EMPLOYMENT TRIBUNALS

Claimant: Mr S Donnelly

Respondent: PQ

Heard at: Liverpool **On:** 8 November 2023

Before: Employment Judge Horne

Members: Mr R Cunningham
Mrs A Ramsden

Representatives
For the claimant: Mrs Holliday, friend
For the respondent: Mr P Maratos, consultant

Judgment was sent to the parties on 13 November 2023. The respondent has asked for written reasons for the judgment. Accordingly the following reasons are provided.

REASONS

Remedy issues

1. By a judgment ("the Liability Judgment") sent to the parties on 21 February 2023, the tribunal found that the respondent had discriminated against the claimant by extending his probationary period because he is a man and had thereby contravened section 39(2)(b) of the Equality Act 2010.
2. Written reasons for the Liability Judgment were sent to the parties on 28 April 2023. We will refer to them as "the Liability Reasons" or "LR" for short.
3. In the same judgment, the tribunal also found that the respondent had wrongfully constructively dismissed the claimant. His damages for wrongful dismissal were agreed. As a result, we had no issues to decide in relation to that claim for damages.
4. We were solely concerned with the claimant's remedy for unlawful discrimination.
5. The first set of issues concerned the claim for financial losses.
6. We start by recording an issue that we did not need to decide. The respondent initially raised an issue concerning the period of financial loss. Had the argument been pursued, we would have had to decide whether or not that period should be restricted to one month. Mr Maratos' submission, made at the start of the hearing,

was that, had there been no unlawful discrimination, the claimant's employment would inevitably have terminated by 11 April 2022. During his final submissions, however, Mr Maratos accepted that he could not pursue that argument. He conceded that, before the tribunal could make the finding he sought, the tribunal would first have to reconsider paragraph 8 of the Liability Judgment. He confirmed that he was not applying for reconsideration.

7. The claimant said he had lost just over £6,020. That was 14 weeks' net pay at £430 per week. It was agreed that, had the claimant remained in employment with the respondent, his weekly net pay would have been £430.

8. The remedy issues are:

   Remedy Issue 1 - mitigation

   8.1. Has the respondent proved that the claimant failed to make a reasonable attempt to keep his losses to a minimum by not trying hard enough to find other work?

   8.2. If so, has the respondent also proved that, had the claimant made a reasonable attempt, his losses would have been reduced?

   8.3. If so, by how much?

   Remedy Issue 2 – injury to feelings

   8.4. How much should the claimant be awarded as damages for injury to his feelings?

   Remedy Issue 3 - interest

   8.5. Does the tribunal have any discretion to decide the rate of interest on damages for discrimination?

   8.6. If so, should the tribunal exercise its discretion to award interest at 4%?

Evidence

9. We read an agreed remedy bundle running to 108 pages. We also referred back to documents in the original 141-page bundle for the liability hearing.

10. The claimant gave oral evidence. He confirmed the truth of his remedy statement and answered questions.

11. The respondent also made a written statement but, having taken instructions, Mr Maratos did not ask us to rely on it.

Facts

12. On 14 February 2022, the claimant spoke to his general practitioner. This was a telephone consultation. At LR paragraph 54, we referred to the claimant having told his GP that he had been "snapping at people at work". He also said that he was "not sleeping", had "lower appetite" and was "withdrawing from things, not interested in going out". He reported a loss of confidence. They discussed what was happening in the claimant's life. The doctor wrote down what he or she thought were the underlying issues. The record states, "Mum has sadly passed away, has been referred to Coroners/court as ?neglect. Lots of concern about Mum's care, whether death could have been prevented." Understandably, this was the claimant's main pre-occupation at this time.

13. On 7 March 2022, the claimant spoke again to his GP on the telephone. He told the GP that he had been "having some stresses with work" and mentioned a "breakdown of relationship with client". He said his drinking had increased again and was drinking every evening. He was about to start counselling.

14. The claimant missed his GP appointment on 21 March 2022.

15. On 25 March 2022 the claimant had a further GP appointment by telephone. By this time, he had resigned from his employment. He mentioned this fact to his GP. His drinking had reduced. His GP prescribed Sertraline.

16. On 11 April 2022 the claimant told his GP that he had spoken to a careers advisor and "might have a job lined up…working with cars". His outlook was observed to be more positive. He had self-discharged from psychological therapy as it he did not find it helpful.

