Case Numbers: 3332631/2018
3320811/2019
3320812/2019
3328251/2019

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr A Macleod	**v**	Royal Berkshire NHS Foundation Trust

Heard at:	Reading	**On:** 2 November 2023 & 3 November 2023 (in chambers)
Before:	Employment Judge Anstis Mr C Juden Mr F Wright	

Appearances
For the Claimant: In person
For the Respondent: Ms E Misra KC (counsel)

RESERVED JUDGMENT

The respondent must pay to the claimant £3,000.00 plus £1,320.00 interest as compensation for unlawful disability discrimination. This makes a total award of £**4,320.00**.

REASONS

INTRODUCTION

1. In a liability judgment dated 28 July 2023 we found that the claimant had been subject to direct disability discrimination by way of comments made by Dr Barker during a meeting on 3 May 2018. These comments are set out in full in our liability judgment, but include "*there are a lot of doctors who are on the spectrum*", "*just watch the not winding people up*" and "*make Joe Bloggs a cup of tea*". We found in our liability judgment that the remarks "*were not intended as harmful*" and "*Dr Barker was reacting with good intentions during the course of an emotional meeting. However, in doing so she subjected the claimant to less favourable treatment.*"

2. This hearing has been convened to determine the remedy the claimant is entitled to following that decision. The claimant is no longer employed by the respondent so no question of a recommendation arises. The necessary

declaration has already been made in our liability judgment, so the only relevant remedy for the discrimination is financial compensation.

3. An order in respect of preparation for this hearing was made on 28 July 2023.

THE HEARING

Adjustments

4. This hearing was convened in person. For the avoidance of doubt, we considered the adjustments set out in appendix 3 of our liability judgment to be as applicable to this hearing as they were to the liability hearing. The claimant recorded the hearing in accordance with those adjustments. We note, however, that the claimant preferred to continue with his cross-examination rather than take the break that had been allowed for in the adjustments.

The claimant's application

5. Early on the morning of the first day of the hearing the claimant submitted a written "urgent application" by email. In the summary on the first page of the application the claimant said "*this is an urgent application raising concerns in relation to the remedy hearing*". The fact that the application raised concerns was clear, but it was not clear what it was that the claimant was actually applying for or asking the tribunal to do. In initial discussions we asked the claimant what it was that he was applying for, but he said that he was not applying for anything in particular and would not know what to apply for in any event. His application was as it said it was – raising concerns, rather than applying for anything in particular.

6. Given that, it was agreed with the parties that the tribunal would break to read the application and the witness statements submitted by each party. So far as the application was concerned, this would be treated as "raising concerns" but with no specific order or action requested by the claimant. The tribunal would consider the application and whether it felt it ought then to make an order or take action of its own motion. In the meantime, the claimant's position was that as everyone was here and it appeared that evidence had been served from both sides, the hearing could and should proceed if the tribunal did not consider it appropriate to take action of its own motion.

7. There were two threads to the claimant's application. The first was that he had not known what to do in preparation for this hearing. This was to be considered in the light of his status as a litigant in person and a disabled person. The second was that he had not been able to access materials submitted by the respondent on the basis that they had been prepared electronically in a manner he could not access.

8. The claimant had first raised with the tribunal the question of what he was supposed to do in preparation for this hearing in an email dated 7 September 2023. This concluded "*The Tribunal has not considered if any special arrangements are required prior to the remedy hearing. I am requesting, as a reasonable adjustment, that an in-person hearing is organised where I will have the opportunity to discuss the requirements in the orders. If this cannot be arranged prior to the remedy hearing, then I am requesting the orders are paused and the current remedy hearing is used to discuss the requirements.*" The email of 7 September 2023 was appropriately copied to the respondent.

9. That email was not on the tribunal file and has never been referred to an employment judge. We are unable to say why that is, but note that the tribunal's administrative systems are not well equipped to cope with the extent of correspondence that is generated by a case such as this.

