Case Number: 3325832/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs J R O'Day

Respondent: The Dominic Barbieri Multi Academy Company

Heard at: Reading (by C.V.P.; fully remotely) **On:** 19 February 2024

Before: Employment Judge George;
Mrs C Carr;
Dr C Whitehouse.

Appearances
For the claimant: no attendance, written submissions
For the respondent: no attendance, written submissions

UPON APPLICATION made by the respondent by letter dated 11 July 2023 to reconsider the varied remedy judgment sent to the parties on 7 July 2023 under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

1. The reconsideration application succeeds. The remedy judgment is varied as set out in para.2 below. For clarity, the variation is shown in italics.

2. The respondent shall pay to the claimant compensation for disability discrimination in the sum ***of £73,955.60*** calculated as follows:

Injury to feelings		
Compensation for injury to feelings **caused by pre-termination discrimination**	21,000.00	
Interest on £21,000.00 @ 8% from 21.07.2018 (mid-point between 26.03.2018 and 13.11.2018) to 31.03.2023 (1715 days) @ £4.60 p.d.	7,893.70	
Total award for injury to feelings incl. interest	**28,893.70**	**28,893.70**

Past Financial Loss (calculated as at 31.03.2023)
Financial Loss 2018-19
Net Salary £473.10 p.w.
Gross Salary £673.23 p.w.

Employer's pension contribution £110.95 p.w. Total £(473.10 + 110.95) = £584.05 p.w.		
01.10.2018 to 31.03.2019 (on ½ pay due to sickness absence) 26 weeks @ £292.03 p.w.	7,592.78	
01.04.2019 to 31.08.2019 22 weeks @ £584.05 p.w.	12,849.10	
Loss to 31.08.2019	20,441.88	20,441.88
LESS 30% for chance C would not have returned to work in Summer 2018		(6,132.56)
Adjusted Loss to 31.08.2019		**14,309.32**
Financial Loss 2019-2020 Net Salary £482.66 p.w. employer's pension contribution £113.17 p.w. Total = £595.83 52 weeks @ £595.83 p.w.	30,983.16	
Financial Loss 2020-2021 Net Salary £492.31 p.w. employer's pension contribution £115.43 p.w. Total = £607.74 52 weeks @ £607.74 p.w.	31,602.48	
Financial Loss 2021-2022 Net Salary £502.16 p.w. employer's pension contribution £117.74 p.w. Total = £619.90 52 weeks @ £619.90 p.w.	32,234.80	
Financial Loss 2022-2023 01.09.21 to 31.03.22 (taken as date of calculation for ease) Net Salary £512.20 p.w. employer's pension contribution Total = £632.30 p.w. £632.30 X 30.33 weeks	19,177.66	
Total Financial Loss 01.09.2019 to 31.03.2022	113,998.10	113,998.10
LESS 50% for chance of retirement aged 65 years at 31.08.2019		(56,999.05)
		56,999.05
LESS 70% of that for declining prospect of remaining in full time employment until aged 70 years		(39,899.34)
Adjusted loss 2019 – 31.03.2023		**17,099.71**
Adjusted loss to 31.08.2019 carried forward		**14,309.32**
Total adjusted financial loss to 31.03.2023		31,409.03
Interest on that @ 8% from 31.12.2020 (mid-point between 1.10.2018 and 31.03.2022) to 31.03.2022 (821 days @ £6.88 p.d.)		5,651.90

Total adjusted financial loss 01.09.2023 to 31.03.2023 incl interest		**37,060.93**	**37,060.93**
<u>Future Financial Loss 01.04.2023 to 31.03.2024</u>			
5 months (21.66 weeks) @ £632.30 p.w. for year 2022-2023	13,695.62		
7 months (30.33 weeks) @ (£632.30 X 1.02) = £644.95 p.w. for year 2023-2024	19,561.21		
Total financial Loss 01.04.2023 to 31.03.2024	33,256.83	33,256.83	
LESS 50% for chance of retirement aged 65 years at 31.08.2019		(16,628.42)	
		16,628.41	
LESS 70% of that for declining prospect of remaining in full time employment until aged 70 years		(11,639.89)	
Adjusted loss 01.04.2023 to 31.03.2024		**4,988.52**	**4,988.52**
<u>Total compensation for financial loss subject to grossing up to take account of the incidence of income tax</u>			**42,049.52**
Excess over £30,000 of total compensation liable to be subject to tax		*12,049.52*	
Grossing up of £12,049.52 at 20% (12,049.52 X 100/80)		*15,061.90*	
LESS £12,049.52		*(12,049.52)*	
Increase in compensation necessary to compensate for incidence of tax		***3,012.38***	***3,012.38***
Total compensation for financial loss after grossing up			***45,061.90***
Total award for injury to feelings incl. interest			***28,893.70***
Total Sum Payable			***73,955.60***

