



WRITTEN REASONS - REMEDY

EMPLOYMENT TRIBUNALS

Claimant: Miss H Thomas

Respondent: T&R Direct Insurance Limited

Heard at: Southampton ET

On: 6 November 2023

Before: Employment Judge Horder, Ms C Date, Mr K Sleeth

Appearances

For the Claimant: Unrepresented

For the Respondent: Ms Afrayie, Legal Consultant

JUDGEMENT ON REMEDY

The judgement of the Tribunal on remedy is that:

1. The Respondent shall pay the Claimant the total sum of £56,542.06 calculated as follows:
 - a. Basic Award of £846.24
 - b. Compensatory award arising from the Claimant's unfair dismissal:
 - i. Past loss of earnings between 26.8.22 to 6.11.23, calculated on the net weekly sum of £356 pw = £18,512
 - ii. Past pension lost between 26.8.22 to 6.11.23, calculated on the basis of £12.71 pw = £793.46
 - iii. Future loss of earnings, 26 weeks at £356 = £9,256
 - iv. Future pension loss, 26 weeks at £12.71 = £330.46
 - v. Loss of statutory rights = £500
 - c. Injury to feelings arising from the Claimant's claims of discrimination arising from disability and harassment relating to disability (sections 15 and 26 Equality Act 2010): £24,000
 - d. Interest on the award for injury to feelings (at 8% from 26.8.22 to 6.11.23); £2,304

2. It would not be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal.
3. The Claimant did not cause or contribute to her dismissal and it would not be just and equitable to reduce her compensatory award.
4. The Employment Protection (Recoupment of Jobseeker's Allowance & Income Support) Regulations 1996 apply. For the purpose of regulation 4 of the Regulations the relevant information is as follows:
 - i. Prescribed element: £15,420.50 [*NB: before the statutory cap the compensatory award for past loss of earnings was £22,224.57. This has been reduced down to the statutory cap of £18,512, a reduction of 16.7%. As a result the prescribed amount of £18,512 should be reduced by 16.7% down to £15,420.50.*]
 - ii. Prescribed period: 26.8.22 – 6.11.23
 - iii. Total Monetary award: £56,542.06
 - iv. Excess of total monetary award over prescribed element: £41,121.56

REASONS – REMEDY

Preliminary / Procedural Issues

1. The Claimant gave further live evidence at the start of the hearing. She explained her revised schedule of loss that had been provided to the Tribunal and Respondent in accordance with case management directions made at the conclusion of the four day hearing on liability.
2. The sole topic on which she was cross-examined by Ms Afrayie was whether she had failed to attend and participate in a grievance meeting. To this extent Ms Afrayie sought to rely on emails dating 12.8.22, 16.8.22 and 17.8.22 that purported to be between the Respondent's Lee Taylor and the Claimant about attendance at a grievance meeting.
3. The Tribunal reminded all parties that the issue of whether there should be any reduction to the Claimant's award on the ground that she had failed to comply with the ACAS code by failing to pursue a grievance had already been dealt with. With the agreement of both parties that issue and the issues of contributory fault and Polkey had been considered and determined during the liability hearing. The Tribunal had concluded that there was no basis for such a reduction and no unreasonable failure to comply with the code (see the Tribunal's separate written reasons on liability).
4. Further, the existence of such emails had been referred to by Mr Lee Taylor (Director of the Respondent) in his oral evidence during the liability hearing. His reference to such emails had surprised the Tribunal for two reasons. Firstly, because the Respondent did not challenge in cross-examination the Claimant's evidence that, agreeing to meet Peter Smith via email dated 11.8.22, she had

heard nothing further. Secondly, no such emails were produced in evidence by the Respondent nor were they included in the agreed bundle or produced during the 4 day hearing on liability.