10. The only relevant document that had been referred to an employment judge prior to this hearing was a later email of 17 September 2023. This was in very similar terms to the 7 September 2023 email but did not refer to the 7 September 2023 email and had not been copied to the respondent. It was rejected by the employment judge on the basis that it had not been copied to the respondent.

11. The claimant is therefore correct to draw attention to the fact that he had made an application (on 7 September 2023) that had not been addressed by the tribunal.

12. We note the Equal Treatment Bench Book's caution against generalising on what adaptations may be appropriate for people with autism, but we also note its guidance that courts and tribunals should "*Give very explicit instructions on all case management directions, including precise details regarding who documents should be sent to and when.*" We have sought to do this as far as we can in matters arising before us. However, the order of 28 July 2023 had not been made at a hearing so had not been explained by the tribunal in any way other than as appears in that order.

13. This was a cause for concern. However, at the point of this hearing the claimant was not asking for us to do anything in particular other than to be aware of his concerns. The only option open to the tribunal would have been the adjournment of a case that had already taken far too long. In fact, each party had complied with the order. The claimant had prepared a schedule of loss, the parties had disclosed documents. Witness statements had been prepared. There were rival bundles, rather than a single bundle, but neither party seemed to take issue with that and it appeared unlikely to interfere with the smooth running of the hearing.

14. The claimant has, in fact, complied with the order. He has produced a schedule of loss, evidence and a witness statement that, broadly speaking, address the

matters the tribunal would want to consider in making a remedy award. For the tribunal in those circumstances to do more and to specify precisely what it wanted to see by way of evidence would, in our view, go beyond the provision of reasonable adjustments for a disabled litigant and amount to advice or coaching of the claimant on how to optimise any possible award. That is not something that would be appropriate.

15. Accordingly, (i) in the absence of any particular order or action sought by the claimant, (ii) with the tribunal's order having apparently been complied with by both parties and (iii) with the claimant willing to proceed with the hearing, we considered it to be in the interests of justice to proceed rather than adjourn or postpone the hearing, and we declined to take any action on this point of our own motion.

16. The second thread concerned the respondent's evidence and difficulty the claimant had had in accessing it. An aspect of this is the production of a joint bundle, which we will say nothing about as we were willing to proceed on the basis of the two rival bundles submitted.

17. The claimant's position was that the respondent had sent its documentary evidence in encrypted form on 21 September 2023 (the relevant deadline). He replied saying he required unencrypted documents. These were then sent on 5 October 2023 via a file transfer service which the claimant says he was unable to access. According to the claimant the respondent's witness statement was then sent encrypted on 20 October 2023 (a day late, although the claimant's objection does not concern the timing of when it was sent). The claimant wrote saying he required unencrypted documents on 28 October 2023. The respondent resent the documents on 1 November 2023 via the file transfer service, which the claimant says he remains unable to access.

18. We did not consider it necessary for the respondent to reply to these matters and do not know their version of events. We note that there is nothing inherently wrong with sending documents encrypted (provided access credentials are given) and that in many cases that will be best practice and necessary for data protection reasons. Use of a file transfer service (in this case apparently with password protection) is also standard practice in such situations. The claimant's request for unencrypted documents to be sent as attachment to emails seems to us to be at best a last resort, and to be avoided if at all possible.

19. We are not in a position to assess the technical difficulties apparently encountered by the claimant in accessing the materials. We do, however, accept that he was unable to access them prior to the hearing. The respondent provided hard copy at the start of the hearing, but we appreciate that the claimant is not in a position to digest matters at this stage. The question is what (if anything) we should do about this of our own motion, in the absence of any specific application by the claimant for us to do something.

20. The only thing we could do about this would be to adjourn, with directions given for the documents to be provided in a particular manner. However, for the reasons given above adjourning the hearing is not an attractive option.

21. So far as the respondent's documents were concerned, it was our understanding that there was nothing new in this documentation. All that had been provided was extracts from the liability hearing bundle, which the claimant would already have been very familiar with and able to access. The difficulties in accessing the respondent's documents was, therefore, not an obstacle to justice in this situation.