REASONS

1. The reserved remedy judgment was sent to the parties on 24 April 2023 with case management orders directing the parties to seek to agree the amount by which the award should be increased to take account of the incidence of income tax. No response was received by the tribunal. The reserved remedy judgment was varied by Employment Judge George by way of a reconsideration of the Tribunal's own initiative.

2. The respondent made an application for reconsideration of that varied judgment on 11 July 2023 on the basis that the parties had been attempting to agree a calculation of the amount by which the award should be increased and had expected there to be a further hearing at which any contested dispute about that amount would be considered. On 4 August 2023, Judge George directed that the application should proceed and expressed the provisional view that it should be granted because the remedy judgment was varied in

ignorance that the parties had attempted but failed to reach agreement about the likely incidence of tax on the award, and because Judge George considered that there was a procedural error. The varied judgment had been a decision of Judge George alone and had not been taken by the full panel. The parties were asked to write by 18 August 2023 setting out their views on whether the application could be determined by the full panel in chambers, on further written submissions, or whether an oral hearing would be required. Both parties agreed that the reconsideration could proceed on the basis of written submissions without the necessity for attendance by the parties but differed as to whether the decision should be that of the full panel or not. Since it was a hearing to reconsider the reserved judgment of the full panel at the remedy hearing, it was right that the reconsideration should be considered by a full panel and, on 10 October 2023, the tribunal wrote to the parties making case management orders for them to provide written submissions.

3. The respondent sent in an 8-page submission (hereafter the RSA) dated 31 October 2023 and included a copy of the summary of <u>Moorthy v Revenue and Customs Commissioners</u> [2018] ICR 1326 CA. The claimant's submissions were sent to the tribunal and the respondent on 1 November 2023 under cover of an email which confirmed that the claimant would not respond further to the respondent's submissions. In that 4-page submission (hereafter the CSA) the claimant relied upon the case of <u>Slade v Biggs</u> [2022] IRLR 216 EAT, and the tribunal has had reference to that report. Although both parties had been given the opportunity to send any reply they wished to make in writing to the other party's submissions they did not take that opportunity. A notice of hearing was sent to the parties on 23 Janaury 2024 informing them that a reconsideration hearing had been listed for 19 February 2024 but that the parties were not require to attend, in accordance with their previous confirmation. A further opportunity was given to the parties to send any further submissions to the other party and to the tribunal to arrive no later than 5 February 2024. No further submissions were received. The reconsideration hearing therefore went ahead on the basis of the written submissions listed in this paragraph.

4. The remaining dispute between the parties is as to whether or not the calculation of the sum by which the award should be increased to take account of the incidence of tax should be done on the basis that it is more likely than not that HM Revenue and Customs will regard the compensation for injury to feelings of £28,893.70 as being subject to tax under s.401 of the Income Tax (Earnings and Pensions) Act 2003 (hereafter referred to as ITEPA).

5. Section 401 ITEPA provides that taxation of payments and benefits on termination of employment apply to:

> "(i) …payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with –
>
> (a) The termination of a person's employment,
>
> (b) …"

6. By s.403, a payment or benefit covered by the chapter counts as employment income in the relevant tax year to the extent that it exceeds £30,000. This is subject to detailed provisions in ss.401 to 414C but, for the purposes of this reconsideration judgment, those are the principal sections.

7. The respondent argues that the injury to feelings component of the award made by this tribunal "Can be paid free of tax as an award of compensation not "in consideration or in consequence of, or otherwise in connection with" the termination of employment." (RSA para.6.a.) More properly, their position is that the injury to feelings component in its entirety is unrelated to termination of employment and therefore no account needs to be taken of it when calculating the sum which after tax would leave the claimant with the full compensation of £70,943.15 in her hand. The respondent offers to indemnify the claimant against any successful challenge by HMRC should their position prove to be incorrect.

8. The respondent relies upon Moorthy to the extent that the Court of Appeal there held that the entirety of a settlement payment was taxable because it was received by the taxpayer in consideration of the termination of his employment and was described as loss of office. A competent tribunal had found that the taxpayer did not experience discrimination prior to the termination. The other element of Moorthy, which is not the focus of the respondent's argument, has been superceded by statutory change. In Moorthy the Court of Appeal held that the then wording of s.406 IETPA meant that payments of compensation on account of injury (including injury to feelings) were exempt. The wording of s.406 was subsequently changed and it is clear that the wording which applies in the present case has the effect that injury to feelings awards in cases of discriminatory dismissals are taxable.

9. The respondent has also cited the HMRC Employment Income Manual (RSA para.17) as the basis for their argument that the HMRC are likely to be satisfied that compensation for injury to feelings attributed solely to discrimination occurring before the termination of employment should be accepted as not connected with the termination and outside the scope of s.401.

10. The claimant argues that it does not follow from the tribunal's findings that "the dismissal was not discriminatory" (CSA para.2) that no injury postdating dismissal can be subject to tax. It is argued on her behalf that by awarding compensation for losses and for injury following what she describes as the dismissal the tribunal "appears to have accepted that on dismissal there was an injury which was ongoing, and for which the claimant should be compensated" (see CSA para 6). It is also argued on the claimant's behalf that the tribunal does not appear to have expressly attributed the claimant's injury to events pre-dismissal. It appears that by that she means apportioned the injury as between events pre-dismissal and those which arose in connection with what is described as the claimant's dismissal. She invites the tribunal to do so.

11. The claimant's representative relies upon the case of Slade v Biggs arguing that statements made by the EAT in that case emphasised the breadth of s.401

ITEPA and held that, on the face of it, s.401 covers more than damages for the dismissal itself.

12. We consider that, in their conclusions in Slade v Biggs, the EAT (Mr Justice Griffiths presiding) concluded that the awards made by the tribunal in that case for both injury to feelings and aggravated damages were in connection with the termination of the claimant's employment and therefore within the scope of s.401 ITEPA (see paragraph 95 of the judgment). Mr Justice Griffiths' analysed, in paragraph 93 and 94, the findings of the tribunal when reaching that conclusion. As set out in the headnote, he formed the view that the tribunal's reasoning on its awards for injury to feelings linked the awards to what in that case had been a discriminatory determination to dismiss or drive out the claimant.

13. We are satisfied that our existing findings make clear that both the physiological injury and injury to feelings (which were not divided in our assessment of compensation) were not connected with resignation. We have used the term "dismissal" when referring to the claimant's submissions, but it is important to note that there was in fact no dismissal. Nevertheless, the wording of s.401 ITEPA refers to termination.

14. We say that this is clear based on our existing findings because of the following:

    a. All of the acts found to be unlawful took place between 12 March 2018 and 22 November 2018.

    b. The claimant was not dismissed by the respondent she resigned with effect on 21 July 2019 some eight months after the end of the period covered by the acts we found to be unlawful. She failed in her claim of constructive dismissal so termination was not an unlawful act by the respondent.

    c. The tribunal at the remedy hearing, amongst other things, had to assess her argument that her ill health was caused by the discriminatory acts and therefore loss of employment and loss of income was caused by those acts no because termination was unlawful but because it flowed from unlawful acts. It is not argued that financial losses flowing from termination are unlikely to be subject to income tax.

    d. A summary of the psychological injury we found to have been made out is at remedy judgment para 44 (in these reasons the remedy judgment is referred to as RJ). We accepted that the claimant had been tipped into being unfit to work by the discriminatory acts - in particular, the failure to make reasonable adjustments and the instigation of the disciplinary process. However, we note and remind ourselves of our finding in RJ para 43 in respect of the instigation of the formal MAP process that:

       > "This action does not, in itself exacerbate or cause any psychological injury but does cause an affront and offence which should be marked in the award of injury to feelings compensation."

