EMPLOYMENT TRIBUNALS

Claimant: Mr D Ford

First Respondent: Ingenica Solutions Ltd
Second Respondent: Mr S O'Callaghan

Heard at: London Central **On:** 1 to 2 February 2023

Before: Employment Judge Nash
Mr K Ghobti Ravandi
Mr P Alleyne

Representation
Claimant: Mr Murden of counsel
Respondent: Ms Duane of counsel

REMEDY JUDGMENT having been sent to the parties and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REMEDY REASONS

1. The remedy hearing proceeded directly after judgment was handed down on liability. The tribunal had sight of the same bundle.

2. In respect of evidence the Tribunal heard from the Claimant who relied on his written witness statement and on his disability impact statement. The respondent led no oral evidence. The Tribunal also took into account the evidence it had heard at the liability hearing.

Issues

3. After discussion it was agreed that the only issues for the Tribunal to determine at the remedy hearing were in respect of compensation under s.15 Equality Act : (i) what if any loss of earnings the Claimant should be entitled to and (ii) what if any injury to feelings he should be entitled to and (iii) whether or not interest should be awarded. The tribunal was not required to make findings on other matters going to remedy.

Loss of earnings

4. Discrimination under s.15 Equality Act 2010 is a statutory tort, and thus compensation should seek to put the Claimant in the position he would have been had the discrimination not occurred. This inevitably involves a Tribunal in constructing what might have happened, in a "parallel universe" in which the discrimination did not occur. When assessing what earnings the claimant would have received absent the unlawful act, the Tribunal adopted the reasoning in *Software 2000* Ltd *v Andrews* [2007] ICR 825. When seeking to re-construct what might have been, the tribunal has no choice but to speculate. Nevertheless, it must do so based on the evidence.

5. Had the discrimination not occurred, the Tribunal found that the Claimant would have returned to work for the Respondent on an amended version of Doctor Poulter's plan dated 17 June 2022 (a phased return 4 hours a day 4 days a week and building up to full time in 5 weeks being only 37 hours over 4 days). However the tribunal found that, based on the serious issues the claimant continued to suffer with his health, the adjusted return would have been slower and more gradual than Dr Poulter's plan. The respondent would have carried out a stress risk assessment.

6. The Tribunal considered what effect the claimant's phased return would have had on the respondent's headcount.

7. Before the Claimant had fallen sick, the higher management function of the Respondent consisted of the Claimant and Ms Hall working in effect full time with a contribution by Mr O'Callaghan in the later stages. By July 2022 - when the Claimant would have been returning - Ms Hall was no longer there. Mr O'Callaghan remained working ten days a month. Mr O'Callaghan had restructured the respondent's management function by putting in three directors reporting into his role and a significant amount of the operational management function had been delegated to them.

8. The tribunal found that the Claimant would have been able to have come back working no more than part time at 50%, with the support from Mr O'Callaghan and with the three directors doing many of his previous duties. The reason was that the claimant's ill health would have limited his ability to return full time. His health was still by early 2024 very seriously affected. The Claimant's evidence was that, even at his best in July 2022 he was not functioning on average one day a week, and this was unpredictable. Whilst a return to work may have mitigated his ill health, the tribunal found that it was unlikely to cure it completely. The most likely outcome was that the

claimant would be able to work no more than 50% of a full-time role, even after a phased return.

9. As there had been significant respondent redundancies during 2022, it was reasonable to assume that there would have been at least some commensurate reduction in the head count at the top management level, compared to that in October 2020. It would therefore have been likely that Mr O'Callaghan would have continued working for the Respondent but reduced to about six days.

10. Upon return the Claimant would, in the absence of Ms Hall, have taken responsibility for much of the running of the company. Further as the co-founder and an employee - compared to Mr O'Callaghan who was brought in as a consultant - he would have felt things more deeply and been more involved. To put it another way, the buck would have stopped with him.

11. The question for the Tribunal, therefore, was how the Claimant would have reacted to the situation. The Tribunal had no medical evidence in respect of the Claimant's health after the Poulter report in June 2022. The Tribunal did not have sight of GP records, which the Tribunal would have expected to be available. The Tribunal had no medical evidence as to what the Claimant's medical situation might have been had he returned to work. The claimant's evidence was that, when he did not return to work, his health worsened considerably following June and July 2022; this was a long-term effect and continued during the tribunal hearing. Nevertheless, the final OH doctor, albeit only over the telephone, judged him fit to return to work in September 2022. The tribunal had no medical evidence as to what would have happened had he returned to work. The Claimant's case was that the significant worsening of his condition would not have happened absent the discrimination and that he would have been able to return to work full time following a phased return.