22. The apparent difficulty in accessing the respondent's witness statement was a greater cause for concern. However, the claimant expressed himself as willing to proceed on the basis that the employment judge could ask any necessary questions of the respondent's witness. For the reasons we give below we considered the respondent's witness evidence (as such) to be of very limited significance in this case, even to the extent that we did not consider there were any relevant questions that we could ask. On that basis, and in the absence of any specific application made by the claimant, we did not consider it necessary in the interests of justice to take any action or make any orders ourselves. Accordingly, while noting the claimant's concerns, we have not taken any action or made any orders of our own motion.

The hearing

23. The hearing resumed around 11:45 with the claimant being questioned by Ms Misra through to around 13:45. As indicated above, this is longer than we would usually have allowed without a break, but the claimant wished to continue and complete his evidence in one go without a break, so that is what we did.

24. A section of the claimant's witness statement addressed matters which seemed obviously to be "without prejudice" and which he confirmed related to discussions via ACAS. We have taken no account of that section of his evidence.

25. After a lunch break the hearing resumed at 14:30 with the respondent's witness's evidence. As referred to above, the claimant preferred the employment judge to ask any necessary questions on his behalf, but after deliberation the panel declined to ask any questions. This was because the evidence consisted largely if not entirely of the witness recounting matters arising at the liability hearing and referring to documents along with giving her indication of the significance of those documents. Very little, if anything, was first-hand evidence of facts in dispute. To the extent that those documents were relevant the claimant would have previously had access to them at the liability hearing, and the significance and meaning of those documents were matters that the tribunal could decide for itself.

26. Following this, Ms Misra made oral submissions. In accordance with the adjustments made for the claimant he made a brief oral reply to Ms Misra's submissions, but preferred to rely for his submissions on his written witness statement, which incorporated both evidence of fact and legal submissions.

27. The remainder of the afternoon was taken up with case management matters in respect of the claimant's other claims, with the tribunal reserving its decision on remedy. The tribunal was able to meet in chambers the next day (3 November 2023) to prepare this reserved decision.

THE LAW

The statutory basis of compensation

28. The tribunal's power to make an award of compensation arises from s124(2)(b) of the Equality Act 2010. S124(6) provides (via s119) that the compensation is to be based on the principles applicable to proceedings in tort and that it may include compensation for injured feelings. The objective is "*as best as money can do it, the application must be put into the position* [they] *would have been in but for the unlawful conduct*" (Ministry of Defence v Cannock [1994] ICR 918).

Specific points

Causation

29. As described in para 36.11 of the IDS Handbook on Discrimination at Work, "*tribunals must ascertain the position that the claimant would have been in had the discrimination not occurred*" and "*another way of looking at it is to ask what loss has been caused by the discrimination in question*".

30. The claimant refers in his witness statement to <u>BAE Systems v Konczak</u> [2017] EWCA Civ 1188. In this somewhat complex case, Underhill LJ said that where circumstances arise in which an injury (including psychological injury) has multiple causes "*the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused … that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.*"

Compensation for injury to feelings

31. Compensation for injury to feelings is addressed in the case of <u>Vento v Chief Constable of West Yorkshire Police (No. 2)</u> [2002] EWCA Civ 1871. For the purposes of this hearing it is sufficient to note that this divides the possible award of injury to feelings into three "bands". There is a "top band" for "*the most*

serious cases, such as where there has been a lengthy campaign of discriminatory harassment", a "middle band" "*for serious cases which do not merit an award in the highest band*" and a "lower band" "*for less serious cases, such as where the act of discrimination is an isolated or one off occurrence*". The values attached to those bands has varied over time and are the subject of Presidential Guidance.

DISCUSSION AND CONCLUSIONS

Introduction

32. The claimant had prepared his witness statement and submissions by reference to his schedule of loss, which helpfully addressed his claim under headings A-J. We will adopt those headings in that decision. We can deal briefly with some, but others require more detailed consideration, and it is sometimes convenient to address more than one category at once.