17. The claimant stopped taking Sertraline because he did not like the side-effects, which included headaches. He spoke to his GP over the telephone on 25 April 2022, at which point he was about to start his car-related job.

18. In fact, the claimant never started work in that employment. When the time came to start work, he could not face it.

19. On 18 May 2022, the claimant told his GP that he was "struggling with mental health" and "not sleeping well". According to his GP he was "agoraphobic, tearful, anxious sleep poor (5 hours restless), poor appetite, ruminating lots." Amongst the significant events currently happening in his life, the claimant mentioned that he was grieving for his mother, who had died in January that year, and mentioned a medical negligence claim concerning her death. He also said that he felt he had been "sexually discriminated against" and was "going to court". He told his GP that he was "off work as [a] care manager". He said that he could not see a way out.

20. By 31 May 2022, the claimant had been offered a job at a cheese factory. He had recently had a road traffic accident. He was anticipating the inquest hearing in July. He was prescribed Mirtazapine.

21. It is evident from the two consultations in May 2022 that there were two quite separate things weighing heavily on the claimant's mind at that time. One was his sense of injustice at the way the respondent had discriminated against him. The other was his perception that his mother had been neglected prior to her death, the gnawing doubt about whether proper care could have saved her, and anxiety about the forthcoming inquest.

22. The claimant did not start the cheese factory job. He told us, and we accept, that he "was not in a state to go back to work".

23. On 29 June 2022 the claimant's GP noted, "coping with new job in Manchester". In fact, the claimant had not started that job either. He was taking Mirtazapine but at a lower dose than had been prescribed to him.

24. By the end of June 2022, the claimant had decided that he would not try to find another job in the care sector. As the claimant saw it,

> "Following the discrimination I totally lost focus and ability and no longer wanted to work in the care sector. I doubted myself."

25. The claimant did not earn any money from working between 11 March 2022 and 8 July 2022. He had a Class II heavy goods vehicle driver's licence and was legally

allowed to drive vehicles of up to 7.5 tonnes. His licence was due to expire, but he did not do the training for his renewal.

26. The claimant was not eligible to claim unemployment-related benefits and did not do so.

27. The claimant made his remedy witness statement approximately 17 months after he had resigned. He mentioned, truthfully, that he had "called Samaritans and MIND as I didn't feel that I had anything to offer". The claimant did not say when he had made those calls. He acknowledged the "patience and stoicism" of his partner, without which the discrimination "could also have impacted on my relationship". Writing in the past tense, he stated:

> "I could no longer contribute to that relationship, physically, emotionally or financially".

28. In the same witness statement, the claimant stated:

> "I still have difficulty sleeping. In the moments I had hoped I could move on, there was another delay, more accusations, refusal to accept responsibility on behalf of the Respondent and a total lack of accountability for the consequences of their actions, which could have been brought to closure far earlier without the unnecessary delays and obfuscation causing issues with non-associated parties."

29. We accept that these passages truthfully describe how the claimant felt. They enable us to make the following findings:

    29.1. The claimant regarded the tribunal's decisions as a form of "closure" and an opportunity to "move on". The "delays and obfuscation" about which the claimant was complaining appear to us to relate to things that happened both before and after the Liability Judgment. We therefore took the claimant to be saying that the Liability Judgment was a significant step in his journey towards "closure", but that he could not properly move on until his remedy had also been determined and the respondent's appeal routes had been exhausted.

    29.2. The claimant had impaired ability to contribute to his cohabiting relationship, but, by 17 months after the discrimination happened, the claimant was referring to as something that happened in the past and which the relationship had happily survived.

30. During the claimant's oral evidence at today's hearing, we asked him how he would have reacted if, instead of extending his probationary period, the respondent had spoken to him and explained how she felt about a man providing intimate personal care. The claimant told us that any such conversation would have "hurt massively". He added, "You should never judge". These answers are consistent with our conclusion at LR paragraph 131.2.

31. Because of the claimant's inability to work for 14 weeks, and also for other reasons, the claimant and his partner struggled to meet their day-to-day living costs. Eventually they moved into cheaper accommodation.

32. According to the Office for National Statistics, Consumer Price Inflation was 7% in March 2022. That figure rose steadily to 11.1% in October 2022 and then gradually decreased to 6.7% in September 2023. From April 2022 until May 2023, the Consumer Price Inflation rate was higher than 8%.

Relevant law

33. Section 119 of EqA makes provision for the county court's powers to grant a remedy for a contravention of EqA. It provides, relevantly:

> …(2)The county court has power to grant any remedy which could be granted by the High Court—(a)in proceedings in tort…
>
> …(4)An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis…

34. The power of an employment tribunal to award a remedy is to be found in section 124. Relevantly, the section provides:

> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may— …(b) order the respondent to pay compensation to the complainant…
>
> …
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

35. The following propositions can be derived from *Prison Service v. Johnson* [1997] IRLR 162:

> (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.
>
> (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 be seen as the way to untaxed riches.
>
> (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.
>
> (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.
>
> (5) Finally, tribunals should bear in mind the need for public respect for the level of awards made.

36. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318 the Court of Appeal identified three broad bands of compensation for injury to feelings awards, as distinct from compensation

awards for psychiatric or similar personal injury. The lower band of £500 to £5,000 applied in less serious cases. The middle band of £5,000 to £15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).

37. The Presidential Guidance on Employment Tribunal Awards for Injury to Feelings, Fifth Addendum states:

> 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.

38. In *Vento,* the Court of Appeal gave examples of particular kinds of discrimination tending to fall into particular bands. A "one-off" act of discrimination was apt for the lower band. But the type of discrimination is not determinative: what matters is the effect of the discrimination on the individual: *Base Childrenswear Ltd v. Otshudi* UKEAT 0267/18 per HHJ Eady QC at paragraph 36.

39. Sometimes an employee is injured by two causes, one of which is the employer's legal responsibility, and the other of which is not. In such cases, the tribunal should follow the following principles, derived from *BAE Systems (Operations) Ltd v Konczak* [2017] IRLR 893:

a) Psychiatric harm may be divisible, even if it takes the "classic" path of stress turning into injury;

b) In all cases 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;

c) In such an exercise, focus must be on the division of the injury or harm (and not the causative potency or culpability of the tortfeasor for it

d) Whether there is a rational basis for divisibility depends on the facts and the evidence including medical evidence and the questions asked of any medical experts;

40. Where a claimant complains of two alleged discriminatory acts, only one of which is found to have contravened EqA, it is open to a tribunal to find that the employee's injury was caused by the lawful act, and not by the unlawful one, provided that there is a clear evidential basis: *Wisbey v. Commissioner of City of London Police* [2021] IRLR 691.

41. The tribunal has the statutory power under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides to award interest on "an award under the relevant legislation". Curiously, an award of compensation under section 124 of the Equality Act 2010 is not included within the express definition of "an award under the relevant legislation", but neither party suggests that the 1996 Regulations do not apply to such awards.

42. Regulation 2 provides, relevantly:

> "(1) Where… an employment tribunal makes an award under the relevant legislation-
>
> (a) it may, subject to the following provisions of these Regulations, include interest on the sums awarded…

43. The rate of interest is prescribed in regulation 3(2), which provides, so far as is relevant:

> (2) Subject to paragraph (3), the rate of interest to be applied shall be…the rate fixed, for the time being, by section 17 of the Judgments Act 1838…

44. The rate prescribed by section 17 of the Judgments Act 1838 is 8% per year.

45. Paragraph (3) allows the tribunal to adopt a median or average rate where the Judgments Act rate has changed during the period of time over which the interest is to be calculated. That has not happened here. The Judgments Act rate has not changed since 1993.

46. We interpret regulations 2 and 3 to mean:

    46.1. That the tribunal can decide not to award interest; but

    46.2. If the tribunal does decide to award interest, it must award it at the rate of 8%.

Conclusions

Remedy Issue 1 - mitigation

47. It is for the respondent to prove that the claimant failed to take reasonable steps to keep his losses to a minimum. In our view the respondent has not discharged that burden. The claimant tried to find other jobs. He was successful three times in a 14-month period. The reason why he did not work in those jobs was because, when the time came to start work, he could not face it due to his mental health.

Remedy Issue 2 – injury to feelings

48. In our view, there is identifiable damage to the claimant's feelings that can be rationally attributed to the unlawful discrimination. The attributable injury to feelings is properly separable from:

    48.1. The grief and anger that the claimant would in any event have experienced due to his mother's death and his belief that neglectful care was a contributory cause;

    48.2. The associated anxiety and loss of sleep and appetite that the claimant would inevitably have felt as his mother's inquest hearing approached; and

    48.3. The profound hurt and self-doubt that the claimant would inevitably have suffered as a consequence of the respondent using lawful means to address the issue of opposite-sex intimate care.

