EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Taskova**

Respondent: **GXO Logistics UK Limited**

Heard at: **Sheffield** **On: 1 August 2023**

Before: **Employment Judge Maidment**
Members: **Ms J Lancaster**
Mr M Taj

Representation
Claimant: **In person**
Interpreter: **Ms I Almeida**
Respondent: **Mr B Williams, Counsel**

JUDGMENT having been sent to the parties dated 1 August 2023 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. This hearing was listed to determine the claimant's remedy arising out of the tribunal's findings that the respondent failed to comply with a duty to make reasonable adjustments from 30 July - 2 August 2019. This related to the claimant's knee impairment and her not being rotated sufficiently on 30 and 31 July and 1 August 2019 around a number of available tasks in a manner which would reduce the possibility of an exacerbation of her condition. The claimant left the workplace early on 2 August 2019 on learning that her situation would not improve on that day. These reasons must be read with reference to the tribunal's reserved Judgment and reasons as to liability sent to the parties on 13 March 2023. The respondent has also since the tribunal's Judgment made an application for costs.

Applicable law

2. As regards injury to feelings arising out of the act of discrimination upheld, according to **Prison Service and others v Johnson [1997] ICR 275** the purpose of an award for injury to feelings is to compensate the claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock [1994] ICR 918** the aim is to award a sum that, in so far as money can do so, puts the claimant in the position he or she would have been had the discrimination not taken place. Pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05**, an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the claimant.

3. The Tribunal was referred to the **Vento** guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Nevertheless, the tribunal considers that the decisive factor is the effect of the unlawful discrimination on the claimant.

4. The bands originally set out in **Vento** have increased in their value due to inflation and a further uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. This has given rise to Presidential Guidance which re-drew the lower band for claims brought on or after 1 April 2019 as ranging from £900 - £8,800 with the middle band going up to £26,300. The claimant's complaints were brought on 20 January 2020.

5. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the claimant, so far as possible, into the position that she would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock** above – essentially a "but for" test in causation when assessing damages flowing from discriminatory acts. The claimant does now contend that she suffered some financial loss arising out of the failure to make reasonable adjustments during a period of sickness absence shortly after the failure.

6. The tribunal has the power to make an award of costs by virtue of Rule 76 of the Employment Tribunals Rules of Procedure 2013, which provide, so far as material, as follows:

> ***"76 When a costs order or a preparation time order may or shall be made***
> *A Tribunal may make a costs order …, and shall consider whether to do so, where it considers that –*
> *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part)*
> *or the way that the proceedings (or part) have been conducted; or*
> *any claim or response had no reasonable prospect of success."*

7. The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see **Yerrakalva v Barnsley MBC [2012] ICR 420 CA**. It was also reaffirmed in that case that costs in the employment tribunal are still very much the exception rather than the rule.

Evidence and factual findings

8. The claimant gave further evidence to the tribunal. She said that after the failure to make reasonable adjustments she had been absent from work for 6 days. She had been caused further pain in her foot and also pain in her knee and work-related stress. She had left the workplace on 2 August and her first day of illness had been 3 August until her return to work on 10 August. She had missed therefore 37.5 hours when she would ordinarily have worked and there was a shortfall of 7 hours in respect of pay for 2 August due to her leaving early. She believed that she had only received statutory sick pay for the fourth and fifth day of her absence, 9 and 10 August. She said that she had not received any company sick pay because her entitlement had run out. This loss had not previously been pleaded or referred to within a schedule of loss as a head of compensation sought. The claimant has provided the tribunal with no figures in terms of pay which she says ought to have been received as against amounts received in statutory sick pay. Nor has the tribunal any evidence as to her contractual sick pay entitlement.

9. The claimant had taken antidepressants and painkillers. She had been prescribed amitriptyline on 23 August 2019, an antidepressant. However, that had been prescribed originally in February 2019 and taken, from then, on a continuing basis. She said that her dosage had been increased. In terms of timing, she was simply able to say that she received a higher dosage when the next time came for her prescription to be reviewed.

10. She repeated that, for her, the respondent's failures to make adjustments for her knee condition had subsisted since December 2017 and that empty promises had been made to her by the respondent. Whilst she was told

there would be changes to the work tasks allocated to her, team leaders had given evidence to the tribunal to say that they had not been updated. There was, therefore, no consistent approach.

11. She said that she had taken further advice, having received the tribunal's Judgment and reasons on liability, and been told that any award of injury to feelings ought to fall within the lower Vento band. She considered, however, that because she had raised issues of a failure to make reasonable adjustments before and the team leaders did not know her requirements any award should be in the upper part of that lower band. There was no claim for aggravated damages. Mr Williams submitted that any award ought to be towards the bottom of the lower band and referred the tribunal to employment tribunal assessments in what he suggested were comparable cases.

12. In terms of her means, the claimant said that she had a monthly income of £1080.12 in respect of universal credit, which included an element for rent. She was not in employment. She had no savings, owed money elsewhere and did not own her own home. She owed £1500 on her credit card and believed that she was around £50 or £60 short of her credit limit.

Conclusions on remedy

13. The tribunal cannot award any compensation for financial losses. The claimant was absent after she had been asked to work a fourth shift on picking exceptions, but the tribunal has heard no evidence and made no findings about that absence. The tribunal has no evidential basis for concluding that the failure to make reasonable adjustments caused the claimant's absence. The claimant had an underlying health issue which could flare up regardless. There was a lot going on in her employment which was causing her stress and frustration. There is no medical evidence before the tribunal or evidence other than a return to work form, which refers simply to work-related stress, physical pain and migraine. Nor has the tribunal any evidence of what was paid to the claimant, for what period, what her ordinary earnings might have been or the extent of her entitlement to company sick pay.