It follows that the most serious injury to the claimant was caused by the instigation of the disciplinary action and not by the later instigation of the MAP process.

e. We made clear that "The claimant decided to resign and the loss of the job itself is not within the loss caused by the discriminatory acts." (RJ para 46).

f. We found that the exacerbation of the claimant's mental health condition lasted approximately four years in total (RJ para 49) but that it varied in the seriousness of those effects over time. We accepted that by the date of the remedy hearing the claimant's exacerbation of her mental health condition had subsided to no additional effect over her pre-existing vulnerability. However, there is a clear finding that the psychological effects did not include, certainly those we took into account did not include, any effect of her leaving her employment. The fact that there was an element of her psychiatric injury and mental ill health as at the date of resignation which was attributable to discriminatory acts that pre-dated November 2018 does not mean that any element of that mental health exacerbation was caused by the resignation. Indeed, we repeatedly emphasised in our remedy judgment that we sought to distinguish between the impacts of those acts that we had found to be discriminatory and the claimant's resignation. We see our original findings as being essentially the same as if the claimant had experienced a physical injury (for example exacerbation of a back condition) as a result of a failure to make reasonable adjustments the effects of which could still be felt as at the date of termination of employment, but which are entirely unaffected by the end of that employment.

g. Our detailed findings on injury to feelings which were the basis of our assessment of compensation start at paragraph 73 and included an element for exacerbation of the claimant's mental health condition. Relevant parts of our findings include paragraph 76 RJ, which reflect our acceptance that the consequences to the claimant of the acts dating from March 2018 to November 2018 lasted beyond that period but "We are not including in the assessment any feelings of grief or loss from the loss of the job itself".

h. We were asked at the Remedy Hearing to consider whether there should be apportionment of the injury as between different causes both in respect of the causes of psychiatric injury or apportionment of responsibility for financial losses. In RJ para 79 we concluded that there was no rational basis for a further division of the causes of financial loss or injury to feelings for reasons we explain in that paragraph. We expressly did not at that time apportion the injury to feelings award as between different causes of the claimant's ill health. It is true that that does not expressly say that we did not find a rational basis, having considered the matter, to apportion the compensation for injury to feelings as between that caused by the discriminatory acts and that caused by the loss of the job. However, it is clear from paragraph 76

that we had sought only to award compensation for the discriminatory acts.

15. The analysis of the reserved judgment makes clear that we set out to assess compensation for injury to feelings excluding any impact of the termination of employment. The question we are asked to consider now is whether based on our original findings we think it is more likely than not that the compensation for injury to feelings, or any part of it, is likely to fall within s.401(1) ITEPA. The claimant's representative invites us to attribute part of it to pre and post dismissal. However, our original conclusions make clear that in fact we set out to assess both psychological injury and injury to feelings caused only by the discriminatory acts which pre-dated termination and did so by a number of months. The fact that the effect of the injury, in particular the psychological damage, continued in time beyond the date of the claimant's resignation does not mean that it was caused by it. We assessed compensation for deterioration in mental health and injury to feelings which as a matter of fact existed as at the date of resignation but was not connected with resignation simply because it was ongoing as at that date.

16. Having expressly excluded from our consideration the claimant's feelings arising from the loss of her job, as set out in RJ para 76, it appears that the claimant's arguments invite us to reconsider that conclusion and there is no justification for doing so.

17. What there is justification for doing is varying the way in which the incidence of tax was taken into account in the varied judgment sent to the parties on 7 July 2023 because that itself did not take into account our existing findings as set out in detail in this reconsideration judgment. This is a completely different situation to that in Slade v Biggs because we have in our findings expressly separated the consequences of the discriminatory acts from the consequences of termination of employment in least in so far as they affect the injury to feelings. We think it is probable that the injury to feelings award would not be subject to income tax and therefore it should be excluded from grossing up. We note that the respondent has offered an undertaking to indemnify the claimant should HMRC take a different view.

18. It therefore remains to carry out the calculation. In the claimant's written submission at page 4 she had provided some information about her income in the tax year 2022 to 2023 although it appears from the respondent's submissions that the payment is now to be made in the tax year 2023 to 2024. By that the claimant appears to indicate that she anticipates that any sum which would be subject to tax under s.401 ITEPA will be taxed at the 20% basic rate. The total financial compensation for past losses and future losses is £42,049.52 therefore the excess of that over the tax-free threshold is £12,049.42. We do not need to add any sum in respect of an award of compensation for injury to feelings attributable to termination of employment for reasons we have already explain and, therefore, it is that figure of £12,049.52 which needs to be grossed up at 20% as has been done in the judgment above. This means that a sum of £3,012.38 needs to be added to the compensation of £70,943.15 in order to make sure that when the appropriate tax has been accounted for the claimant has that sum in hand.

19. The reconsideration application succeeds, and the remedy judgment will be varied accordingly.

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Employment Judge George

Date:…22 February 2024…………

Sent to the parties on:

29 February 2024
…………………………….
For the Tribunal:
…………………………………..