A – injury to feelings

Discussion

33. It is this head of loss that is at the heart of the remedy the tribunal must award in respect of Dr Barker's comments. While Ms Misra correctly reminds us that it is for the claimant to establish the loss that requires compensating, she also correctly accepts that in practice we are bound to make an award of compensation for injury to feelings in these circumstances.

34. Mr Macleod tell us, and we accept, that we must take into account his autism in assessing the evidence and making our award. This means, amongst other things, that we ought not to expect his reactions to the discrimination, the manifestations of his reactions to the discrimination, or his explanation of them to be the same as they would be in the case of someone who did not have autism.

35. As stated above, the intention of compensation for unlawful discrimination is to be compensatory. It must reflect the loss that the individual in question suffered as a result of the discrimination. That will be a very individual matter, and the respondent, having committed an act of discrimination, cannot complain that an individual has been unduly sensitive to or responded unduly to the act of discrimination. That will particularly be the case with a claimant whose disability may make them particularly vulnerable to adverse reactions to setbacks or comments that may not affect others in the same way.

36. The starting point for an assessment of compensation for injury to feelings will typically be the claimant's own description of the effect of the discrimination. However, we have to be careful to ensure that this is a description of the effect

of the discrimination in question, and not the effect of other matters that did not amount to discrimination or which we have not (or not in these proceedings) been asked to find amounted to discrimination.

37. At first sight, the claimant's description of the damage done by Dr Barker's comments appears improbable, particularly given our findings that Dr Barker's comments were well-meaning and were not intended to be hurtful. As Ms Misra points out, the claimant initially appeared to react well to the meeting with Dr Barker, and it was only many months later that he raised a grievance about the comments. In his witness statement at page 11 the claimant talks of "*extreme distress*" and "*extreme mental anguish that required the claimant to have a six-month period of sickness absence*". But for the claimant's autism we cannot see any basis on which Dr Barker's comments could have been said to have such an effect. This is particularly so in the case of what seem to be more pressing problems at work (such as the consequences of the Datix report and difficulties in his relationship with colleagues and managers) which we have found in our liability judgment not to be disability discrimination. We do not mean to trivialise important matters, but on the face of it Dr Barker's attempt at words of comfort appear to be towards the least of the claimant's problems at this point.

38. The claimant's reactions, as an autistic person, will not necessarily be the same as those of a person who does not have autism. That this description may appear to be an over-reaction does not mean that it was not how the claimant responded to Dr Barker's words.

39. We must, however, pay attention to what it is that the claimant says gives rise to that reaction. In the same passage of evidence we have cited, the claimant refers to "*the comments <u>and actions</u> of the Medical Director* [Dr Barker]" (our emphasis). This seems to relate back to pages 8 & 9 of his witness statement, where the claimant describes the comments of Dr Barker as betraying her perception of autism and the claimant's medical condition. He says "*it is clear the MD did not accept the claimant was disabled and required additional support within the employer*". He says "*it is highly likely that this perception would colour how she interacted with others while discussing the claimant*" and "*although the tribunal has decided others were not found to be liable for discrimination, it is important to remember the MD had involvement with many of the other concerns raised*". He goes on to cite her dealings with a number of the other witnesses we heard from. Although he does not say as much, the implication seems to be that Dr Barker's flawed approach to his disability (as revealed in her comments) permeated much of the respondent's other actions, through her influence. At page 11 onwards he describes the consequences of Dr Barker's "actions" in vivid terms, under headings including "*acute health effects of actions of medical director*", "*chronic health effects of actions of medical director*" and "*work-related effects of actions of medical director*".

40. The problem with this is that it does not reflect the discrimination we found or are awarding compensation for. We have not found that Dr Barker engaged in any discriminatory actions (as opposed to making comments). The discrimination was in the comments, not in any actions.

