



EMPLOYMENT TRIBUNALS

Claimant: Ms K Pearce

Respondent: Barking Havering and Redbridge University Hospitals NHS Trust

Heard at: East London Hearing Centre

On: 16 January 2024

Before: Employment Judge C Lewis
Tribunal Member A Berry

Representation

Claimant: In person
Respondent: Mr L Harris - Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant is entitled to the following remedy:

1. Unfair dismissal

The Respondent shall pay the Claimant the following sums:

- (a) A basic award of £1,614.00
- (b) Compensatory award
 - i. Loss of statutory rights £500.00

2. Disability Discrimination.

The Respondent shall pay the Claimant the following sums:

- (a) Compensation for financial losses:
Loss of income from 24 December 2020 to 29 March 2021
In the sum of £10,482.00
- (b) Compensation for injury to feelings in the sum of £9,000.00;

(c) Interest on compensation for financial loss calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 in the sum of £1,285.70

(d) Interest on compensation for injury to feelings calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 in the sum of £2,373.04

REASONS

1. This remedy hearing was listed following a decision of the Tribunal on liability sent to the parties on the 25th of July 2023. The Tribunal at the liability hearing consisted of Employment Judge C Lewis, Mr P Quinn and Ms A Berry. Before the liability decision was sent to the parties but after the tribunal had concluded their deliberations Mr Quinn sadly died. The parties were informed and the remedy hearing proceeded with the Tribunal consisting of Employment Judge C Lewis and Ms A Berry.
2. We were provided with a bundle prepared by the Respondent which consisted of 526 pages; and a second bundle which contained the Claimant's schedule of loss and witness statement for the remedy hearing, the Respondent's counter schedule of loss and a witness statement from Mr Michael Smartt on behalf of the Respondent.
3. The hearing took place via CVP. The Claimant attended the hearing from a tribunal room separate to the one in which the judge was situated, everyone else attended remotely by CVP.
4. We heard evidence from the Claimant and from Mr Smartt. Mr Smartt is employed as a Recruitment Transformation Lead within the Human Resources department at the Respondent and has been since June 2022. He gave evidence in respect of his experience and knowledge of the labour market within the NHS for midwives and the number of vacancies for roles at band 6 and band 7. He refuted the contention in the Claimant's schedule of loss that it would take her five years to find another band 7 role the NHS or an equivalent position.
5. Having heard the evidence we then heard submissions from Mr. Harris on behalf of the Respondent and from the Claimant. We made the following decision as to remedy unanimously, having carefully considered the evidence before us and the respective submissions. We reminded ourselves that the Claimant succeeded in her claim for constructive unfair dismissal, and in just one of her complaints for disability discrimination, that is, in respect of one complaint of failure to make reasonable adjustments. The Claimant did not seek reinstatement or re-engagement.

Basic award

6. It was not disputed that the Claimant was entitled to a basic award, the calculation of which is in accordance with the statutory formula contained in

s 119 of the Employment Rights Act 1996. The Claimant was 39 years old at the effective date of termination. She is entitled to one week's pay subject to the statutory maximum (the relevant maximum in force at the time the claim was issued was £538 per week) for each complete year's service. The Claimant was employed from the 16 January 2017 to the 24 December 2020, she had therefore accrued 3 complete years' service at the date of dismissal and is entitled to a basic award of £1614.00 (3 x £538).

Compensatory award

Loss of statutory rights

7. The Claimant is entitled to do an award for loss of statutory rights. The Claimant sought the sum of £500. The Respondent contended that she should only receive £250 for this on the basis that she resigned from her role at Princess Alexandra Hospitals NHS Trust after a few weeks. We are satisfied that the award is intended to reflect the fact that it will take an employee who has been unfairly dismissed two years before they again accrue the right not to be unfairly dismissed. We do not find that by resigning from her role at Princess Alexandra Hospitals NHS Trust the Claimant can be said to have relieved the Respondent from its responsibility for the loss of her statutory rights in respect of its unfair dismissal. We find that it is just to award the Claimant the sum of £500 which she seeks in respect of loss of statutory rights.