5. After Lee Taylor had made reference to such emails in his oral evidence, the Tribunal addressed the Respondent's then solicitor, Mr Williams. The Tribunal informed him that if there was any application to adduce further evidence (i.e. those emails), the Tribunal would consider it after the lunch adjournment (on what was day 3 of the hearing) and hear submissions from both sides. Despite that invitation, no such application to adduce further evidence was made by Mr Williams either then or subsequently.
6. Despite the above, Ms Afrayie sought to rely on those emails which had been attached to the Respondent's recently submitted counter schedule of loss and in effect re-open this issue. In the course of argument the Tribunal asked her to explain why such emails had not been put before the Tribunal before and why, when the Tribunal had specifically raised the issue with Mr Williams, no application had been made at that stage. Ms Afrayie was unable to provide the Tribunal with an answer. The Claimant stated that she had never previously been provided with such emails.
7. The Tribunal went on to consider whether the Respondent should be entitled to rely on, at this stage, further evidence in the form of those emails (dated 12.8.22, 16.8.22 and 17.8.22.) The Tribunal concluded that it would not be in the interests of justice to vary the previously made case management orders that dealt with the service of evidence in this case under Rule 29, nor would it be consistent with the overriding objective (Rule 2). The Respondent advanced no reason at all why the evidence had not been included in the original trial bundle, nor why they were not produced in evidence at the 4 day liability hearing when this specific issue was raised. Further, the issues those emails went to (whether the Claimant had complied or not with the ACAS code) had already been determined by the Tribunal (see the reasoning set out in the written reasons on liability). The Respondent had had an opportunity to both cross-examine the Claimant about those emails and also to make an application to adduce them in evidence at that hearing. They were represented by a solicitor throughout and chose not to.
8. The Tribunal did consider the emails themselves and concluded that even if the Tribunal were to a) accept them in evidence and b) accept they were actual emails exchanged between the parties, they would not have altered the Tribunal's conclusion.
9. Notwithstanding those further emails, the Claimant had already set out her complaint against the Respondent in writing in her resignation email. The Respondent's brief grievance policy did not provide any guidance on how to raise a grievance against the Respondent's directors, nor did it provide an alternative means of raising a complaint where part of the complaint related to the conduct of an employee's line manager. The Claimant's line manager was the son of one of the directors the Claimant was complaining about. This was also a relatively small and close nit family business. Further, on 8.8.22 Lee Taylor had informed the Claimant by email that *"you can speak to ACAS in the meantime or you can hold*

off until the grievance hearing is complete, the decision is completely up to you". In such circumstances it was not unreasonable for her to do just that and chose to pursue her complaints against the Respondent through ACAS.

Evidence

10. The Tribunal had regard to the original agreed bundle of evidence totally 193 pages, as well as the further 21 page bundle produced by the Claimant at the start of the hearing.
11. In addition, the Claimant provided an updated schedule of loss and the Respondent a counter schedule.
12. The Claimant gave live evidence setting out what she was claiming and why. The Respondent only sought to cross-examine her on the further emails referred to above (that the Tribunal declined to allow the Respondent to rely on). She was not challenged on any of the evidence set out in her witness statement or her disability impact statement (at p.61 of Bundle 1).

Issues

13. The issues to be determined as to remedy had previously been set out and agreed in the Case Management Order of Employment Judge Craft dated 25.5.23 and was amended at the start of the 4 day liability hearing.
14. With the agreement of both parties, issues relating to the principles set out in *Polkey v AE Dayton Services Ltd [1987] UKHL*, those of contributory conduct under s.122(2) of the EA 1996 and whether either party unreasonably failed to follow the ACAS Code of Practice on Discipline under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) had been considered and determined during the liability hearing.
15. At the start of the hearing both parties assisted the Tribunal by further clarifying what was in dispute in regards to remedy. The key issues in dispute were:
 - a. The claim for past loss of earnings. The Respondent argued that the Claimant should be entitled only to 6 months.
 - b. The claim for future loss of earnings. The Claimant was seeking 6 months from today, the Respondent argued she was entitled to none.
 - c. Injury to feelings. The Claimant was seeking an award in the middle Vento band, the Respondent submitted the appropriate award should be in the lower hand.
 - d. Aggravated damages. The Claimant was seeking aggravated damages based on how the Respondent had conducted the proceedings namely by denying that they knew of her mental health difficulties before May 2022.
 - e. Loss of Statutory Rights. The Claimant was seeking a sum of £500, the Respondent argued the sum should be £250.

