Case No: 1600714/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr S Bridges

Respondent: Asda Stores Limited

Heard at: Newport **On:** 27 November 2023

Before: Employment Judge S Moore
Mrs B Currie
Mr A McLean

Representation
Claimant: In person
Respondent: Ms A Stroud, Counsel

RESERVED JUDGMENT ON REMEDY

1. The Respondent is ordered to pay the Claimant the following:

2. A basic award of £13,328.00.

3. Compensation, which is awarded under section 124 (2) (b) Equality Act 2010 as follows:

4. Loss of earnings in the sum of £64,458.34;

5. Loss of holiday pay entitlement in the sum of £3263.12;

6. Loss of retirement benefits in the sum of £2162.24.

7. Interest on past loss of earnings in the sum of £13,944.19.

8. Injury to feelings in the sum of £29,000.00.

9. Interest on injury to feelings in the sum of £12,547.07.

10. Loss of statutory rights £500.00.

11. In respect of tax payable on the award ('grossing up'), the sum of £24,240.76.

REASONS

Background and introduction

1. This judgment on remedy follows the liability judgement dated 3 May 2023. Within that liability judgment the claimant's claims for constructive and discriminatory dismissal, direct disability discrimination, discrimination arising from disability and harassment related to disability succeeded.

2. The tribunal heard evidence from the claimant. No witnesses were called for the respondent. There was an agreed bundle of documents. The hearing started late as respondent's counsel was sent to the wrong hearing centre by her instructing solicitors. Judgment was reserved as there was insufficient time to give oral judgment.

3. In the morning, the claimant indicated he did not wish to pursue an application for a Preparation Time order. He was given time to think about this and confirmed his position not to pursue such an order after lunch.

Agreed matters

4. The following matters had been agreed between the parties:

The basic award which amounted to £13,328.00;
Loss of Statutory rights of £500.00;
The injury to feelings award did not fall within the lower band;
The claimant's gross and net annual and weekly pay with the respondent and his new employer, Next Retail Ltd. These were:

Employer	Gross annual	Net annual	Gross weekly	Net weekly
Asda	38,320.65	33,184.45	736.93	638.16
Next	33,706.40[1]	29,493.00	648.20	567.17

5. This means an ongoing net weekly loss of £70.99 (for the avoidance of doubt it was not agreed that such loss should be awarded but it was agreed this was the shortfall).

6. The following issues remained between the parties:

a) Whether the claimant had failed to mitigate his loss in finding alternative work based on a 42 hour contract instead of a 45 hour contract;
b) The period of loss;

[1] The respondent's counter schedule contained a small error and noted this as £33,760.40. The correct amount is in the table as evidenced by the P60.

c) Loss in respect of less favourable holiday entitlement;
d) Loss in respect of less favourable sick pay entitlement;
e) Whether the claimant should be entitled to recover a one off retirement payment but for the discriminatory dismissal;
f) Pension;
g) Injury to feelings;
h) Acas uplift;
i) Interest – the respondent submitted this was a case where there would be a serious injustice if the Tribunal calculated interest in the usual way.

Findings of Fact

"Old job" facts

7. The claimant was 50 years old at the effective date of termination. His date of birth is 18/2/1972 and he is currently 51 years old. He commenced employment on 9/3/2001 and had 21 years continuous employment with the respondent. He lives with his family in the county of Torfaen which was about a 40 minute / 27 mile commute to the respondent's depot in Mathern, Chepstow.

8. The claimant's evidence was that but for the discriminatory dismissal and discrimination he intended to remain employed with the respondent until he reached the state retirement age of 67 years which would have been on 18/2/2039. He had worked for the respondent for a long period of time (21 years) and enjoyed benefits of this long service including increased sick pay and holiday pay entitlement (see below). He had joined the pension scheme some years earlier and had built up a fund of almost £17,000.

9. The claimant was a member of the respondent's pension scheme. This was a defined contribution scheme called "The Asda Pension Plan". The respondent's employer contribution was 3%. Based on the weekly gross salary the employer pension contributions @ 3% were £22.11 per week.

Holiday entitlement

10. The claimant was entitled to 28 days holiday whilst employed by the respondent. This would have been due to increase on 9/3/2026 to 29 days when he reached 25 years service, but for the discriminatory dismissal.

Sick pay entitlement

11. The claimant was entitled to six month's full pay in the event that he became unfit for work with the respondent.

One off retirement payment

12. Had the claimant remained employed with the respondent, he would have been entitled to 4 week's pay upon retirement as well as a £50 cash gift and a contribution towards a retirement party.

"New job facts"

13. The effective date of termination was 3 April 2022. The claimant commenced work with Next Retail Ltd on 4 April 2022. The claimant secured employment prior to his resignation so was able to start quickly. The new place of work is in Severn Beach, Bristol which is about 12 miles further commute each way. The claimant started to research suitable vacancies in or around February 2022. The claimant knew he would not be able to undertake HGV roles in a number of retail companies as they used cages and curtain side pulls, which he was unable to use due to his disability (see paragraphs 47 of the liability judgment). He was also unable to use manual pump trucks if the pallets were going to be heavy such as carrying bottles and cans.

14. The claimant looked at vacancies online and also spoke to other HGV drivers to get an understanding of the type of work involved and whether he would be able to do that work. The claimant was fearful of disclosing his disability to a potential new employer and did not want to put himself into a new workplace that would necessitate repeated disclosures of his disability to colleagues. He was also fearful that even if adjustments were put in place they would be removed, as had been proposed by the respondent.

15. The claimant was cross examined on his research and it was suggested there would be other employers where his disability would be accommodated and where he could work 45 hours. There was no evidence adduced by the respondent as to who these employers were and also no evidence of other job vacancies or any witness evidence about the HGV job market.

16. The claimant found HGV job opportunities in the local area to be very limited as most used cages and curtain side trailers for the delivery systems. The only company within a reasonable commute was Next Retail Ltd who use neither and the pallets are a fraction of the pallet weights used by the respondent.

17. The claimant's new contract is a 42 hour week contract. The hourly rate was broadly similar to that of the respondent however as the number of hours per week was three less, the claimant has a reduction in pay and pension contributions.

18. It was suggested that the claimant could have requested an increase in his hours to 45 per week. There is a term in the new contract of employment that provides no request for changes to working hours could be made for six months but thereafter a request can be made and a decision will be made based on the employee's circumstances and the business needs. The claimant had not understood this to mean he could ask to increase his hours to 45 hours. He told the Tribunal and we accepted his evidence that all of the drivers at the depot worked 42 hour week contract. We also noted that Next Retail Ltd recognise a trade union and the employee handbook provides that if there are any significant changes proposed to hours this will be by negotiation with the union. The employee handbook noted that if the hours were increased the line manager would process the changes. Normal hours of work were provided in the contract. We did not think the questions about van drivers hours to be relevant as the claimant

did not work as a van driver and they had specific different set terms and conditions.

19. Any hours worked over 42 would be paid as overtime at time and a half.

20. The claimant joined Next Retail Ltd's pension scheme, called "The People's Pension". This was also a defined contribution scheme with the same employer contribution of 3%. Based on a weekly gross salary of £648.20 this equates to £19.45 per week. Therefore, the weekly pension loss is £2.66 (£22.11 - £19.45).

Holiday entitlement

21. In his new role, the claimant was entitled to the following holiday entitlement:

Holiday year	No of days	Shortfall
2022 - 2023	20	8
2023-2024	22	6
2024-2025	24	4
2025-2026	25	3
2026-2027	26	3[2]
2027-2028	27	2
2028-2029	27	2
2029-2030	28	1
2030-2031	28	1
2031-2032	29	0
Total		30

Sick pay entitlement

22. In his first year of employment in the new role, the claimant received equivalent to SSP. After 12 month's service he was entitled to company sick pay of 20 days per year between one – five year's service.

Injury to feelings

23. The liability judgment sets out some relevant findings regarding the impact of the discrimination on the claimant's feelings (see paragraphs 77-80, 82, 88, 89, 90, 91, 118, 131). There was no medical evidence of any psychiatric injury to the claimant and he did not seek help from his GP or a counsellor preferring to rely on family. The claimant experienced severe emotional distress, loss of self esteem, self confidence and worth. The impact of the acts of discrimination and harassment affected his personal relationships, social interactions and overall quality of life. As he was made to feel guilty about his disability this made the claimant feel embarrassed and uncomfortable in having to disclose it in other situations and as a result he withdraw from social and activities where he might need to disclose his disability.

[2] This stays at 3 days as if the claimant had remained employed with the respondent he would have been entitled to 29 days holiday from 2026 see above

24. The claimant also experienced difficulty with sleeping. He tried over the counter remedies which did not assist. This led to him becoming impatient with his wife and children and he began to spend less time with them and friends.

25. At the point he embarked on looking for work in February 2022 his confidence was at an all time low and he felt worthless and humiliated and that he was not welcome in the workplace due to his disability.

The Law

26. The burden of proof is on the Respondent to show the Claimant has failed to mitigate his loss. **Ministry of Defence v Cannock [1994] ICR 918 and Wilding v British Telecommunications Plc [2002] ICR 1079.**

27. Awards must be purely compensatory and not penal. Essentially, the Claimant should be put in the position she would have been in but for the unlawful conduct of the Respondent.

28. The Court of Appeal gave guidance to Tribunals when assessing future loss of earnings after a discriminatory dismissal in **Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA Civ 545.** Where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach. This case was also relevant when considering whether an ACAS uplift should be awarded having regard to the overall size of the award.

29. Ms Stroud referred us to **Qu v Landis & Gyr Ltd UKEAT/0016/19.**

30. **Abbey National plc v Chagger [2010] IRLR CA** provides that the task of the Tribunal is to put the employee in the position he would have been in had there been no discrimination and that is not necessarily the same thing as asking what would have happened to the particular employment relationship had there been no discrimination. If there is to be a career loss, the Tribunal must take into account and made a reduction reflecting the vicissitudes of life such as a possibility he would have been fairly dismissed for any other reasoning or given up employment for other reasons. This can be done on a broad brush basis.

31. Guidance on assessment of compensation in injury to feelings is contained in **Vento v Chief Constable of West Yorkshire Police (No2) [2003] ICR 318**. There are three bands.

32. The Claimant's claim was presented on 16 June 2022. The fifth Addendum to Presidential Guidance provides as follows. In respect of claims presented on or after 6 April 2022, the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases), with the most

exceptional cases capable of exceeding £49,300.

33. **Cannock** is also authority for the principle that the Tribunal should not simply make calculations under different heads, and then add them up. A sense of due proportion is required and to look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed (per Morison J at para 132).

34. S207A of the Trade Union and Labour Relations (Consolidations) Act 1992 provides:

> **207A Effect of failure to comply with Code: adjustment of awards**
>
> **(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.**
>
> **(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.**

Conclusions

Mitigation

35. The Claimant has mitigated his loss.

36. The claimant has found employment within one day of his dismissal on largely comparable terms and conditions albeit to reach certain levels of enjoyment with holiday and sickness he needs to secure further years of service. The difference in wages is purely because the new job is on a 42 hour week contract rather than the 45 hour.

37. We do not consider that the claimant has failed to mitigate his loss by not asking his new employer for an increase in hours. All of the other drivers are on 42 hours and it is likely that the HGV runs are planned on this basis. Moreover, any hours above 42 are paid at overtime. It seems highly unlikely that the new employer, in the context of the claimant being within a collective bargaining unit would agree to such a request especially given that the contract terms provide for any hours above 42 to be paid at overtime rates. There was no evidence to support this contention.

38. The claimant was limited in where he could work due to the adjustments he needed for his disability. The claimant embarked on research to secure equivalent as far as possible employment and found it within a reasonable commute distance from his home. We find the claimant took reasonable steps to mitigate his loss.

39. Given that the burden of proof is on the respondent to show he has failed to do so, the respondent led no evidence on other vacancies that could have been more suitable or have more hours.

Likelihood of the claimant remaining in the respondent's employ, but for the discriminatory acts

40. We are required to assess what would have happened but for the unlawful acts or failures to act by the Respondent and the unfair dismissal. To do so requires a degree of speculation in which we must assess likelihoods both on the upsides and on the downsides.

41. The Claimant seeks compensation for future loss until state retirement age at 67 years of age. He says he will not get another job earning the same amount as with the respondent due to his restraints on what type of HGV work he can undertake.

42. The Respondent's position is that the Claimant should not be awarded any future loss. There are 86 weeks between the effective date of dismissal and the date of the remedy hearing which should suffice. Ms Stroud submitted at the most, future loss should not go beyond April 2024.

43. We have very carefully considered when the claimant ought to obtain equivalent remuneration. As observed above the main difference in this case is not in pay but the shortfall of three hours. We must assess the loss flowing from the unlawful acts and unlawful dismissal. We have concluded that this is one of the rare cases where it is appropriate to award career loss. The claimant has 16 years until he reaches retirement. Due to the very specific adjustments he requires to continue with his work as a HGV driver, he has found a role almost identical in terms save for the three hours a week difference, that can accommodate his disability. Given that his disability rules out the majority of other HGV employers and that we accepted his new role is one of the only employers that could provide a role to accommodate his disability we have concluded that there is no real prospect the claimant will ever secure a wholly equivalent job to that he enjoyed with the respondent. The claimant has found a job and it is entirely possible to calculate his actual loss flowing from the discrimination given the period between the dismissal and his retirement is 16 years and the particular circumstances of this case.

44. Having found that the claimant should be compensated for the loss until he reaches 67, we have gone on to consider the amount of reduction from the overall award for future loss to reflect the uncertainties and vicissitudes of life as per **Wardle.**

45. We accepted the claimant's evidence that but for the discrimination he intended to remain at the respondent until state retirement age. He had 21 years service and was 50 years of age. He had accumulated good benefits that came with the length of service and was committed to his pension plan. He lived within a reasonable commuting distance. He has an unblemished disciplinary record. The respondent is a very stable local employer and very unlikely to go out of business or make HGV drivers redundant.

46. There was no evidence at the liability stage that the claimant's disability would have worsened so there was no specific evidence in regards to health we could take into account when assessing the withdrawal factors.

47. Applying all of the above factors we apply a discount to the future loss of 15% to take account of the general vicissitudes of life.

Loss of holiday entitlement

48. As can be seen from the table above it will take the claimant until 2032 to reach parity in terms of the holiday entitlement he enjoyed with the respondent. Applying a broad brush approach, we consider it just and equitable to compensate him for the loss of the holiday entitlement by calculating an amount equivalent to him losing 30 days holiday pay.

Loss of sick pay

49. We have concluded that no loss can be awarded for this head of claim. The claimant has, by the time of this remedy hearing, reached the length of service where he would enjoy 4 weeks full pay. Whilst this is less that the six months he would enjoy if he was still employed by the respondent, he has not experienced any actual loss as he has not had any sickness absence.

Retirement payment

50. As we have concluded there is an 85% chance the claimant would have remained employed by the respondent but for the unlawful acts, we award the claimant the four week's pay and the £50 cash lump sum minus the 15% reduction discount. We decided not to award the contribution towards the retirement party on the basis that this is too speculative.

Injury to feelings

51. We refer to our findings of fact set out above. We also considered the quantum reports submitted by counsel.

52. In our judgment the injury to feelings falls at the top of the middle band. There were 15 acts of discrimination between 2 July 2018 – 1 March 2022 and the claimant succeeded in respect of a direct discrimination, discrimination arising from disability and disability related harassment claims. The claimant experienced a significant degree of hurt, emotional distress and loss of self esteem. The impact of the discriminatory acts impacted on his private and family life affecting sleep and social activities.

53. In respect of the direct discrimination (see paragraph 194 of the liability judgment), the claimant was refused the use of a physical aid that had been agreed and made derogatory and demeaning comments about the claimant's disability saying he and any driver with a disability should never be sent to that depot again.

54. In respect of the S15 and harassment claim there was a continuing pattern / theme that the claimant had to explain his disability and why he needed

adjustments to colleagues and managers. He described having to "fight" for his adjustments and evidently experienced a great deal of personal embarrassment in having to go into the reasons for the adjustments. It was akin to the claimant constantly having to justify being disabled. Further the way in which the driver review was handled, outside of policy and the use of language led to the claimant's dismissal.

55. We did not consider that the injury to feelings falls within the upper band for the following reasons.

56. Apart from the direct discrimination claim, we did not conclude that the other complaints were motivated by malice or specifically intentional. We did not conclude there was a campaign to dismiss the claimant. Moreover as we reflected in our liability findings, there was a general level of incompetence in the dealings with the claimant regarding the effectiveness of the adjustments agreed and the decision to take him through the capability procedure. The comments made to the claimant at the capability review meetings were clumsy and offensive but they were not malicious and were more likely made because of ignorance and lack of proper training by the respondent's of their managers on policy and diversity.

Acas uplift

57. Has the Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

58. See liability judgment at paragraphs 126-148. We found significant shortcomings in the way in which the grievance was conducted.

59. The Respondent accepted that given the liability findings the Respondent has failed to comply with the ACAS Code but submitted that any adjustment should not exceed 10%.

60. In respect of the grievance procedure there was some attempt to follow a grievance procedure. However Mr King initially incorrectly refused to accept the grievance. The only reason the respondent decided to deal with the grievance was because the claimant had resigned. Mr Vickery applied completely the wrong grievance procedure. We found he conducted an inadequate investigation and reached an erroneous conclusion no reasonable person could have reached. The wrong outcome was included in the letter. There was no right of appeal afforded.

61. Having regard to these shortcomings, we conclude there were breaches to the code in respect of an unreasonable delay in arranging the meeting, the action decided upon was not appropriate and there was no right of appeal afforded. The uplift to be applied is 15%.

