



EMPLOYMENT TRIBUNALS

Claimant: C
Respondent: D
Heard at: East London Hearing Centre
On: 24 March 2023
Before: Employment Judge C Lewis

Representation

Claimant: In Person
Respondent: Did not attend (Response not entered)

JUDGMENT having been sent to the parties on 31 March 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The judgment was delivered orally at the hearing on 24 March 2023. The Respondent did not attend the hearing but has requested written reasons by email sent on 1 April 2023.
2. The Tribunal heard oral evidence from the Claimant and from F and considered the Claimant's Schedule of Loss as well as the medical evidence provided by the Claimant.
3. The Respondent who had not entered an appearance in these proceedings and did not attend the Remedy Hearing although she was present and took part in the Liability Hearing to the extent permitted by the Employment Judge which included cross examining the Claimant and her witnesses and making submissions to the Tribunal. The Respondent was served with notification of the Remedy Hearing by email and by post to the addresses set out on the Notice of the Remedy Hearing dated 11 February 2023. The date and venue for the Remedy Hearing was also sent out in the Case of Management Orders sent to the Claimant and D on 6 February 2023 at the same time as the Employment Tribunal's Judgment on Liability.
4. D responded to the Tribunal's email on 21 February 2023 indicating that she

intended to appeal the Liability Judgment.

5. On 22 February 2023 the Claimant emailed the Tribunal and D a Schedule of Loss. On 15 March 2023 D was copied into correspondence to the Claimant from the Tribunal in response to the Claimant's request for information as to the situation on the understanding that D was possibly going to appeal the liability judgment. The Tribunal's response dated 15 March 2023 informed the Claimant (copied to the Respondent) that appeals are dealt with by the Employment Appeal Tribunal and not the Employment Tribunal, and that appeals are not suspensory meaning that the Remedy Hearing would proceed on 24 March 2023 as listed. D responded by requesting the Schedule of Loss and medical evidence.

6. The Claimant made representations before and at the liability hearing in respect of not wishing to send copies of her private medical information to the Respondent, D, for a number of reasons, including the following: the Claimant was concerned as to D's prior conduct, she had, in the Claimant's words, been harassing her with aggressive emails, and the Claimant was concerned that the Respondent had made various representations to the Tribunal including offering to pay the Claimant's wasted cost of a morning's hearing due to her late arrival at the Tribunal but had failed to keep her word, the Claimant was concerned that D would not keep her sensitive medical information confidential and would use it for other purposes including possibly to further disparage or "harass" her. The Employment Judge made a case management order at the end of the liability hearing on 31 October 2022 that the Schedule of Loss be sent to the Respondent but that the medical report be sent to the Tribunal for the Judge to consider whether to direct that it be sent on to the Respondent. On receipt of the medical evidence the Judge considered whether it should be sent to the Respondent and decided it should not for the following reasons: Ms El- Sobky had not entered a response in time which meant that whilst entitled to receive notice of any hearing she is only able to participate in any hearing to the extent permitted by the Employment Judge, the medical evidence was of a personal and sensitive nature and there was a reasonable basis for the Claimant's concerns, including that the Respondent had previously made disparaging comments on a WhatsApp group about the Claimant's disability, such that in the circumstances it was proportionate and appropriate for D to be provided with the opportunity to consider the evidence at the Tribunal but not to be sent copies in advance or to be permitted to take copies away with her.

7. In the event, D did not attend the Remedy Hearing, the Judge proceeded with the hearing and was satisfied that she had been provided with notice of the hearing and was aware that it was taking place.

8. The following findings of fact were made on the evidence before the Judge.

Personal injury

9. The Claimant suffered previously with poor mental health and Post Traumatic Stress Disorder, she refers to this in her witness statement at paragraph 2. However, I am satisfied from Dr Umoh's notes [referred to below] that the Respondent's discriminatory treatment and the resulting litigation have exacerbated that condition and have led to the reoccurrence of the Claimant's symptoms. This has led to a period of depression and suicidal thoughts and an increase in the Claimant's medication. I refer to the medical reports produced by the Claimant for their full description of the effects upon her.