49. At LR paragraph 131.3 that it was not inevitable that the claimant would have resigned if the respondent acted lawfully. It must follow, logically, that he would not have left the care sector either. Had the respondent raised the issue of intimate personal care in a proportionate manner, the claimant's confidence would not necessarily have been shaken to the point of leaving care work. The unlawful

discrimination had the effect of making him finally decide to abandon care work and to resume his career as a driver.

50. Although the discriminatory act started and finished on the same day, the effects were longer-lasting.

51. The discrimination was believed by the claimant to be one of the causes of his poor mental health in May 2022, some three months after he had resigned.

52. The discrimination was one of the reasons why the claimant was prescribed Sertraline a few weeks later, and Mirtazapine a few weeks after that.

53. The discrimination contributed to the claimant's sense of inadequacy in his relationship with his partner. That had improved substantially by the time of his remedy statement (some 17 months post-discrimination).

54. The first milestone towards closure happened approximately one year after the claimant resigned. That was when the tribunal announced the Liability Judgment. There has been some residual bad feeling since then.

55. We do not award the claimant any additional compensation for any alleged delaying tactics on the part of the respondent. It is, however, a fact that the time it has taken for the claimant's case to be heard has had a knock-on effect on the timing of the Liability Judgment and the date of the remedy hearing. That in turn has meant that the claimant has had to wait longer to achieve closure than if his case had been heard promptly.

56. Had all of the claimant's negative feelings over the last 18 months been caused by the unlawful discrimination, adequate compensation would not be achieved by an award within the lower *Vento* band. This would be one of the more serious cases meriting a middle-band award. But we are concerned only with those hurt feelings that were caused by the discrimination. Concentrating on those, and with the duration of the recovery period also in mind, we have taken the view that the lower *Vento* band is easily wide enough to provide the claimant with sufficient compensation. In our view, the right amount is £6,000.

<u>Remedy Issue 3 - interest</u>

57. Our interpretation of the 1996 Regulations is that we do not have the power to vary the rate of interest. If we award interest at all, it has to be at 8% per year.

58. It is conceivable that our interpretation of the 1996 Regulations might be held to have been overly narrow. To cater for that possibility, we have thought about how we would exercise our discretion if we had any.

59. We would leave the rate of interest at 8% even if we had the power to change it.

60. The purpose of interest on awards is to try to ensure that a victim of discrimination is not financially disadvantaged by having to wait for their compensation. One way of measuring that disadvantage is by looking at the interest rate that the claimant would have been able to get by putting the equivalent sum into a bank account at the time of the discrimination.

61. The respondent says that the claimant would not have been able to find a bank who would pay him more than 4% on a £6,000 deposit. Therefore, argues Mr Maratos, the claimant would receive a windfall if the tribunal's rate of interest were any higher than 4%.

62. That argument might have been attractive if the claimant had nothing better to do with a lump sum than to put it into a bank account and leave it there to earn interest. But the claimant had plenty of better things to do with that money. Otherwise, he and his partner would have been unlikely to have moved to cheaper accommodation. Had the claimant received his compensation in March 2022, it would, in all likelihood, have been spent on bills, accommodation, food and other items of expenditure. A far more realistic measure of the disadvantage caused by delayed receipt is therefore to look at what has happened to prices. For the entire period they were increasing by more than 6% per year. For almost all of the period they were increasing by more than 8% per year. If the tribunal awarded less than the Judgments Act rate of interest, the claimant would find the purchasing power of his compensation to be significantly less than it would have been had it been awarded at the time of the discrimination.

Calculation

63. Now that we have determined all three remedy issues, the rest is just mathematics.

64. The period of financial loss is 14 weeks. Compensation for loss of earnings was agreed at £430. Damages must be reduced by 75% in line with paragraph 8 of the Liability Judgment. Total financial losses should therefore be compensated at:

    £430 per week x 14 weeks x 25% = £1,505.

65. The mid-point date for financial losses is 17 May 2022. The interest calculation period for financial losses is 1.5 years.

66. Interest on financial losses should therefore be:

    £1,505 x 8% pa x 1.33 years = £180.63.

67. The calculation period for the damages for injury to feelings is 1.72 years.

68. Interest on those damages should therefore be:

    £6,000 x 8% pa x 1.72 years = £827.62.

Employment Judge Horne
12 December 2023

SENT TO THE PARTIES ON
14 December 2023

FOR THE TRIBUNAL OFFICE