Law

Loss of earnings

16. The starting point for determination of loss of earnings is the period for which the Claimant would have been employed by the previous employer had she not been subjected to an unfair dismissal. For example, if the Claimant would have been dismissed at a certain point because of redundancy or closure of the business, then that usually sets a limit to the amount of compensation payable because the claimant would have lost her job then anyway.
17. A Claimant is expected to take reasonable steps to minimise the losses suffered as result of the termination of their employment. The burden of proving a failure to mitigate is on the Respondent. It is insufficient for a respondent merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondent has to prove that the Claimant acted unreasonably. There is a difference between acting reasonably and not acting unreasonably. If the Claimant has failed to take a reasonable step, the respondent has to show that any such failure was *unreasonable*.
18. In this regard the Tribunal had regard to authorities including *Fyfe v Scientific Furnishing Ltd [1989] IRLR 331* and *Wright v Silverline Car Caledonia Ltd UKEATS/0008/16*.
19. The Tribunal should consider the following three steps:
 1. what steps the claimant should have taken to mitigate his or her losses;
 2. whether it was *unreasonable* for the claimant to have failed to take any such steps; and
 3. if so, the date from which an alternative income would have been obtained, and the amount of that income.

Future loss of earnings

20. The task for the Tribunal is to assess the losses an employee will suffer in the future. This requires an assessment of whether the Claimant would have remained employed or have been dismissed in any event and if so would she have found equivalent employment or not. The Tribunal must take into account the personal characteristics of the employee such as age and health.
21. The Tribunal will go on to 'to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice' (see *Software 2000 Ltd v Andrews [2007] IRLR 568*, per Elias P). As HHJ Hand QC said in *Stroud Rugby Football Club v Monkman UKEAT/0143/13/SM*, the assessment of future loss is a 'rough and ready matter. It always has been and it always will be'.

Injury to feelings

22. An award for injury to feelings can cover feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress and depression. It is hard to measure those feelings in monetary terms, but the tribunal must do its best. Three broad bands of compensation for injury to feelings were suggested in the case of *Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR*

102, CA. For dismissals in the year beginning April 2022 Presidential Guidance suggests the top band should be £29,600 - £49,300 or more in exceptional cases; the middle band should be £9,900 – £29,600; and the lower band should be £900 - £9,100.

23. Within each band there is considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

24. If the claimant's injury to her feelings and/or personal injury is caused by a number of different factors, the tribunal can only award compensation for the injury caused by the unlawful discrimination (unless it is indivisible).

25. In Prison Service v Johnson [1997] IRLR 162 the following general principles were set out:

- a. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;
- b. Awards should not be too low, as that would diminish respect for the policy of the antidiscrimination 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;
- c. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;
- d. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;
- e. Tribunals should bear in mind the need for public respect for the level of awards made.

26. A tribunal may award interest on its award and must consider whether to do so. Interest on an award for injury to feelings runs from the date of the discrimination until the date of calculation by the tribunal (inclusive). Interest on any financial loss starts on a date midway between the act of discrimination and the calculation date, and ends on the calculation date. The rate of interest is that fixed by section 17 of the Judgments Act 1838. Since July 2013, that has been 8%.

Conclusions

Basic Award

27. The basic award was agreed in the sum of £846.24. As set out in the judgement on liability the Tribunal concluded that there was no basis for any reduction.

Past Loss of Earnings

28. The Claimant's evidence was that after being signed off work unwell in July 2022 she remained off work and unable to work as a result of her mental health difficulties. In support of this she produced her GP records and a Universal Credit letter dated July 2023 [p.171 of Bundle 1] that detailed that she had a limited capability for work. The same letter stated that she *"will not have to look for work but you will need to meet with your work coach to take steps to prepare for work in the future"*.

29. The Claimant gave further evidence that she had been assigned a work coach (by the DWP). She had attended all appointments and meetings with them and they were helping her to return to work. She was confident, as was her work coach, that she should be able to return to work within 6 months from today.