14. The claimant can, therefore, only be compensated for injury to feelings. The tribunal can award compensation for the injured feelings arising only out of the act of discrimination found. Obviously, again, there was a lot upsetting the claimant regarding her working environment. The claimant was upset, clearly from her original tribunal claims and other causes of action she attempted to pursue, by, what she believed, was a course of conduct she was subjected to because of her race and her having made protected disclosures. The case she brought was very wide-ranging in terms of the complaints and the types of complaint asserted. Given her withdrawal of these claims, the tribunal's written reasons in its decision on liability is not fully reflective of that range of issues causing the claimant upset. The grievance, which the claimant raised on 8 August 2019, shows a range of

matters which were causing her upset, including a perceived delay at dealing with a number of grievances she was pursuing. The claimant had separate complaints about a breach of GDPR in the alleged wrongful disclosure of her personal information. There is no doubt that the claimant's physical condition has and continued to cause her significant distress. She has suffered stress from the continuance of these tribunal proceedings. Such impacts do not fall to be compensated for in any award of injury to feelings and must be factored out of the tribunal's considerations. The claimant has not sought to relate any particular upset to the specific failure to make reasonable adjustments.

15. The claimant has, indeed, told the tribunal very little about how the reasonable adjustment failure affected her. The tribunal has no examples of any change in her behaviour or description of her feelings at the time. The tribunal has seen that, later in August 2019, the claimant was prescribed antidepressants, but the claimant had been prescribed them from at least the preceding February. The tribunal has no evidence that in August the dosage was doubled and, even then, what might have been the cause of that.

16. The tribunal can and does conclude that the claimant was upset by the tasks she was given in breach of the respondent's duty. She left the workplace. She was off work for a period thereafter. There was, in the claimant's mind, a repetition of previous failures by the respondent to accommodate her physical impairment and an instance making her believe that the respondent was not going to live up to its previous promises and an agreement as to task rotation reached with her.

17. The tribunal is here compensating for an injury to feelings for a failure over a single four day period only. Such a case, in the absence of significant evidence from the claimant of her feelings, is appropriately assessed in the lower of the Vento bands.

18. The tribunal, on balance, considers that, on the evidence before it and given the multiple causes of upset to the claimant, an award of £3500 represents a fair assessment of the claimant's injury to feelings in money terms. Interest must be awarded on that over a period of exactly 4 years up to this remedy hearing at the rate of 8%. That produces an additional sum payable to the claimant of £1120. There can be no uplift of any award, as argued for by the claimant, in respect of a purported breach of the ACAS Code of Practice on Grievance Procedures. No relevant breach of the code in respect of any particular grievance has been identified, let alone relevant to the injury to feelings suffered arising out of this failure to make reasonable adjustments which was investigated promptly with an outcome given.

Conclusions on costs application

19. Costs in the tribunal are the exception and not the rule. The claimant is a litigant in person and regard must be had to that. She should not be judged against the standards of a legal representative. The claimant is intelligent, but English is not her first language. The claimant has no legal knowledge and has struggled to understand the legal concepts involved in a variety of claims pursued at various stages – in particular, what she would have to prove.

20. The claimant is capable of becoming fixated on certain matters and has struggled, with a mass of material, to understand what is relevant and less relevant to her claims. She, however, has believed in the validity of her claims. She has not sought to mislead the tribunal.

21. Any respondent faced with a claimant in these circumstances will be more likely to have to spend greater time in case preparation. Sadly, there are few free sources of advice open to litigants in person and litigants in person do sometimes struggle to understand that concentrating on key aspects of their case, may make the case easier for them to manage and for the tribunal to understand.

22. The claimant did withdraw a number of her claims. The tribunal does not consider that she never had any belief, however, in her race discrimination complaints. She may have come to an understanding that some of them might have been easier to show to be in fact whistleblowing detriments, but the claimant considers still that she was treated differently to others and that she can relate that treatment to her nationality in circumstances where a number of Bulgarian colleagues, she felt, had been treated in a similar adverse way to herself.

23. The tribunal has a very limited ability to weed out weak claims or claims which are unlikely to succeed. The tribunal is admonished to take a case at its highest and not to strike out claims of discrimination in all but the clearest of cases. Employment Judge Wade conducted a review of the claimant's complaints in terms of their prospects. The claimant was ordered to pay a deposit in respect of a number of those claims. No doubt sensibly, she did not pay those deposits and those claims fell away before the final hearing.

24. However, she was allowed to proceed with her remaining claims unfettered. That was on the basis that these claims were said to be "arguable". In the claimant's mind, therefore, the claims she brought to the final hearing were "arguable" and it was not unreasonable for her to believe that to be the case and that to be a sufficient basis for her to pursue those claims to a conclusion.

25. During the course of the hearing, the claimant did drop all claims except for a failure to make reasonable adjustments. It was far more reasonable for her to have done so then, rather than continue with what she only then realised to be difficult claims to succeed in. In all the circumstances, the tribunal does not consider that the claimant's behaviour ought to be characterised as unreasonable so as to sound in an award of costs or that it can be said that the claims she ultimately withdrew had no reasonable prospect of success. Any conduct of the claimant in preparing this case for hearing has to be seen in the light also of the aforementioned factors.

Employment Judge Maidment

Date 25 August 2023