10. I heard evidence from the Claimant and from F, a friend who has known the Claimant for some time and has previously supported her through her Fibromyalgia symptoms. I am satisfied having heard and accepted their evidence that in the period prior to her employment by the Respondent, D, the Claimant was coping with her Fibromyalgia and her Post Traumatic Stress Disorder was not affecting her day-to-day life at that time. The Claimant was able to go to the gym two times a week, go out for meals, spend time with friends, she was able to make journeys on public transport on her own and was able to undertake work and studies at university. She was able to do all of this if she was allowed to work at her own pace and have rest breaks to recover her energy. I refer back to my findings the Liability Judgment in respect of the impact of the Claimant's condition on her day-to-day activities and the steps she took to manage her condition.

Functional Neurological Disorder and PTSD

11. I am satisfied that as a result of the impact of the discriminatory treatment the Claimant received from D these coping strategies broke down, her mental health also broke down and she suffered the reoccurrence of the symptoms of Post-Traumatic Stress Disorder such that the impact on the Claimant goes beyond normal injury to feelings and has resulted in a personal injury.

12. I am satisfied from the medical evidence before me that the Claimant has developed Functional Neurological Disorder. The symptoms of Functional Neurological Disorder developed in July 2022 when the Claimant collapsed, had multiple seizures on 19 July and was hospitalised. The seizures continue daily; she has also developed speech and other difficulties.

13. Following a clinic on 22 November 2022 Dr Hayer Mohammed, speciality Doctor in Neurology at Basildon and Thurrock University Hospitals NHS Foundation Trust had referred the Claimant to Neuro Psychology/Neurology at UCLH describing her symptoms as appearing to be non-organic and pointing towards Functional Neurological Disorder. The change in symptoms since the July collapse had a significant effect on the Claimant's mobility and speech and significantly impacted on the Claimant's academic plans and also caused her to lose out on training posts.

14. On 27 November 2022 Doctor Mohammed referred the Claimant, to Dr Gary Price a specialist in FND and neuropsychiatry at UCLH, that referral has been accepted by the neuropsychiatry team (see email confirmation dated 14 March 2023) and she is waiting to see the Neuro Psychiatrist at UCLH in respect of Functional Neurological Disorder. Dr Mohammed also requested her GP to make referrals for speech therapy and a mental health review.

15. The Claimant's medical notes also reflect that she saw Dr Umoh, Consultant Psychiatrist at Essex Partnership University NHS Foundation Trust, at the Knightswick Clinic on 4 January 2023 for a review at which he made changes to her prescribed medication and at that date her notes record that the Claimant had seen two neurologists and both came to the same conclusion [FND] and the neurologist from Basildon [Dr Mohammed] had referred to UCL. On 30 January 2023 Dr Umoh diagnosed Post-Traumatic Stress Disorder noting that at that date the Claimant was too unwell to participate in psychological therapy. In his visit summary he notes that the Claimant's physical condition

had changed so much since he last saw her that it was hard to recognise her as the same patient that he had seen in the previous May; he set out the symptoms experienced to July and described a complete neurological collapse, he observed that the litigation against the Claimant's employer was an important context and that anxiety was a significant factor in causing her collapse.

16. Since her health collapsed in July 2022 the Claimant has been completely unable to work, she is not able to concentrate on anything for any length of time and is unable to go out alone; she has regular seizures triggered by stress, her speech has been affected, as have her facial muscles in particular her eyelids and she is unable to walk unaided and uses crutches or a stick.

17. I am satisfied that the Respondent caused or significantly contributed to the development of the recent symptoms and the development of the Functional Neurological Disorder, such that it is not possible to separate out the discriminatory treatment from any other cause or contribution. I am satisfied that the discriminatory treatment is an indivisible cause of the injury in the sense set out in *Hatton & Sutherland [2002] ICR 613*. I therefore find that the Respondent is liable for the entirety of the injury in respect of the Functional Neurological Disorder. That is the basis on which I therefore assess the compensation to which the Claimant is entitled.

18. The Claimant was somebody who had a pre-existing disability, Fibromyalgia and Chronic Pain and a prior history of PTSD. However, the new symptoms have proved catastrophic to her life and her career plans have been put on hold.

The Claimant's losses

19. I find that but for the complete breakdown in her health as a result of the discriminatory treatment the Claimant would have continued to work part-time earning commission for the sale of beauty products, as she had done throughout her period of employment with D; and she would also have continued assisting as a Student Ambassador at her University, both of which she had been able to fit around her work for the Respondent.

Past loss of income (to date)

Loss of income for the period of December 2021 to July 2022

20. I find that the Claimant's loss of income for the period from the termination of her employment with the Respondent in December 2021 until her health broke down in July 2022 is £4,309.14, being a loss of £130.58 per week. This figure is taken from the Claimant's invoices over the relevant period. This figure is below the lower earnings limit and did not trigger tax and national insurance payments. The Claimant applied for a full-time permanent job in July 2022. She was successful in her application and was due to start work on a salary of £24,000 per annum. She had decided to take up this position as she had been unable to continue with her studies toward the Bar due to her financial difficulties as a result of losing her job with the Respondent. I accept the Claimant's evidence and find in all likelihood she would have worked in this job for two to three years whilst she saved money for Bar School. The job was ideally located for her in that it was based in Canary Wharf, and her father would have been able to give her a lift to and from work. I am satisfied that

since her health collapsed in July 2022 she is now completely unable to work.

Loss of income to date of remedy hearing 24 March 2023

21. I have awarded the sum of £4,309.14, in respect of the Claimant's loss of income to date, calculated as 33 weeks at £130.58 from 8 December 2021 to 25 July 2022; plus loss of £11,812.08 net from 25 July 2022 when the Claimant would have taken up her new role to date of this hearing, 24 March 2023, being 8 months salary at £1,476.51 net per month. Total loss of income to date of hearing = £16,121.22.

Future loss

22. The Claimant had put in evidence a booklet on FND which provides relevant information to people with a diagnosis. The rehabilitation period for her condition is likely to take approximately 18 months. There is no guarantee however that she will recover her function to previous levels. The Claimant has been told that the current waiting list to be seen by the Consultant in the relevant department is 6 - 12 months. I accept her evidence that given the current situation with NHS waiting lists, which are increasing rather than decreasing, that it is likely that the wait will be closer to 12 months rather than 6 months.

23. In assessing the Claimant's losses into the future I find that her losses will continue for two and a half years into the future, based on one year on a waiting list and an 18 month rehabilitation period. I have therefore awarded lost income for the period of two and a half years in the sum of £1,476.51 per month x 30 months = £44,295.34.

24. I have taken into account the effect of accelerated receipt in deciding on the length of the period for which I have compensated the Claimant, which I consider to be erring on the conservative side of the likely duration of her losses.

Injury to feelings and personal injury

25. There is considerable overlap in this case between the personal injury and injury to feelings. The Claimant in her Schedule of Loss has sought £25,000 which is in the middle-Vento band. When asked to clarify any claim for personal injury claim she told me that she did not know what to ask for in respect of personal injury. Having found that the Claimant has suffered a personal injury as a result of the Respondent's discriminatory treatment I am satisfied that in order to put the Claimant back into the position she would have been in but for the discriminatory conduct it is necessary to compensate her for that injury.

26. I considered the JSB guidelines in respect of similar conditions including head and brain injury. I consider that the nearest or closest equivalent condition is epilepsy which has similar effects on the individual; FND is not treatable by medication however but epilepsy is deemed to be life long, as is the need to take medication. In respect of the extent of the injury I am satisfied that the injury in this case has had a severe effect on the Claimant and has curtailed her social life and significantly impacted her day to day activities. The Claimant sleeps during the day to recover from frequent seizures, she is fully dependant on her parents and has to live at home, she is unable to go out alone.