30. As set out in the Tribunal's reasons relating to liability, the Tribunal accepted that the Respondent's conduct had been a significant reason for her originally being signed off work back in July 2022. The Tribunal was also satisfied that it was more likely that not that but for the Respondent's treatment of the Claimant, she would have remained in work with the Respondent. Prior to the events that caused her to resign she had liked her job and had progressed well. She had no reason to want to leave and had shown a degree of determination to return to work after her absence as a result of her disability.

31. The Tribunal concluded that the Claimant had taken reasonable steps to mitigate her loss. She had continued to take medication as directed by her GP and had cooperated and followed the advice of her work coach. She had done all that was asked of her. The Tribunal accepted the Claimant's evidence that if she could and was able to return to work she would. She previously had a good work record, enjoyed her work and was good at her role.

32. The Respondent had not shown that the Claimant had failed to mitigate her loss. The Respondent has been represented throughout. They did not seek to draw the Tribunal's attention to any evidence about alternative jobs available to the Claimant that, given her personal circumstances (that included the fact she did not have a car) would have been available to her. Further, they did not challenge her evidence in cross-examination about her ability to work, the steps she had taken to find work or when she was likely to be able to return to similarly remunerated work. The Tribunal concluded that her failure to obtain alternative employment was not unreasonable in the circumstances of this case.

33. As a result, the Tribunal concluded that the Claimant was entitled to past loss of earnings between the end of her notice period on 26.8.22 to today, 6.11.23. The agreed net weekly sum is £356. However, the statutory cap under s.124(1)(z)(a) ERA 1996 applied, limiting the total sum to 12 months. The award for loss of earnings is therefore £18,512.

34. The Employment Protection (Recoupment of Jobseeker's Allowance & Income Support) Regulations 1996 apply to this part of the Claimant's award. The relevant figures are set out at the end of these written reasons.

Past Pension Loss

35. The parties agreed that the relevant sum for weekly pension loss was £12.71 per week. The Respondent accepted that the Claimant was entitled to 6 months pension loss but nothing thereafter on the basis that she should have returned to work by then.

36. For the reasons set out above in relation to past loss of earnings, the Tribunal concluded that the Claimant was entitled to past pension loss for the same period as her claim for past loss of earnings. The relevant period is therefore her notice period on 26.8.22 to today, 6.11.23. The agreed net weekly sum is £12.71, the total sum ££793.46.

Future loss of earnings and future pension loss

37. The dispute here was whether the Claimant should have returned to work already and, if not, how much longer would be an appropriate period before which she would be able to return to equivalently remunerated work.

38. Based on the totality of the evidence before the Tribunal, including that heard during the liability hearing, the Tribunal accepted the Claimant's evidence that a further 6 months represented a reasonable further time frame before which she is likely to find equivalent employment.

39. Assessing when and in what circumstances she will and should return to work is not an easy task or exact science. However, the Tribunal was satisfied that the Claimant was taking reasonable steps to return to work as soon as she properly could. The Tribunal's assessment of the Claimant was that she was someone who liked and valued work and her career. The Tribunal accepted that she would want to and would return to work as soon as she properly could. The Tribunal also accepted her assessment of the time frame in which that was likely to happen, considering that 6 months from today was a realistic and reasonable further period.

40. The Tribunal therefore accepted that future loss of earnings and pension loss should be awarded for a six month period as follows:

a. Future loss of earnings, 26 weeks at £356 = £9,256

b. Future pension loss, 26 weeks at £12.71 = £330.46

Injury to feelings arising from the claims of discrimination and harassment (sections 15 and 26 Equality Act 2010)

41. The injury to feelings in this case arises from the specific acts of discrimination that the Tribunal found proven (namely issues 1a, b, c and f of the amended list of issues).