41. Perhaps the claimant's reference to "actions" was intended simply as a reference to her comments, but it is difficult to read his statement in that way. We have the passage at page 9 onwards addressing suspected actions by Dr Barker. There is an extensive passage under the heading "*what should have happened during the meeting with the medical director in May 2018*" which goes far beyond the findings in our liability decision. In terms of remedy for discrimination, we are concerned with the difference in effect of a meeting at which the comments in question were made and an identical meeting at which the comments were not made. The claimant's discussion of what should have occurred goes far beyond that. At the foot of page 18 of his statement the claimant makes his position clear:

"- *The tribunal needs to conclude the MD did not believe the claimant was disabled or autism was not a disability requiring support in the workplace (as noted by her discriminatory comments)*

- *It is highly likely such a belief would be reflected in discussions the MD would be having with others within the employer.*

- *It is highly likely that this would re-enforce certain individuals opinions that the claimant was 'bad'.*

- *It is clear during the meeting, or, potentially, even before the meeting, the MD had decided a formal disciplinary process would be followed.*

- *It is also important the tribunal remembers the MD initiated the second formal disciplinary investigation against the claimant.*

- *The tribunal should be under no illusion that the events of this meeting with the MD in May 2018 had serious and detrimental effects upon the claimant and his long-term ability to work.*

- *Had the MD approached the situation in a supportive, capability way, then it is highly likely the long-term effects could have been avoided.*

- *It is important the tribunal considers this when considering the remedy and does not excuse it as a simple, one-off, event."*

42. The problems with this are clear from the very start of the extract. The claimant says that the tribunal "*needs to conclude*" something which it was never previously asked to conclude as a matter of discrimination or, if it was an issue in these claims, the tribunal has concluded did not amount to discrimination. Now is not the time for the claimant to invite the tribunal to draw liability conclusions that did not arise in the main hearing. The claimant proceeds from that to draw conclusions as to how Dr Barker may have influenced others, which are not warranted from our liability decision. He concludes by saying that a better approach to the meeting would have avoided the long-term effects (not that not making those comments in the meeting would have avoided the long-term effects). He continues that the tribunal should "not excuse" something as a simple, one-off, event, when the whole nature of the liability decision (and the remedy we are to award) is that the comments were a one-off event.

43. We have been anxious in making our decision not to deprive the claimant of appropriate compensation because of a neuro-typical view of how someone might respond to such comments or, indeed, simply because his statement talks of actions as well as comments, but it is clear to us from the claimant's statement taken as a whole that the extreme damage he is talking of relates to his response to actions other than those we have found to be discriminatory. Separating out the effect of an individual act of discrimination from the difficult circumstances the claimant found himself in is not easy, but it is not a task that the claimant has attempted in his witness statement. The "*extreme distress*" and "*extreme mental anguish*" he refers to relates to matters that are not the comments we have found to be discriminatory. He sees in them a general attitude from Dr Barker and consequences arising from that which either we have not found or have not been asked to find. The circumstances and damage he describes arise from an extension by him of our liability decision which is simply not permissible nor warranted.

44. What was the actual effect of the comments? Again, acknowledging that the claimant ought not to be expected to respond in a neuro-typical way, we accept Ms Misra's submission that there was no immediate adverse reaction by the claimant to the comments, and that the comments were well-meant. The claimant's initial response to the meeting, in follow-up emails, was positive. He only complained about the comments in his grievance many months later. We raised with him the point about whether his autism may mean that he only had an adverse rection to the comments much later on. However, this was not his case. His position was that the damage was done immediately.

45. It is plain that the claimant has been in a position of considerable distress for a number of years, but it is equally clear to us that this was not caused by the comments we have found to amount to disability discrimination. They caused at most little upset. The claimant did not complain about them at the time. The claimant was, at the time, well able to stand up for his rights and made

complaints about the actions of others. The appropriate award of injury to feelings is at the lower end of the lower *Vento* band. That applies to "*an isolated or one off occurrence*".