12. The Respondent would have carried out a stress risk assessment upon the claimant's return. In view of the Tribunal, Doctor Poulter's attitude to the way a CEO might avoid stress was unrealistic. Whilst stress coping mechanisms could be put in place, and some responsibilities moved around, there was no avoiding the fact that a CEO of struggling business, such as the respondent at this time, would be under very significant pressure. According to the Claimant's evidence, it was the demands of the business that were the main precipitating factor in his falling ill in the first place. He said this in terms in his witness statement written in February 2024. He also stated this in his letter to his lawyers in January 2022, which was written materially closer in time to the events. According to his January 2022 letter, the main pressure was in effect keeping his investors happy. The investors sat on the board and had considerable control.

13. In the medical evidence predating July 2022, the prognosis was essentially that it was going to be a long haul but it should lead to a reasonably full recovery. However, as of February 2024 unfortunately the Claimant was not close to a full recovery.

14. In view of the Tribunal the most helpful evidence was that the demands placed on the claimant as CEO - especially from October 2021 to February 2022 - were such that in

his own words he collapsed and he “broke”. As a result of this collapse he became very seriously ill for a very long time. The Tribunal accepted that the cause was predominantly the claimant’s work with the Respondent.

15. In view of the Tribunal some of the demands which led to the claimant’s collapse would have been mitigated by the new structure set up by Mr O’Callaghan. The three directors taking away some of the CEO duties, and Mr O’Callaghan’s input would have given the Claimant some more resilience to deal with the remaining CEO duties.

16. Nevertheless, the Tribunal found that as it was the job of CEO which had precipitated the disability. The investors were still on the board. Ms Hall resigned according to the Claimants account in January 2022 due to the pressure from investors, showing that the pressure from the investors had lasted from at least mid-2021 to early 2022. The tribunal saw no indication that this pressure would have reduced from June/July 2022 onwards.

17. Despite a risk assessment and any mitigating adjustments, upon return the Claimant would still have been the person with primary, if not exclusive, responsibility for keeping the investors happy and dealing with, what in his view, were their unrealistic expectations.

18. In view of the Tribunal, the Claimant would have sought to return to his previous role with a great deal of motivation and determination to succeed. However, even working half time, his health would not have improved sufficiently to permit him to carry out the CEO role in the high-pressured environment which had previously precipitated his health problems. The Tribunal accepted that the claimant was highly motivated to return and that he identified strongly with the company. His financial difficulties provided a further significant motivation as well as his desire to do something with his life. This was evident by the claimant’s pushing to return from February 2022. However, the same pressures which had led to his becoming seriously ill would not have gone away and would have recurred. Whilst those pressures would probably not have been as significant as when he fell ill, they would still have been enough to prevent him from carrying out the role.

19. The Claimant would have come back on a half time basis. After three months, that is on 17 October, it would have become clear that regrettably the situation was not working and the claimant was not functioning effectively as the CEO. The Claimant might have been signed off sick, without sick pay, or he might have resigned. The Tribunal found it was more likely that he would not have done this because was committed to the company. He would have carried on working. Accordingly the Respondent would have put him through a capability procedure. In view of the Tribunal, a fair and reasonable capability procedure would have taken two months and would have resulted in a fair dismissal on capacity grounds on 17 December 2022. The Claimant would then have been entitled to six months’ notice and would have been paid up to 16 June 2023.

20. The tribunal went on to determine the amount of notice pay. Whilst the Claimant would have come back half time, this would not have been a permanent contractual variation because the Claimant would have kept hoping for an eventual full-time return. Therefore, his contract would have remained that of a full-time employee and the notice pay would have been paid on a full-time basis. For the avoidance of doubt, the Claimant would not have been entitled to any bonus due in May 2023 because he would have been either already dismissed or serving his notice of termination.

21. As compensation must put the Claimant in the position he would have been absent the discrimination, the award for loss of earnings must make allowance for the £25,000 awarded for breach of contract, to avoid double recovery.

22. The Tribunal went on to consider whether the respondent had discharged the burden of showing that the Claimant had failed to comply with his duty to mitigate for the period up to 16 June 2023. In the absence of evidence of mitigation, the Tribunal had to determine what would have happened had the claimant mitigated his loss. The tribunal found that he would not have obtained alternative employment by 16 June 2023 for the following reasons. His age would have put him at a disadvantage. He had been dismissed for gross misconduct from a senior role from a company with which he had been associated for ten years and of which he was the co-founder. He had, prior to his dismissal, a poor sickness record.

23. Accordingly, there was no deduction for any failure to mitigate. The Tribunal understood that it was the Claimant's case that from 11 November 2022 until 16 June 2023 he had no income. The tribunal informed the parties that, if the Tribunal had misunderstood the claimant's case, any such income would fall to be deducted.