42. The dispute between the parties was whether the appropriate award lay in the middle or lower Vento band.
43. When considering the Tribunal's conclusions as to the appropriate award for injury to feelings, regard should be had to the written reasons on liability.
44. The Tribunal concluded that, following the Claimant's approximately eight week absence because of her mental health difficulties, the Respondent created an intimidating and hostile environment for the Claimant. Despite her effectively doing a job previously done by herself and three others (albeit with some adhoc assistance from Lee Taylor and Justin Ward) she was provided with no meaningful support or assistance. By contrast, by their actions the Respondent undermined the Claimant and signaled that she was no longer valued or respected as an employee.
45. The conduct that she was subjected to included being shouted at in an office setting by a senior director (Justin Ward). One such incident prompted the Claimant to message her partner in the following terms on 9.6.22: "*...I walked out of the office in tears this morning, Karen convinced me to go back. It's just not a nice place to work and I know I just can't up and leave because of the kids and money. What Justin did I was warned would happen by previous managers so I kind of expected it but not nice being on the receiving end xx*".
46. Other conduct she was subjected to included another senior Director making repeated comments about her weight. This caused the Claimant immediate humiliation and ongoing anguish and concern, as contemporaneous WhatsApp messages to her partner again evidenced [16.6.22, p.193].
47. Her self-esteem and confidence were further impacted by actions that included advertising a more junior role at a potentially higher salary and refusing to assist her to work from home as they previously had done. The Respondent also unreasonably, in the context of a meeting on 6.7.22, accused her of finding excuses to avoid working properly and efficiently, something that the Tribunal described as "*demonstrating an insensitive, unsupportive and inflexible attitude to an employee who the Respondent knew to have had difficulties with her mental health and who was further managing the commercial side of the business that was significantly understaffed.*"
48. Very shortly after the 6.7.22 meeting the Claimant was signed off as sick from work as a result of her mental health. She remained unwell and was signed off from work with "depression and anxiety" initially from 12.7.22 to 31.7.22 and then from 1.8.23 to 23.8.22. The Tribunal accepted that her treatment by the Respondent was a significant reason for her being signed off work for that period, notwithstanding other serious stressors in her private life that are also detailed in both her evidence and medical records. In reaching such a conclusion the Tribunal has had regard not just to the Claimant's evidence but also that of her partner Derek Mallet who described her reaction to work events in clear and measured terms.
49. The Tribunal also had regard to the Claimant's medical notes that demonstrated

that consulted and described the impact of events at work on her to her GP. For example, on 12.7.22 she told her GP that she made herself sick at work due to stress only to be accused by her line manager of “having worms” and that one of her bosses “won’t talk to me” whilst the other “constantly puts me down”. On 14.7.22 her GP recorded that she was experiencing “bullying at work” and that she was “very much reactive to her work environment”. The Tribunal did not ignore that those notes also reference the other stressors and difficulties in her private life. However, the Tribunal accepted that the Claimant had had to contend with similar such issues previously and over a sustained period of time. Despite such issues she had not had to take extended periods of time off work as direct result of issues in her personal life.

50. The Claimant’s partner described what he saw of the impact of events at work on the Claimant. He stated that in terms of the stress and anxiety she spoke of and told him about 80% appeared to be as a direct result of work. The Claimant agreed with that assessment and the Tribunal accepted that the Respondent’s treatment during this period was a significant and the main cause of her anxiety and depression. The Tribunal notes that at the point of her return to work on 9.5.22 her depression and anxiety had been under control and had been no barrier to her returning to work.
51. The Claimant’s disability impact statement does detail the fact that prior to the period the Tribunal is dealing with (i.e. post 9.5.22) she had felt anxious and sick at work. However, the Tribunal accepted that her levels of anxiety and stress became much worse following her return to work as a result of the Respondent’s discriminatory treatment of her. The Tribunal accepted the evidence set out in her Impact statement where she described getting to the point where she was having anxiety attacks every morning and she would constantly purge and make herself sick. By the time she was again signed off work ill in July 2022 she could not get out of bed and felt worthless as a result of her treatment. She also described the impact on her confidence and self-esteem that the Tribunal accepts was severe.
52. The Tribunal concluded that the injury to feelings in this case caused by the Respondent’s actions was significant and extended over a period of time. The Tribunal could not accept the Respondent’s submission that the act of discrimination in this case was solely a one off or isolated act. Such a submission wholly ignored the Tribunal’s conclusions and findings on liability. The Tribunal was satisfied that this was neither an isolated nor one off occurrence. Further it could not be described as a less serious case.
53. As a result, the Tribunal concluded that the appropriate award lay in the middle Vento bracket. The injury to feelings resulted from a number of acts and pattern of behavior over a two month period and was a significant cause of the Respondent being signed off work. The anxiety, stress and humiliation caused to the Claimant was evident in both her written and oral evidence. It was also evidenced by contemporaneous WhatsApp message she had sent (e.g. those following the shouting episode and the comments about her weight) and the evidence of her partner that the Tribunal accepted.
54. The Tribunal did not ignore and had to be alert to the fact that the Claimant did

