20/21 and 39 of the Equality Act 2010 and the balance to the claims brought under Sections 26 & 27.

4. The Claimant is awarded £2,000.00 in aggravated damages on the basis of the Tribunal's finding that the Respondent's actions in victimising the Claimant were conscious and deliberate acts that would obviously cause distress.
5. The total of the award for non-pecuniary loss is **£42,000.00**.
6. The Tribunal found that there would be a serious injustice for the purposes of Regulation 4(3) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 if it awarded interest from the date of the earliest injury (as the Claimant invited it to do) on that the basis that the early injury was substantially less significant and more so at the earlier stages of the failure to make adjustments and the subsequent more serious injury occurred a substantial period later. The effects of the earlier injury manifested themselves to a far greater degree at a date well after the failure to make reasonable adjustments first occurred. The Tribunal decided that apportioning the injury for the purposes of calculating interest was arbitrary and artificial and that a broad brush approach was appropriate. In the light of those matters the Tribunal determined that interest should run on the non-pecuniary loss from 1 August 2019.
7. The interest is calculated as follows:
 - 7.1. The applicable rate of interest is 8%
 - 7.2. The sum on which interest is to be awarded is £42,000.00
 - 7.3. The number of days between 1 August 2019 and 11 August 2023 is 1472
 - 7.4. The interest is therefore $0.08 \times £42,000.00 \times 1472/365 =$ **£13,541.26**

Loss of earnings and pension

8. The Claimant has suffered a loss of wages and/or tips between 14 November 2019 and 21 June 2021 when she obtained employment at a higher rate of pay. The losses accrued as follows:
 - 8.1. Period A – from 14 November 2019 when the Claimant was suspended until 6 January 2020 at which point the Claimant's suspension was lifted at which point she was too unwell to work.
 - 8.1.1. The Claimant's loss during this period was restricted to the loss of tips that she would have received but for her (unlawful) suspension. The sum was agreed to be **£1,906.28** (not taking into account benefits received during this period which are accounted for below).

- 8.2. Period B from 6 January to 13 August the date of the Claimant's dismissal.
- 8.2.1. From 6 January 2020 to 20 March 2020 the Claimant would have received her normal wages plus tips.
- 8.2.2. From 20 March 2020 the Claimant would have received 80% of her basic wages and no tips as she would have been placed on furlough.
- 8.2.3. The total sum that the Claimant would have received had she not been unwell was £9,240.59.
- 8.2.4. The Claimant must give credit against that sum for:
- 8.2.4.1. sums received from the Respondent £4,325.09 (which included a payment in lieu of notice which the Tribunal have attributed to this period as it makes no practical difference)
- 8.2.4.2. in respect of state benefits received because she was not being paid her full wages the benefits received between November 2019 and August 2020 were £3,739.45 (and include some benefits attributable to period A)
- 8.2.5. The loss of wages in Period B is therefore £9,240.59 – (4,325.09 + 3739.45) = **£1,176.05**
- 8.3. Period C is the period from 13 August 2020 the date upon which the Claimant was dismissed until 28 January 2021. The tribunal found that, had the Respondent acted lawfully the Claimant would have been lawfully dismissed at a time when there was a hiatus in the employment market and in particular in the hospitality sector. The Tribunal find that during this period the Claimant's prospects of finding and keeping a job mean that the loss during this period should be reduced by 70% to reflect the probability that she would have had significant periods of unemployment.
- 8.3.1. The period of loss is 24 weeks.
- 8.3.2. The starting point for the calculation of loss is the weekly figures of £242.24 in wages and £251.82 in tips = £494.06
- 8.3.3. The loss during Period C is 24 weeks x £494.06 x 30% = £3,557.23.
- 8.4. Period D from 28 January 2021 to 21 June 2021. The Tribunal found that at that stage the labour market had stabilised to the extent that it is no longer appropriate to reduce the losses to reflect the possibility of further unemployment.
- 8.4.1. The period is 20 weeks and 3 days (20.428 weeks).
- 8.4.2. The rate at which losses accrued is £494.06 per week.