27. The JSB guidelines given for a moderate brain injury, distinguish between three bands, i, ii and iii: the lowest, iii being for moderate injury with a small risk of epilepsy, described as cases in which concentration and memory are affected, the ability to work is reduced, there is a small risk of epilepsy and any dependence on others is very limited. There may nonetheless be vestibular symptoms and an effect on senses: the range is from £43,060 to £90,720. The middle band ii, under moderate brain injury, ranges from £90,720 to £150,110 and reflects cases in which there is a moderate to modest intellectual deficit, the ability to work is greatly reduced if not removed, and there is some risk of epilepsy. Whilst I consider that overall the Claimant's injury is less severe than those falling within the middle band of the moderate brain and head injury awards described in the JSB guidelines, her injury does contain some elements of the effects described there. I consider that the injury described in the lower band are less severe than the Claimant's injury, for instance, the Claimant experiences multiple seizures daily, is now completely dependent on her parents and is currently unable to work at all.

28. I am satisfied that the JSB guidelines for awards under Brain and Head Injury (B) Epilepsy are those that are closest in their effects on the claimant. The awards for Petit Mal range from £54,000 to £131,000, the factors affecting the level of award within those brackets include, whether attacks are successfully controlled by medication and the extent to which the need for medication is likely to persist; the effect on working or social life; the existence of associated behavioural problems, and the prognosis.

29. I also considered the JSB guidelines on PTSD and consider that the Claimant falls within the Moderately Severe band which ranges from £23,150 to £59,850, which reflects cases where the effects are likely to cause significant disability for the foreseeable future but where the prognosis is that there will be some recovery with professional help; I noted that the majority of awards in this category are between £28,760 and £37,120. I also noted that there is an overlap between the PTSD and the depression suffered by the Claimant.

30. I find that absent the personal injury an award for injury to feelings would have been appropriate, however, in this case there is considerable overlap between the personal injury and an injury to feelings award and I make no separate award for injury to feelings.

31. I am satisfied that the appropriate award for the injury caused to the Claimant is an award for personal injury in the sum of £90,000 to reflect both the Functional Neurological Disorder and the recurrence of the PTSD and the Claimant's depressive symptoms. In reaching this decision I have taken into account the JSB guidelines in respect of PTSD, moderate head and brain injury and epilepsy. I have taken into consideration the overlap or combined effects of FND and PTSD and discounted the award to reflect that the Respondent's discriminatory treatment caused a recurrence of the Claimant's PTSD, rather than being the original cause. I have also stepped back to consider the overall amount to ensure that I am not overcompensating the Claimant. This is also why I have not made a separate award for injury to feelings.

Interest

32. I am satisfied that it is just to award interest at the usual rate which is currently 8%.

On injury to feelings, the award is normally from the date of discrimination and for all other awards interest is awarded from the 'mid-point' date, halfway between the date of the act of discrimination and the date of calculation of the award. However, because in this case the award is to reflect the catastrophic impact on the Claimant's health causing a personal injury suffered by the Claimant from 18 July 2022, I am satisfied that the interest should be calculated from that date – see *MOD v Cannock & ors* [1994] ICR 918, EAT where a serious injustice would otherwise be caused it is appropriate to adjust the date for calculation of interest. The period of the award is from 18 July 2022 to date which is 249 days at 8% on £90,000, giving the daily rate of £19.75, the total interest on the personal injury award is the sum of £4,917.75.

33. Interest on the financial loss is accrued from the mid-point from the date of the termination of employment which was 8 December 2021 to the date of hearing 24 March 2023 being a period of 224 days, on the total sum of losses to date which is £16,121.22 at 8% = £128.19 per year, with a daily rate of £0.35 (x 224 days) = £79.15.

34. The total award of interest is therefore £4,996.90.

Employment Judge C Lewis
Date: 19 December 2023