Injury to Feelings

24. The Tribunal directed itself in line with the following well established factors.

a. An award of injury to feelings is intended to compensate a claimant for the anger, stress and upset caused by unlawful treatment. It is compensatory not punitive, and the focus is on the actual injury suffered and not the gravity of the acts.

b. In respect of the general principles, these are laid out in the *Prison Service v Johnson* [1997] IRLR 162, para 27 and they remind the Tribunal that injury to feelings awards are compensatory and must be just to both parties. Feelings of indignation at the discriminator's conduct should not inflate the award.

c. Awards on one hand must not be too low as to diminish respect for the policy of the anti-discrimination legislation. On the other hand, awards should be restrained for the same purpose.

d. Awards should bear some broad general similarity to the range of awards in personal injury cases and Tribunals should take into account the value of everyday life for the sum they have in mind. Tribunals should also bear in mind the need for the level public respect of awards made.

e. It is settled law that an award of injury to feelings is awarded in line with the bands set out in *Vento v Chief Constable of West Yorkshire 2003 [IRLR102].* This divided the compensation into three bands, the top band, the middle band and the lower band.

f. The Tribunal must concentrate on the injury to the claimant rather than the respondent's act and the Tribunal reminded itself that different individuals react in very different ways to what may be a very similar act or acts. However, a one-off act is, all things being equal, likely to result commonly in injury to a person's feelings than a long catalogue of mistreatment, and vice versa.

g. It is for the claimant to prove the nature and extent of the injury to feelings.

25. The tribunal agreed with the Claimant's submission that compensation should fall within the *Vento* middle band, which at the material date was £9,900 to £29,600. This was a serious case but it did not merit and award in the highest band.

26. The Tribunal took into account the Claimant's evidence at hearing, his written witness statement and his disability impact statement. The Claimant spoke convincingly of his profound sense of loss of the business, once he realised that he was not going to return. He was not simply an employee who had worked for the company for ten years. He had helped found the business and had put a lot of himself into the business over ten years and he was involved in it not only financially but emotionally. Whilst this business was not his only commercial operation, it was very much his main focus.

27. Further, the Claimant was in a vulnerable position when he was subjected to the discrimination due to his medical condition. Whilst the Tribunal found that he would not have been well enough to come back to work permanently, the tribunal accepted that there is a significant difference between an employee who is given a chance and it does not work out, and an employee – such as the claimant - who is never given a chance at all. The tribunal accepted the claimant's evidence that his health had suffered as a result of the discrimination.

28. It is trite law that it is impossible to put the damage done to a person's feelings, their sense of injustice and distress, into money terms. Nevertheless, considering the matter holistically, compensation fell in the middle of the middle band. The Tribunal accordingly awarded £20,000 for injury to feelings.

29. The Tribunal did not adjust this sum for any contributory fault because this was not an exceptional situation, see *First Great Western Ltd -v- Waiyego* [2018]

UKEAT 0056_18_0612. The Tribunal had found that the Claimant's misconduct did not amount to gross misconduct and there were no other circumstances rendering the matter exceptional.

30. The Tribunal went on to determine how to divide the compensation for injury to feelings of £20,000 between the different acts of discrimination as follows:

a. The Tribunal agreed with the Claimant's submission that the majority of the injury was caused by the refusal to return to work. The Tribunal accordingly awarded £14,000.

b. In respect of the failure to pay salary, the tribunal took the view that whilst this was mainly a consequence of the refusal to return, there was a separate injury to the Claimant's feelings because he did not receive money when he was in a difficult financial situation. It awarded £2,000.

c. The Tribunal took the view that the injury flowing from the grievance was limited but it was one of the events that made the Claimant realise that he was not going to return to work. The Tribunal awarded £1,000.

d. In respect of the disciplinary procedure and dismissal, the Tribunal accepted the Claimant's contention that he knew he was going to be dismissed before the procedure started because the respondent had already refused his return to work. The dismissal was a simple consequence of this refusal. Nevertheless, it marked the certain end of his relationship with the respondent and the Tribunal awarded £3,000.

31. The Tribunal did not accept the Respondent's contention that to award interest would be a serious injustice. It agreed with the Claimant's submission that it had heard no evidence going, for instance, to financial hardship in the case of either Respondent. It had not been provided with any financial documents in respect of either Respondent. Accordingly, the tribunal awarded interest on compensation for loss of earnings in accordance with the principles in Reg 6(1)(b) IT(IADC) Regs 1996 and for injury to feelings in accordance with the principles in Reg 6(1)(a) IT(IADC) Regs 1996 .

Calculations

32. After discussion with the parties, the parties worked together on the calculations necessary to finalise the tribunal's award, which were recorded in the tribunal remedy judgment.

Employment Judge Nash
Dated : 19 March 2024

Sent to the parties on:

3 April 2024

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M PARRIS

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For the Tribunal Office