- 8.4.3. The loss of wages is therefore $\text{£}494.06 \times 20.428 = \text{£}10,092.94$.
- 8.5. The Claimant must give credit for state benefits received because she had no wages. The total during period C and period D is $\text{£}6,073.23$.
- 8.6. The Loss during Period C and D together is $\text{£}3,557.23 + \text{£}10,092.94 = \text{£}13,650.17$ less $\text{£}6,073.23 = \text{£}7,576.94$.
9. The total loss of wages in period A, B, C and D is $\text{£}1,906.28 + \text{£}1,176.05 + \text{£}7,576.94 = \text{£}10,659.27$
10. The Claimant sought pension loss of $\text{£}6.51$ per week. A total of $\text{£}466.00$ for the period. Based on our findings in respect of Period C we find that for a period of 24 weeks those losses should be reduced by 70%. Taking into account those pension losses the loss is **£356.63**.
11. The total of the pecuniary loss related to loss of earnings awarded by the Tribunal is therefore $\text{£}10,659.27$ plus $\text{£}356.63 = \text{£}10,659.27 \text{ £}11,015.90$
12. The Tribunal found that to award interest from the date calculated in accordance with regulation 6(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 would cause serious injustice as the losses had all accrued By June 2021 and to use the midpoint meant that the Claimant would not be in receipt of interest for a significant proportion of the time that she had been deprived of wages. The Tribunal considered it appropriate to award interest from the approximate mid-point of the loss that had occurred that being 1 September 2020.
- 12.1. The sum on which interest is due is ~~£10,659.27~~ **£11,015.90**
- 12.2. There are 1075 days in the period.
- 12.3. The interest is therefore ~~£10,659.27~~ **£11,015.90** $\times 1075/365 \times 0.08 = \text{£}2,510.72 \text{ £}2,595.53$
13. The Tribunal make no further awards for any of the pecuniary loss claimed by the Claimant having concluded either that there was no evidence of such loss or that the loss did not arise as a consequence of any unlawful act.

Costs of future medical care

14. We awarded the Claimant the costs of future and contingent medical care. The sums awarded are:
- 14.1. The costs of a course of EMDR psychotherapy of 20 sessions at $\text{£}150.00$ per session = $\text{£}3,000$

- 14.2. The costs of medication based treatment under the supervision of a Consultant Psychiatrist being one consultation @ £400.00 and 4 follow up sessions at £175 a total of ~~£700.00~~ **£1,100.00**
- 14.3. A contingent assessment of future EMDR treatment at a cost of £1,500.00
15. The total costs of medical care are ~~£5,200.00~~ **£5,600.00**. Those costs having not yet been incurred we make no award of interest.

ACAS Uplift

16. The Tribunal found that insofar as there was any failure to follow a provision of any relevant ACAS code of practice the failure to do so was not unreasonable. In the circumstances the Tribunal cannot uplift any award and in any event it would not have been just and equitable to do so.

Taxation

17. At the close of the hearing and after judgment Counsel for the Claimant raised the question of whether any part of the award should be grossed up on the basis that it is taxable in the Claimant's hands. The Tribunal expressed the view that:
- 17.1. The award for non-pecuniary loss is not income and would not fall to be treated as income for the purposes of Section 401 of the Income Tax (Earnings and Pensions) Act 2003 as the injury was inflicted prior to the Claimant's dismissal (and even if it did the personal injury element would be excepted by Section 406).
- 17.2. That the compensation for non-pecuniary loss is not to be treated as income because from 6 January 2020 the loss flowed from the injury that the Claimant had occasioned and at no stage did the loss flow from the dismissal bringing any losses within Section 401.
18. The parties placed no evidence before the Tribunal of the Claimant's tax affairs in the current tax years and did not make any detailed submissions on this point. In the circumstances the Tribunal decline to make any additional award to reflect the possibility that any part of the award is taxable. The parties have liberty to apply to restore this issue before the Tribunal if either party takes the view that the Tribunal is incorrect.
19. The Respondent is ordered to pay the Claimant:
- 19.1. General damages, injury to feelings and aggravated damages totalling **£42,000.00**
- 19.2. Interest on the damages above of **£13,541.26**
- 19.3. Damages of ~~£10,659.27~~ **£11,015.90**
- 19.4. Interest on the damages above of = ~~£2,540.72~~ **£2,595.53**

- 19.5. Costs of future medical care of ~~£5,200.00~~ **£5,600.00**
20. **The total payable to the Claimant is ~~£73,911.25~~ £74,752.69**
21. The recoupment regulations do not apply to any of the awards above.

Employment Judge Crosfill
Date: 7 September 2023