Loss of income

8. The claim for loss of income was hotly disputed before us. The Claimant seeks compensation for losses from the date of dismissal in December 2020 to this hearing in January 2024 and into the future for a further five years. The statutory cap applies to awards for unfair dismissal compensation and limits the amount a tribunal can award to one year's pay. However, we found that the discrimination, that is the failure to make a reasonable adjustment in respect of the meeting on 1 October 2020 contributed to, i.e. was a factor in, or part of the cause of, the Claimant's decision to resign and that her financial losses fall to be assessed under damages for discrimination.

Discrimination damages

Financial loss

9. The Claimant was out of work until the 10 February 2021 when she obtained a role with Sherwood Forest NHS Trust as a COVID vaccination supervisor. She applied for the role on the 30 December 2020 and started working on a bank contract on the 10 February 2021. The role was in Nottingham and involved working in the vaccination centre on a bank contract. The Claimant worked three days on and four days off, the journey took her approximately 3 hours each way at the beginning and end of her three days, she stayed over in Nottingham on the intervening nights. The Claimant left that job due to receiving shift cancellations at short notice on a regular basis, sometimes when she was driving on her way to Nottingham from Essex. Despite

complaining to her managers about this, she was informed that shifts were allocated and cancelled on a fair basis and that as she was on a bank contract it meant that shifts could be cancelled. The Claimant applied for a band 7 continuity team lead role at the Princess Alexandra Hospitals NHS Trust. She was unsuccessful in interview for the band 7 post but was offered a band 6 midwifery role. She accepted this role and left the role at Sherwood Forest NHS Trust on the 26 March 2021 having received confirmation of her start date of 29 March 2021 from Princess Alexandra Hospitals NHS Trust. She started working 24 hours per week. The Claimant says she was assured that during the initial four weeks she would be working as supernumerary, and she would continue as supernumerary. However, on the 27 April 2021 she arrived at work and was told that she was not going to be supernumerary. She left the role due to her anger and upset at the way she had been misled and the way she was being treated.

10. Since that time the Claimant has undertaken a number of jobs to try to mitigate her losses by, for example, starting a furniture painting business which unfortunately did not prove to be profitable; she also worked in a number of bar jobs and other hospitality sector jobs. The Claimant has been employed by HCRG Care Group since 19 April 2022 as a Child and Family Well-being Nurse, her salary is lower than it would have been had she remained with the Respondent.
11. We have found that the Claimant made reasonable efforts to mitigate her loss in the period between leaving the Respondent and starting her role with the Princess Alexandra Hospitals NHS Trust. We accept the Respondent's submission that her decision to leave her position at the Princess Alexandra Hospital was an intervening event which is not attributable to the Respondent and beyond which the Respondent is not liable for the Claimant's losses. We do not have any cogent evidence before us upon which we could find that the Claimant's reaction to being told that she was no longer supernumerary by Princess Alexandra Hospital was attributable to the discrimination as found, namely the failure to make a reasonable adjustment in relation to the meeting on the 1st of October 2020. Although some of the concerns the Claimant raised about being supernumerary were similar to those she had raised previously with the Respondent those were not matters that we found to have been discrimination or failures to make reasonable adjustments. We have no evidence before us upon which we could properly base a conclusion that there was any causal connection between the effect of the failure to make a reasonable adjustment and the Claimant's subsequent decision to leave her employment at the Princess Alexandra Hospitals Trust.
12. We found that in her evidence to us the Claimant focused largely on her response to the events of January 2019, the Respondent's failure to address her concerns about how that was handled and her perception that the Respondent was not listening to her: we did not uphold the complaints of discrimination in respect of those matters. Having found no cogent evidence of a causal link between the discrimination we found and the decision of the Claimant to leave her role at the Princess Alexandra Hospitals Trust we are satisfied that her losses beyond that date are not attributable to the actions of the Respondent.