have other stressors and difficult events in her private life and here took account of the evidence of both her partner (as set out above) and her medical records. The Tribunal was mindful of the principle that it can and must only award compensation for the injury to feelings caused by the unlawful discrimination. However, the Tribunal had no hesitation in concluding that the Respondent's actions did have a notable impact on the Claimant who was, prior to the unlawful discrimination, already mentally vulnerable. Weighing up all the evidence in this case the Tribunal concludes that the appropriate award in this case is the upper part of the middle bracket Vento bracket. The Tribunal therefore awards £24,000.

55. The Tribunal further concluded that it was appropriate to award interest on that sum. Given that the award results from a number of acts of discrimination over a period of time, the Tribunal has taken the end date of the Claimant's employment as the start date for assessing interest, namely 26.8.22. Interest at 8% between 26.8.22 and 6.11.23 is £2,304.

Aggravated damages

56. The Claimant argued that the Respondent should pay an award of aggravated damages. This was on the basis of how they had conducted the proceedings namely the fact that neither Lee Taylor nor Justin Ward accepted that they knew about the Claimant's mental health difficulties prior to 9.5.23.

57. The Tribunal did not accept the evidence of either Mr Taylor or Mr Ward on that issue for reasons that are set out in detail in the written reasons on liability. Further, the Tribunal noted that their evidence on this topic (their denial they knew she suffered mental health difficulties prior to 9.5.22) caused the Claimant particular upset during the hearing.

58. The Tribunal can award aggravated damages albeit the bar is a necessarily high one. Litigation conduct that can give rise to such an award includes conducting a trial in an unnecessarily oppressive manner, failing or failing to treat the complaint with the requisite seriousness.

59. Whilst the Tribunal rejected Mr Taylor and Ward's evidence in large part and, in particular their evidence concerning when they first knew about the Claimant's mental health difficulties, the Respondent did in fact concede the fact of the Claimant's disability. Further, the Respondent also accepted knowledge of the Claimant's disability from 9.5.23 which was before all of the alleged acts of discrimination. Whilst the denials of Mr Taylor and Ward, in the face of very strong evidence to the contrary, was a source of frustration and upset to the Claimant, the Tribunal concluded that it was not something that must or should, in these circumstances, result in an award of aggravated damages.

Loss of statutory Rights

60. The dispute here was whether the appropriate figure was £500 or £250. Determining this involves a necessarily broad-brush approach. The Tribunal considered that £500 was not an unreasonable or improper amount and so accepted the Claimant's argument on this point.

Recoupment

61. The Employment Protection (Recoupment of Jobseeker's Allowance & Income Support) Regulations 1996 apply to the Claimant's award for past loss of earnings. For the purpose of regulation 4 of the Regulations the relevant information is as follows:

- a. Prescribed element: £15,420.50. Before the statutory cap the compensatory award for past loss of earnings was £22,224.57. This has been reduced down to the statutory cap of £18,512, a reduction of 16.7%. As a result, the prescribed amount of £18,512 should be reduced by 16.7% down to £15,420.50.
- b. Prescribed period: 26.8.22 – 6.11.23
- c. Total Monetary award: £56,542.06
- d. Excess of total monetary award over prescribed element: £41,121.56

Conclusion

62. The total award is therefore as set out at the start of these written reasons.

Employment Judge Horder
Oral Judgement delivered on 06/11/2023
Written reasons dated 16/11/2023

Sent to the parties on: 13/12/2023

For the Tribunal Office: