EMPLOYMENT TRIBUNALS

Claimant: **Ms C Wood**

Respondent: **Silver Lining Sheff Ltd**

HELD by **CVP in Hull** **ON: 27 October 2023**

BEFORE: **Employment Judge Miller**
Ms Yvonne Fisher
Mr D Eales

REPRESENTATION:

Claimant: **In person**
Respondent: **Ms F Clancy (director)**

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

REASONS

Introduction

1. This is our decision on remedy following the Judgment on liability that was sent to the parties on 18 September 2023.
2. Our decision in that judgment was that the claimant's claims of failure to make reasonable adjustments under ss 20 and 21 Equality Act 2010 and discrimination arising from disability under s 15 Equality Act 2010 were successful in respect of her dismissal only.
3. The question today is whether the tribunal should make an award for compensation to the claimant for the discrimination and if so how much.
4. The hearing was conducted remotely by video. The claimant provided a witness statement and gave oral evidence. The respondent produced witness statements from Ms Clancy and Ms Tekale who also attended and gave evidence. Ms Clancy, one of the respondent's directors, again represented the respondent.

5. The claimant had also produced a schedule of loss claiming £4000 for loss of earnings, £1000 injury to feelings, interest and the cost of a prescription certificate.

Facts

6. The facts that we need to find relate to the financial impact on the claimant of the respondent's discriminatory acts (namely the claimant's dismissal) and what injury to the claimant's feelings they caused, if any.

7. We consider first facts relating to the financial impact of the discrimination.

8. The claimant was dismissed on 26 July 2022 and she was paid one months' pay in lieu of notice calculated by reference to statutory sick pay. We find, therefore, that the claimant was paid in accordance with her contract of employment up to 25 August 2022. Thereafter the claimant was on Universal Credit and she received around £291.59 per month from 26 August 2022.

9. The claimant was unfit for work when her employment finished but she was well enough to work from early December 2022. The claimant only claims for her financial losses for the period from July 2022 up to December 2022.

10. During her employment with the respondent, we find that the claimant's net earnings were in the region of £1300 per month. We have not seen any payslips and the claimant's hours of work were not consistent. However, the claimant's hourly rate of pay was £11 per hour and she was contracted to work 32.5 hours per week (she had unpaid lunch breaks) giving a gross weekly pay of £357.50 per week which equates to £1549 per month. Doing the best we can and applying an annual tax allowance of £12500 and a deduction of 30% for tax and national insurance on the remainder (accepting that this is a very rough calculation) gives a net income of around £1300.

11. The respondent asserted that they believed that the claimant has in fact done work in the period up to December 2022. As evidence of this they pointed to a purported review in January 2023 of what was said to be the claimant's work at Mr Young's shop and that the claimant was now licensed to undertake piercing in both Derbyshire and in Sheffield.

12. We find that the claimant did not do any paid work before December 2022. The claimant said that she needed to be licensed to pierce just for the purpose of being in Mr Young's shop, where she was spending time for company. This was not plausible and we reject that evidence. However, while we think that the claimant was being disingenuous in her explanation for the reason for becoming licensed, we do prefer the claimant's evidence that in fact she was hoping to pierce again which was why in June this year she was licensed to pierce in Derbyshire.

13. We think, on balance, that the claimant was not being completely truthful about why she was licensed, but in considering the claimant and her evidence overall we do not consider that that is of itself significant enough to undermine the claimant's credibility generally. The fact that the claimant became licensed to pierce in Derby in 2023 is not relevant to the period under consideration and there is certainly no reason why the claimant ought not to try to restart, or continue, her career in body piercing.

14. We consider next whether the claimant might have been fairly dismissed by the respondent at some point in any event.

15. In our view, there was a chance that the claimant would have been lawfully dismissed at some point in the period from July 2022 to December 2022.

16. We prefer Ms Clancy's evidence that there was a genuine basis on which the respondent could, at some point, have concluded that the claimant was not suitable to work for them so that they could have lawfully dismissed her. However, Ms Clancy's estimates of how long this is likely to have taken were very optimistic and, having heard from the respondent generally, it is far from certain that the respondent would have acted lawfully in any event even then. It is also entirely possible that had the claimant been treated differently in any sickness/capability process she would have continued in employment with the respondent.

17. We consider, on balance, that there was a 50% chance that the respondent would have lawfully dismissed the claimant in the period from July or August 2022 to December 2022. This includes consideration of whether the respondent would have sought and followed proper HR or legal advice and whether, had that happened, things would have turned out differently for the claimant so that she would not actually have been dismissed.

18. Matters that we have specifically considered are Ms Clancy's somewhat dogmatic attitude to what she can or should do as a manager/business owner, the fact that the respondent has been in business for many years without successfully obtaining HR advice, the respondent's business model and the fact that the claimant clearly was having difficulties operating successfully in the business model the respondent had chosen – specifically one with very little direct supervision of staff or formal processes.

19. We consider next the impact on the claimant of the respondent's discriminatory actions.

20. We accept the claimant's evidence of the impact of the discriminatory acts upon her. She said it had impacted on her confidence and her anxieties and while those problems existed before the respondent's actions, they are only now starting to get back to the level that that they were before the discriminatory act. The claimant has continued to be under the care of her GP throughout.

