EMPLOYMENT TRIBUNALS

Claimant: Miss J Mallinowski

Respondent: STB Limited (trading as Surrey Translation Bureau) (1)
Mr G Cooke (2)

Heard at: Bury St Edmunds Employment Tribunal (by CVP)

On: 15 September 2023 (1 day), deliberation 30 November 2023

Before: Employment Judge Hutchings
Mrs K Knapton (Tribunal member)
Ms K Omer (Tribunal member)

Representation
Claimant: Dr S Coulton (lay representative)
Respondent: Miss Moss (counsel)

RESERVED REMEDY JUDGMENT

The first respondent shall pay the claimant the sum of £1,350 as compensation for injury to feelings. There is no award for interest.

REASONS

Introduction

1. The claimant, Miss Mallinowski, was employed by the first respondent, STB Limited (trading as Surrey Translation Bureau), as an English to German translator from 1 April 2011 until her dismissal by a fair redundancy process on 19 March 2021. Early conciliation started on 22 March 2021 and ended on 23 March 2021. The claim form was presented on 24 March 2021. The first respondent, STB Limited ('STB'), is a provider of agency translation services and is based in Farnham, Surrey. The second respondent, Mr George Cooke, is a director and shareholder in STB.

2. By liability judgment dated 22 January 2023 the Tribunal upheld the claim that the respondents failed to make reasonable adjustments to the redundancy process, contravening sections 20 and 21 of the Equality Act 2010. Specifically, by not allowing Dr Coulton to speak on the claimant's behalf at the consultation meetings on 19 October 2020 and 16 December 2020. It is for this failure that we must determine the remedy awarded to the claimant from the first respondent, the employer.

Preliminary matters and evidence

3. The claimant was represented by Dr Coulton (lay representative), who called evidence from the claimant, Mrs Coulton and himself. The respondent and Tribunal only had questions for the claimant. We considered Dr and Mrs Coulton's written evidence, mindful they cannot give evidence as to how the claimant was feeling. This is opinion. The respondents were represented by Miss Moss of counsel. The respondents did not call any witnesses at the remedy hearing.

4. The Tribunal received a 460-page hearing bundle from the respondents. By email dated 25 August 2023 Dr Coulton informed the Tribunal that the claimant was unable to agree a joint bundle with the respondents before departing on a summer holiday. Therefore, Dr Coulton prepared a separate bundle on behalf of the claimant. Prior to the hearing we considered both bundles of documents.

5. In an email to the respondents' solicitor dated 7 September 2023 Dr Coulton informed the respondent that the claimant did not agree the contents of the respondents' bundle, stating "there are three important documents that are missing from your bundle", which are already in the claimant's bundle. We note that, as a result, 6 further pages of evidence were added, and received separately by the Tribunal.

6. To avoid confusion during questions, in keeping with the Tribunal's overriding objective, it is usual for the panel and parties to refer to a single hearing bundle. At the start of the hearing, we addressed the differences between the bundles. Dr Coulton told us he could not use the respondents' bundle, ordered by the Tribunal in case management, as his written opening statement referred to page references in the claimant's bundle which he had "uploaded to the Tribunal's Document Upload System several weeks ago".

7. In the circumstances, mindful that rule 2 of The Employment Tribunal Rules of Procedure 2013 allows us to be flexible in the hearing to ensure the parties are on an equal footing and noting that the bundles contain the same key documents, we agreed to reference the page number of a document in both bundles. Miss Moss agreed this was a sensible approach in the circumstances.

8. We read, Dr Coulton's opening written submissions for the remedy hearing, addressing "the respondents' denial of reasonable adjustments and the consequent injury to feelings and personal injury", which were sent to the Tribunal, copied to the respondents' solicitor, on 25 August 2023.

9. We did not receive a written witness statement from the claimant for the remedy hearing. Therefore, the Tribunal started the claimant's evidence with the question:

   "How did you feel when Dr Coulton was not allowed to speak?"

10. Dr Coulton and Miss Moss made closing statements to the Tribunal. Dr Coulton made a closing statement on behalf of the claimant by reference to a slide presentation. We note this presentation made references to the reconsideration application and the claimant's appeal of the liability judgment to the EAT. We have not taken account of any points challenging the liability judgment in our remedy decision; to do so would be an error of law. The only focus of this hearing is remedy. Points raised by Dr Coulton in his closing statement and the slide presentation regarding the reconsideration and reasons for appeal of the liability judgment are matters for the EAT.

11. Both parties provided us with case law examples each considered comparable awards. Some were referenced in respective parties closing statements; we considered all cases put forward in our deliberations.

12. We make the observation that, given there was only 1 issue to determine on remedy, the hearing was listed for 1 day to allow time for evidence, panel deliberation and judgment. However, time was required to address issues raised regarding the bundles and points raised by Dr Coulton regarding the claimant's reconsideration requests and appeal of the liability judgment. It took some time to resolve the position with the bundles. Mindful that Dr Coulton is a lay representative, we explained the points he raised in his opening and closing statement about reconsideration and appeal are not within the remit of a remedy hearing. At his insistence, and mindful a number of times he expressed frustration we were not going to allow him to address what he considers are errors of law in the liability judgment, we allowed Dr Coulton some leeway to raise points, despite them not being within the jurisdiction of this hearing. We explained that he will have the opportunity to do so comprehensively at the hearing he has requested before the EAT and that this is the proper forum for doing so.

13. As a result, the hearing lasted for the day and there was insufficient time remaining for the panel to deliberate and give an oral decision. We had no option but to reserve judgment. The first available date for the panel members to meet was 30 November 2023. Parties were informed of the date for deliberation by email.

Findings of fact

14. The relevant facts are as follows. At the liability hearing we found that the claimant was anxious throughout the redundancy process and very upset at times. She was anxious before and during the October and December consultation meetings. The notes of a meeting on 12 October 2020 record that the claimant tells the respondents at this meeting that she felt run over at the announcement of redundancy and very anxious all weekend; this meeting is a week before the October consultation meeting. We also found that the redundancy dismissal was fair.

15. We found that Dr Coulton's attendance at the 19 October 2020 and 16 December 2020 consultation meetings was agreed in response to a request from the claimant. At the liability hearing the claimant agreed, and we found, that it was her suggestion that Dr Coulton attend to take notes and be a set of eyes and ears. We found it was not agreed prior to either meeting that Dr Coulton was attending to advocate on behalf of the claimant. We concluded that, notwithstanding this prior agreement, a reasonable employer with the first respondent's knowledge of the claimant's disability would not have prevented Dr Coulton from speaking on the claimant's behalf, due to the failure to make reasonable adjustments being an objective test.

16. At the hearing the claimant confirmed her evidence at the liability hearing that she went into the consultation meetings with no expectation that Dr Coulton was there to ask questions or advocate on her behalf. That was not what she had requested when asking if he could attend and it was not what the respondent had agreed to. Dr Coulton was there to support her and take notes.

17. It is our finding in the liability judgment, which accorded with the claimant's evidence at the remedy hearing, that Dr Coulton did participate in the October consultation meeting as a support and there was not an active refusal; the claimant told us "I believe he wanted to ask a question, but that was answered."

18. The claimant accepted in her oral evidence at this hearing that it was only at the second consultation meeting on 16 December 2020 that Dr Coulton was prevented from speaking. She also accepted that when he asked a question at this meeting, she was told that the respondents wanted to reply to this question in writing, which they subsequently did the following day.

19. At the hearing, when asked ""how did you feel when Dr Coulton was not allowed to speak?" the claimant told us that she felt vulnerable as her medical condition ("MS")

comes with cognitive issues which means she struggles with understanding in stressful situations, particularly concerning complicated things. She explained she felt anxious as she had never been in a situation of redundancy and did not understand how the process worked. The claimant explained, which was. Not challenged, that at the meetings she felt vulnerable as it was her and 3 other people and she was not able to voice opinions very well and she would have felt less vulnerable if she had had someone there to advocate for her.

20. The claimant recalled that, during the December meeting, when Dr Coulton was told he could not speak she found this very upsetting because she was already stressed and anxious about the meeting as she struggles with memory and comprehension. She told us it became a vicious circle of feelings when Dr Coulton was not allowed to speak of her becoming more stressed and anxious. The claimant told us that at the December consultation meeting when she was told Dr Coulton could not speak, she found it very confusing and felt vulnerable "because she did not know her rights, she did not feel she had a ground for complaint because her employers were going along with what she suggested". We find that the feelings of anxiety, stress and vulnerability she went into the meeting with were raised by the refusal to allow Dr Coulton to speak.

21. We have considered the medical evidence in a GP letter dated 4 February recording the claimant's consultations with her GP. There is no consultation meeting with GP in October and December 2020, which are the relevant times of the discriminatory behaviour upheld by the Tribunal.

22. On the evidence before us, the first GP consultation is January 2021, after the telephone conversation with the second respondent, which caused the claimant distress. We have considered the consultation letter; it refers back to the January 2021 consultation to the redundancy process generally and specifically to the telephone call. The January telephone call was found not to be discriminatory. On a literal reading of this letter, the wording of which is clear, we find the stress recorded by the GP links to that telephone call. It does not link to the impact on the claimant on Dr Coulton not being allowed to speak.

23. The medical evidence before us is that the claimant experienced an increase in symptoms from January 2021, due to the impact of redundancy. The redundancy was upheld as fair by this Tribunal.

24. We find that the symptoms described in the medical evidence were due to the stress of a redundancy process and the devastation of losing a job the claimant enjoyed for 10 years. The symptoms described, including lack of sleep and an exacerbation of the claimant's MS were not due to the refusal to allow Dr Coulton to speak, the only discrimination upheld by this Tribunal. Indeed, when asked by the Tribunal how she felt when Dr Coulton was not allowed to speak, the claimant did not mention that it caused her to lose sleep or that preventing Dr Coulton speaking exacerbated her MS. Her evidence was clear and direct: the decision caused her to feel more vulnerable, anxious and stressed in the moment of the meeting.

Issues to be determined by the Tribunal

25. The Tribunal must determine an award of compensation for injury to the claimant's feelings arising directly from the respondents' refusal to allow Dr Coulton to speak at the redundancy consultation meetings.

26. In doing so we must take account of the context in which the refusal was made, and consider the injury directly caused by the respondents' decision not to allow Dr Coulton to speak as the discrimination (not allowing Dr Coulton to speak) must actually cause the injury.

27. We must ensure the award is compensatory of our findings of the injury and not punitive to the respondent.

Law

Injury to feelings

28. The Equality Act 2010 (the "Act") section 124 sets out the entitlement to a remedy for discrimination. Part 9 provides:

    An employment tribunal can make a declaration regarding the rights of the complainant and/or the respondent; order compensation to be paid, including damages for injury to feelings; and make an appropriate recommendation. The measure of compensation is that which applies in tort claims, for example claims of negligence, where the compensation puts the claimant in the same position, as far as possible, as he or she would have been in if the unlawful act had not taken place."

29. The concept of the injury was summarised in Vento v Chief Constable of West Yorkshire Police (No2) [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 31 as: -

    An injury to feelings award encompasses subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

30. The foundation guidance for valuing injury to feelings was set out in Prison Service v Johnson 1997] IRLR 162 Per Smith J at para 27 as:

    30.1. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

    30.2. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use Lord Bingham's phrase, be seen as the way to untaxed riches.

    30.3. Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.

    30.4. In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

    30.5. Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.

31. The Discrimination must Cause the Injury Coleman v Skyrail Oceanic Ltd [1981] IRLR 398. Compensation is to be awarded for foreseeable damage arising directly from an unlawful act of discrimination. It follows that an applicant can claim for any pecuniary loss properly attributable to an unlawful act of discrimination. Once liability is established under the Equality Act all the tribunal needs to be satisfied of is that the loss or damage claimed was caused by it. The question to ask is, "does it in fact naturally flow from the discriminatory act that has been made out?

32. It is a fundamental principle that the award should compensate the claimant's injury and not punish the tortfeasor[1] for the manner of the discrimination. Ministry of Defence v Cannock [1994] IRLR 509. Indeed, in MOD v Cannock the EAT confirmed at paragraph 90 that: "an award for injury to feelings is not automatically to be made whenever unlawful discrimination is proved or admitted". There must therefore be some evidence on which a finding of fact of injury can be sustained. If there is none, not only will there be no error of law in not making an award, but there *would* be an error of law if one was made without evidence.

33. The Tribunal may add Interest to the award applying the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996. This is within the discretion of the Tribunal (Regulation 2). The Tribunal must set out reasons for awarding, or not awarding interest, based on its findings of fact.

34. Regulation 3 sets the rate of interest to apply.

> (1) Interest shall be calculated as simple interest which accrues from day to day.
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> (2) Subject to paragraph (3), the rate of interest to be applied shall be, in England and
> Wales, the rate fixed, for the time being, by section 17 of the Judgments Act 1838 and, in Scotland, the rate fixed, for the time being, by section 9 of the Sheriff Courts (Scotland) Extracts Act 1892

35. Where the rate of interest in paragraph (2) has varied during a period for which interest is to be calculated, the tribunal may, if it so desires in the interests of simplicity, apply such median or average of those rates as seems to it appropriate, usually 8%. Regulation 4 provides the period of interest: the day of calculation is the date judgment is determined. The start of the period is the date of the discriminatory act (the "contravention"). For injury to feelings, interest is calculated at the appropriate rate for the entirety of the period between the contravention to the calculation date.

Conclusions of the Tribunal

36. The starting point for evidence of injury to feelings is what the claimant tells us about her emotional reaction to, and subsequent effects of, the treatment upheld as the failure to make a reasonable adjustment. In determining the injury, we must consider the claimant's description of injury as a direct result of the discrimination (not allowing Dr Coulton to speak), the duration of the exposure, consequences, effect on work and health.

37. In determining the level of injury, we must consider the claimant's direct evidence of how she felt (not a third-party description / opinion of how they perceived her to be feeling) and any medical evidence which relates to the period of the discrimination (the meetings where Dr Coulton was not allowed to speak).

38. We have found that the claimant felt vulnerable, anxious, and stressed when Dr Coulton was not allowed to speak at the December consultation meeting. Injury is a relative concept reflecting the extent of deterioration of the human state of existence after the discriminatory event. We have found that the claimant was already feeling anxious, stressed, and vulnerable going into the meeting; in not allowing Dr Coulton to speak we have found she felt she was in a vicious circle in which her levels of anxiety, stress and vulnerability increased during the meeting. The claimant did not say at any point in her evidence that a consequence of Dr Coulton not being able to speak that she was unable to sleep, or that her MS exacerbated. We conclude that

these conditions were caused by the entire situation, essentially the redundancy process, and not directly as a result of the refusal to allow Dr Coulton to speak.

39. There is no evidence of personal injury to the claimant. Other than an increased feeling of anxiety, vulnerability, and stress, we conclude that none of matters raised in the schedule of loss or in the submissions of Dr Coulton flow directly from him not being able to speak. Dr Coulton's submission that the denial meant he could not influence decision is misguided; the Tribunal concluded the redundancy process was fair. A fair redundancy process does not require an entitlement for him to speak. Indeed, there is no evidence before the Tribunal as to what Dr Coulton would have said to the respondents had he had the full opportunity to advocate and no evidence that he could have made a difference to the outcome or what that difference would have been.

40. In the context of these conclusions, we must consider an award for the claimant's raised level of anxiety, stress, and vulnerability when Dr Coulton was prevented from speaking at a point in time (the duration of the meeting and short period thereafter) in the context of the claimant's admission she was already feeling anxious about the redundancy process. We have found there is no evidence, either directly from the claimant or medical evidence, that the claimant suffered on-going consequences of Dr Coulton not being able to speak. Further, we have found that the refusal to allow Dr Coulton to speak was not a deliberate action of discrimination; the respondents were following the claimant's own request, and agreement reached prior to the consultation meetings, that Dr Coulton would attend as eyes and ears only. There was no malicious intent.

41. In cases where the injury is raised feelings for a short duration case law guides a Tribunal to an award at lowest level. We consider a compensatory award of **£1,350** just and fair.

42. We note that Dr Coulton has referenced several cases for injury to feelings with high awards. It is not the role of the Tribunal to address each case and distinguish it, by which we mean explain how it is materially different on the facts to the case before us. We make the observation that in these cases one or some / all of the following was upheld: unfair dismissal, findings on the evidence of ongoing injury, multiple, sustained acts of discrimination, which inform the high levels of award made.

43. It is within our discretion to award interest. We have found that the discriminatory act was not intended. We have found that in refusing to allow Dr Coulton to speak the respondents were following the claimant's request at the time that Dr Coulton attend as her eyes and ears. We have found that the question raised by Dr Coulton was answered the following day in writing. There was no malicious intent on the part of the respondents. For these reasons, we do not consider it just and fair in the circumstances of the discriminatory act to make an award for interest.

Employment Judge Hutchings

1 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 28 December 2023

FOR EMPLOYMENT TRIBUNALS