13. We went through the accept the Claimant's schedule of loss and the calculations set out in the counter schedule at the hearing. We accept the Respondent's submissions in respect of the enhanced payments claimed in the Claimant's schedule— subject to the amendments and adjustments discussed at the hearing.
14. We accept that calculation of pension loss should be on the simple basis, that is, the loss of employer pension contributions. We were told by Mr Harris, and it was not disputed, that the employer's contribution is 14.38% of earnings. This has been included in the Respondent's calculation for the Claimant's loss of earnings The , the period from 24 December 2020 to 29 March 2021.

The Claimant's loss of earnings between 24 December 2020 and 29 March 2021

15. The Claimant would have earned £15,120.11 in the relevant period, had she still been employed by the Respondent, she earned £4,637.88 while working at Sherwood Forest NHS Trust: her loss in the relevant period is the difference between the two figures, which is £10,482.23.

Injury to Feelings

16. We again reminded ourselves that our finding of discrimination was in relation to one failure to make reasonable adjustments only, namely failing to allow support for the informal meeting on the 1st of October 2020. We addressed our minds to the injury that flowed from that act of discrimination. We took into account the Claimant's evidence at the remedy hearing and also her evidence at the liability hearing, contained in her original witness statement. The Claimant addresses the events of the 1st of October 2020 at paragraph 193 onwards of her witness statement for the liability hearing: at paragraph 200 she describes herself as extremely upset, angry and distressed; in paragraph 202 the Claimant says she felt overwhelmed, upset angry, bullied and not listened to and she resigned on the 2nd of October.
17. We noted that subsequent incidents also made the Claimant feel belittled, berated, disrespected, harassed and not valued (see paragraph 213 about the 4th of October 2020); at paragraph 226, in respect of the 21st of October 2020 the Claimant complains that she felt pushed to work on the labour ward; we did not uphold those complaints as acts of discrimination. The Claimant went off sick on the 23rd of October 2020, she described herself as being very unwell with her mental health, depression and anxiety. Medical evidence from the relevant time confirms the Claimant was off sick with depression and anxiety. We are satisfied that a large part of that was the Claimant's anxiety about the concerns that had been raised about her practise. We found that the Respondent had reasonable cause to raise those concerns and that raising those with her was not an act of discrimination. We have taken into account that an investigation into her practise is likely to have occurred in any event.
18. We are satisfied however that the failure to make the reasonable adjustment identified on the 1st of October 2020 increased or added to the Claimant's

anxiety and added to the stress. Doing the best we can on the basis of the evidence before us, we find the increase, or exacerbation, to be 25%. We are satisfied that it is just to make an award which reflects the increase in the Claimant's feelings of depression and anxiety in the period from October through to April 2021.

19. The Respondent submitted that the injury to feelings award should fall in the lower Vento band; the award is in respect of a one-off act and that a sum in the region of £5000 would be appropriate. We have found that the failure to make the adjustment and provide the support that Claimant had indicated she would need at informal meetings played a role in her decision to resign, albeit it was not the main or principal factor, it contributed to her decision.
20. Taking the above into account we are satisfied that an award at the upper end of the lower Vento band is just and appropriate and we have awarded the sum of £9,000.00.

Interest

21. Interest falls to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.
22. We have awarded the sum of £1285.70 in interest on the compensation for financial loss from the midpoint between the start of the financial loss on 24th of December 2020 to the date of this hearing, 16th of January 2024 (a period of 3 years, 23 days): the midpoint is 559 days, interest at 8% per annum on the sum of £10,482.23 gives a daily rate of £2.30 [559 x £2.30 = £1285.70]
23. We have awarded the sum of £2373.04 in interest on the compensation for injury to feelings: the injury to feelings compensation relates to the period from 1st of October 2020 to the date of this hearing, 16th of January 2024, a period of 3 years, 108 days [1203 days] at 8% per annum on £9000.00 gives £1.97 per day [1203 x £1.97 = £2373.04].

**Employment Judge C Lewis
Dated: 28 February 2024**