21. However, the claimant did candidly agree that 50% of the problems that she has had by way of her anxiety since the dismissal are a result of the impact of the Employment Tribunal proceedings rather than the impact of the respondent's discriminatory acts. We are also pleased to note that the claimant was able to do some work in December which only ended because it was a Christmas job. So there is evidence of some improvement in how she was feeling.

Law and conclusions

22. In calculating the losses for which we should award damages to the claimant, we must try to award sums that will put the claimant back into the position that she would have been were it not for the discriminatory act.

23. In respect of the financial losses, the loss of earnings, the claimant said in her Schedule of Loss were £1000 a month from the period up to December 2022. Having calculated the claimant's net income as somewhere in the region of £1300, noting that the claimant's wages and hours fluctuated, and having seen that she was receiving Universal Credit of £291 per month, we think that £1000 a month as

the claimant set out in her Schedule of Loss is a fair estimate and we award that monthly amount in respect of the period from which her losses started.

24. The claimant was paid SSP in respect of the period up to 25 August 2023. Had she continued to be employed, she would have received SSP for that period in any event so that she has incurred no losses. We have considered the effects of ss 87 – 91 of the Employment Rights Act 1996 which provide that where statutory minimum notice is given, an employee is entitled to their normal pay during their notice period. However, the claimant was given more than one week more notice than the statutory minimum so that that does not apply. In any event, there is no claim before the tribunal for breach of contract.

25. We therefore consider the *actual* losses the claimant incurred and those did not start to run until the date at which her SSP ended.

26. In our judgment the claimant has incurred three and a half months' loss of earnings from 24 August 2023 to the start of her work at the beginning of December. This amounts to losses of £3,500. We accept that the claimant did all that she reasonably could have done to mitigate her losses given her ill health and unfitness for work at the time.

27. However, as we have already found, there was a 50% chance that the claimant would have been lawfully dismissed during that period. Applying that discount of 50% to her losses provides for losses of £1,750. We therefore make an award of £1,750 for financial losses in the period from the date that the claimant's notice would have expired to the time when she started work again.

28. We address briefly the claimant's claim for the cost of her prescription certificate. We have heard no evidence to show that the claimant's need for medication arose from the respondent's acts. In fact, the claimant had been being treated for anxiety for some period before the discrimination. This loss was not therefore caused by the respondent's acts and we do not make an award for this.

29. In respect of injury to feelings, the tribunal may consider an award for injury to feelings under section 124 and 119 of the Equality Act 2010.

30. We refer to the case of *Vento v Chief Constable of West Yorkshire* [2002] EWCA Civ 1871 in which the Court of Appeal gave some very helpful guidance.

"*65 Employment tribunals and those who practise in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.*

(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

(ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

(iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In

general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

66 There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

31. Since that case, the bands have been uprated. In the presidential guidance that applies to the period of the claimant's claims, the three bands are

    a. lower band - £990 to £9900

    b. middle band - £9900 to £29600

    c. upper band - £29600 to £49300 with only the very most exceptional cases exceeding £49300.

32. In our view, by putting her award of injury to feelings at £1000 in her Schedule of Loss the claimant has substantially underestimated the value of compensation due to her for her injury to feelings. £1,000 is only £10 more than the bottom of the lower of the Vento bands and it is not appropriate for the level of injury to feelings caused to the claimant, as we have found above, by the discriminatory dismissal. In fact such a low award would risk not properly recognising the injury to feelings as the court expressed in *Vento*.

33. We take account of the impact on the claimant: that part of that impact was not the respondent's acts, but the unfortunately inevitable impact of the proceedings on the claimant and that the claimant has started to improve slightly. In our view an award in the middle of the lower band is appropriate and for that reason we award £6,500 for injury to feelings.

34. We turn now to the ACAS uplift. The Tribunal has a power under section 207A of the Trade Union and Labour Relations Consolidation Act 1992 to consider increasing an award of compensation for an unreasonable failure to follow the ACAS code on disciplinary and grievance procedures. The maximum uplift is 25%.

35. In our view, the code does apply in this case. It applies in capability and disciplinary proceedings and the respondent sought to rely on the claimant's capability, in addition to her sickness absence, as part of their reason for dismissing her. The respondent did not follow the code of practice at all and in the course of the liability hearing Ms Clancy said that she was not aware of the ACAS code of practice at that time.

36. Normally such unjustified ignorance (given the length of time for which the respondent has been employing employees) would give rise to an increase of 25%. We accept, however, that the respondent has been well intentioned and did take *some* steps to try to support the claimant even if those steps were occasionally misguided. We therefore reduce the uplift from the maximum of 25% to 20%.

37. Finally, compensation is awarded under the Equality Act 2010 so that the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 apply. These provide that the tribunal may award interest at the current rate of 8% per year (calculate don the simple basis).

38. For awards for injury to feelings the interest runs from the date of the discriminatory act to the date of calculation of the compensation and for financial or pecuniary

losses it runs from halfway between the date of the discriminatory act and the date of calculation. The calculation date is 27 October 2023 and the claimant was dismissed (the discriminatory act) on 26 July 2022. The entirety of that period is 458 days. So there is 458 days' worth of interest is awarded for the injury to feelings, and half of that for the financial losses.

39. The calculated sums are set out in the judgment and they are not repeated here.

Employment Judge Miller

Date: 16 November 2023