Interest

62. Under regulation 2 (1) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, the Tribunal is required to consider an award for interest even where not claimed.

63. Ms Stroud submitted that interest should not be awarded from the date of the Coryton incident (the direct discrimination claim on 11 October 2019) under the "serious injustice" rule in reg (6) (3). This was on the basis that the claimant could have brought a claim and did not and it would be an injustice to award interest back that far.

64. We reject this contention for the following reasons. The discrimination claims had been presented in time as there was an ongoing state of affairs between 2 July 2018 and 1 March 2022 which was a repeated pattern of conduct. In our judgment there are no grounds to conclude there would be a serious injustice to the respondent to support not awarding interest. Such examples might include a lengthy delay in the proceedings culminating in the calculation date. This is not the case here. After the Coryton incident, the claimant did make a complaint corroborated by his line manager and it was not dealt with properly by the respondent (see paragraphs 81 – 87).

Accelerated receipt

65. In this case, the future loss is over a relatively lengthy period. Neither party made submissions on whether or not a discount should be applied to the future loss. We have taken into account that average interest rates were very low between 2018 and 2021, rising since then and the current Bank of England base rate is 5.25%. If a reduction is to be made for accelerated receipt then some form of enhancement should be applied with respect to a past loss of earnings **(Melia v Magna Kansei Ltd [2005] EWCA Civ 1547).**

66. Therefore in our judgment we do not consider it appropriate to apply a discount for accelerated receipt as it would be likely cancelled out by then having to apply an enhancement in respect of past losses.

Grossing up

67. The portion above £30,000 requires to be grossed up in accordance with section 401 of the Income Tax (Earnings and Pensions) Act 2003. The claimant will earn £33706.40 in the current tax year gross.

68. The awards that are required to be included for the purpose of grossing up are the compensatory award (£69,883.70) and injury to feelings (£29,000) which totals £98,883.70.

- Personal allowance = £12570.00 (gross);
- Basic rate = 20% on the next £37,700 (gross) leaving £30,160 (net);
- Higher rate = 40% on the next £99,730 (gross) leaving £59,838 (net);
- Salary received £37,706.40;
- Tribunal award £98,883.70 of which £30,000 will be tax free;

69. The first £12,570 of the salary is free of tax.

70. The claimant is expected to earn £33706.40 in the current tax year. £21,136.40 (33706.40 – 12570) is taxable at the rate of 20%. This leaves a further £16,563.60 in the 20% tax bracket (£3312.72). The remaining

£52,321.10 (68,883.70 – 16,563.60) falls to be taxed at the higher rate of 40% (£20,928.04). The total grossed up figure is therefore £24,240.76.

Calculations

Basic award		£13,328.00

Pecuniary losses

Loss of earnings from date of dismissal to date of remedy hearing – 86 weeks

86 x £70.99	£6105.14	
Loss of pension		
86 x £2.66	£228.76	
Total loss to hearing		£6333.90

Future loss

Date of remedy hearing – 27.11.23 to date of state retirement – 18.2.2039 is 5562 days or 794 weeks

794 x £70.99	£56,366.06	
Minus 15% reduction (8454.91)	£47,911.15	
Future loss of pension		
794 x £2.66	£2112.04	
Minus 15% reduction (316.81)	£1805.23	
Total Future Loss		£49716.38
Total loss of earnings		£56050.28
Acas Uplift 15%	£8407.54	
Total loss plus uplift		**£64,458.34**

Interest on past loss

Date of first discriminatory act – 2 July 2018 – date of remedy hearing 27 November 2023 = 1974 days

Interest calculation – 1974 / 2 x 0.08 x 1/365 x 64458.34 =	£13944.19

Loss of Holiday pay[3]

30 x £127.63	£3838.96	
(£638.16 / 5)		
Minus 15% reduction (575.84)		**£3263.12**

Loss of retirement benefit[4]

[3] We have not applied the ACAS uplift to this part of the compensatory award as it denotes loss of a future benefit.
[4] As above

4 weeks @ £638.16	£2552.64	
Plus one off £50	£2602.64	
Minus 15% reduction (390.40)		**£2162.24**

Non pecuniary losses

Injury to feelings £29,000

Interest on injury to feelings

Date of first discriminatory act – 2 July 2018 – date of remedy hearing 27 November 2023 = 1974 days

1974 x 0.08 x 1/365 x 29,000 £12,547.07

Employment Judge S Moore

Date: 21 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22 December 2023

S Griffiths
FOR EMPLOYMENT TRIBUNALS

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