Vento – the relevant range

46. The "*Vento bands*" are subject to Presidential Guidance which is periodically updated. The relevant update is the one that applies at the time the claim is presented. The comments we have found to be discriminatory arise in the claimant's first claim, submitted in September 2018. Accordingly, the relevant Vento bands are to be found in the First Addendum to the Presidential Guidance, for which the lower band is £900 - £8,600.

The award

47. We have said that we consider that the award should be at the lower end of the lower band, and note the respondent's position in its counter-schedule of loss that the appropriate award would be £3,000. In the circumstances we have described, we agree. This is the appropriate award to reflect the injury to the claimant's feelings caused by Dr Barker's comments.

Interest

48. Interest can be awarded on discrimination claims, and we will do so. The terms on which this is done are set out in the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. For an award of injury to feelings this is simple interest at 8% from the date of the discrimination to the date of calculation (reg 6(1)(a)). From 3 May 2018 to today is exactly 5½ years. This means that the award of interest is £3,000 x 8% x 5.5 = £1,320.

B – long term physical and mental health effects

49. This is essentially a claim for personal injury damages. It will be clear from what we have set out above under "injury to feelings" that we do not consider the comments we have found to be unlawful discrimination caused these long term physical and mental health effects. In any event, as Ms Misra submitted, it would be very difficult for us to make such an award without medical evidence linking the comments and the ill-health. There is no such medical evidence in this case.

50. The argument in Konczak does not apply to this or in consideration of injury to feelings as the comments were not part of the cause of the claimant's subsequent ill-health.

C – loss of private income

51. The claimant's claim for loss of private income relates to a period of one month during his sickness absence between May – November 2018 when he was not able to conduct his private practice.

52. During this period the claimant had been signed off sick from his NHS work but it was his position that this was specific to his NHS work and did not affect his capability to carry out private work. On learning that the claimant was still carrying out private work it appears that Mr Pollard alerted the private hospital he was working at to the fact that the claimant had been certified as unfit for work, and the hospital prevented him from carrying out his private work there for a month while it investigated the position.

53. We do not see any causal relationship between the comments and this. The comments did not cause his absence from work, nor did they cause Mr Pollard to alert the private hospital to his absence from NHS work.

D – medical expenses

54. Given our findings set out above, we do not see that this is properly claimable as a head of loss.

E – CEA Level 2 award

55. The CEA ("clinical excellence award") appears to be some sort of bonus payable to consultants. There seemed to be a dispute between the parties as to exactly how this award and on what basis this award would be payable, but as the claimant himself says these were not payable to consultants who were "*undergoing disciplinary investigations or processes*". The claimant was undergoing such process, but this process was not caused by the comments. The failure to pay a CEA was not caused by the comments.

F – legal fees & G – case preparation

56. These are not properly awardable as a remedy for discrimination. To make such an award would require the claimant to have made an application for costs or for a preparation time order, which he has not done.

H – ACAS uplift

57. There is no basis on which we should apply an uplift for failure to comply with the ACAS Code of Practice in this case.

I – Loss of future NHS income … & J – Loss of future private income

58. At the time of the meeting of 3 May 2018 the claimant held not only his NHS appointment but also had a private practice taking ½-1 day a week. It was the claimant's case, albeit one advanced with some hesitation, that the comments

of Dr Barker had ultimately led to the loss of both his NHS job and his private practice. It was his position that he would not recover sufficiently to undertake any other work prior to retirement. This was a claim for career-long loss.

59. We have no hesitation in rejecting that claim. As noted in our liability judgment, this case has not addressed matters in relation to the claimant's dismissal, nor has it addressed any loss of his private practice. We have heard no evidence as to how the claimant came to be dismissed, and what the cause of that dismissal may be. It seems that is a matter that will need to be addressed in the context of his later claims, but there is nothing in the material before us that could lead to a conclusion that Dr Barker's comments had led to the loss of his job or his private practice.

Employment Judge Anstis
Date: 3 November 2023

Sent to the parties on: 10 November 2023

For the Tribunals Office

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