Case No: 2200247/2023

EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MS D WARMAN**
MR D SHAW

CLAIMANT **MS I PILAT**

RESPONDENT **IMPERIAL COLLEGE HEALTHCARE NHS TRUST**

ON: **27 February 2024**

Representation:

For the Claimant: Mr P Ferreira, husband
For the Respondent: Mr L Harris, counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that the Respondent is ordered to pay the Claimant £4,227.19 calculated as set out below .

REASONS

Written reasons given at the request of the Claimant following oral judgment given at the hearing.

1. This was a remedy hearing, following the judgment of the Tribunal sent to the parties on 19th December 2023, in which the Tribunal found that the Respondent had failed to make a reasonable adjustment, and had indirectly discriminated against the Claimant when, for a period of some seven weeks from 7 December 2022 - 25th January 2023 it required her to work from 9-5 , Monday to Friday, rather than on a pattern of compressed hours over 4 days which she had previously enjoyed.

2. The issues were (i) to establish the appropriate award for injury to feelings, (ii) whether to award an uplift for failure to comply with the ACAS code and (iii) whether it was appropriate to award aggravated damages.

3. We had a short bundle of additional documents for the remedy hearing. The Claimant had served an updated schedule of loss, which added a claim for aggravated damages, and provided what was effectively an updated witness statement. We heard evidence from her and had submissions from both parties.

The law

4. Section 124 of the Equality Act 2010 provides that if an employment tribunal finds that there has been a contravention of the Equality Act the tribunal may— (a) make a declaration as to the rights of the complainant and the Respondent in relation to the matters to which the proceedings relate; (b) order the Respondent to pay compensation to the complainant; (c) make an appropriate recommendation.

5. In Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA Lord Justice Mummery identified three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury. These comprised: a top band, to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment, a middle band for serious cases that do not merit an award in the highest band, and a lower band appropriate for less serious cases.

6. These bands have been adjusted for inflation since that judgment. At the time that the discrimination in this case occurred the relevant bands were a lower band of £990 to £9,900, a middle band of £9,900 – £29,600, and a higher band for the most serious cases of £29,600 – £49,300.

7. Aggravated damages can be awarded in a discrimination case where the employer has behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination. (Alexander v Home Office 1988 ICR 685). In Commissioner of Police of the Metropolis v Shaw 2012 ICR 464 the EAT identified three broad categories of case where aggravated damages can be awarded:

   a. where the manner in which the wrong was committed was particularly upsetting
   b. where there was a discriminatory motive
   c. where subsequent conduct adds to the injury.

8. The Tribunal has power, if it considers it just and equitable in all the circumstances, to increase or decrease an award by up to 25% were there has been an unreasonable failure, by either party, to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

(Section 207A of the trade Union and Labour Relations (Consolidation) Act 1992.)

Reasons for our award

9. In this case the Claimant has remained employed throughout and there has been no financial loss but, as we found, the Respondent has for a limited period failed in his duty of to make reasonable adjustments for the Claimant.

10. As both parties submitted, in assessing the injury to the Claimant's feelings we have to take the Claimant as we find her. On the other hand, what we have to compensate her for is the injury to her feelings caused by the failures found by the Tribunal. We have no power to award compensation for upset caused to the Claimant by actions of the Respondent which were not unlawful.

11. It is apparent, both from the evidence we heard during the liability hearing and the evidence we heard during today's hearing, that a large part of the Claimant's upset relates to the fact that the Respondent has not made the compressed working hours pattern that she currently enjoys into a contractual and permanent arrangement. She raised this at the very start of the liability hearing and referred to it again at paragraph 501 of her liability witness statement. She has repeatedly said that her concern is that this 4-day pattern is subject to review and may be withdrawn. We have made no finding that the Respondent has a duty to make that arrangement permanent. On the contrary, as we said in our judgment, the situation must always be judged by the facts as they are at the relevant time. The Claimant complains, and is upset, about the uncertainty that this brings- but that is not something for which she can be compensated.

12. In addition it is also apparent that the Claimant's feelings have been injured about matters that occurred before 7 December 2022 and matters that occurred after 25 January 2023. All Those are not matters for which this remedy hearing can compensate her for.

13. It is of course difficult to extrapolate the extent to which the Claimant's feelings were injured by the sudden withdrawal of her compressed hours (done, as Mr Ferreira rightly submits, without notice) as opposed to the injury to her feelings caused by matters in respect of which she felt and continues to feel aggrieved, but which were not as a result of any unlawful treatment on the part of the Respondent. We consider and continue to consider that the major part of the Claimant's upset is because this arrangement is not permanent. She is also concerned that the reinstatement of her 4 day compressed hours pattern (as a result of her successful internal appeal) was not made formally as a reasonable adjustment- but the fact remains that after 25th January an adjustment had been made which meant that she was no longer at a substantial disadvantage.

14. Doing the best we can we consider that the injury to feelings caused by the sudden, but temporary, withdrawal of her flexible working arrangement is towards the lower end of the lower Vento band. We note that this withdrawal was always subject to her right to appeal, and followed a long period in which the compressed working pattern had been the subject of dispute.

15. Taking all these factors together we consider that an award of £3,500 is appropriate, together with interest at 8% from 7 December 2022 until today's date. We do not consider the cases which were cited by Mr Ferreira are of assistance. (Philips v Bournemouth and Poole College 1404996/19(a first instance case), Transco Plc v O'Brien 2002 EWCA Civ 379 and Slade and Anor v Biggs and Ors 2022 IRLR 216.) Each case must be decided in the light of its own particular facts.

16. This is not a case which gets anywhere near the relatively high threshold for an award for aggravated damages. We do not accept that the Respondent behaved in a high-handed, malicious, insulting or oppressive manner. The withdrawal of the Claimant's compressed working hours pattern was specifically said to be subject to appeal. It followed a long period in which Ms Lewis had sought to address the Claimant's workload, and during which she had had numerous discussions with the Claimant to find a solution. As we said in the liability judgment the Respondent made considerable efforts to assist the Claimant during the process. We found that Ms Lewis was trying to assist the Claimant, while at the same time balancing the needs of the service.

17. Finally we turn to the ACAS uplift. The Claimant submitted a grievance on 18 October 2022. This appears at page 626 onwards of the liability bundle. Reading that grievance it is apparent that, while it is primarily about the Claimant's working pattern, it also covers a number of other matters such as the conduct of the Respondent during the Claimant's sickness absence and other vaguer complaints such as gas lighting, failure to carry out an equality impact statement, intimidation and disrespect.

18. The Respondent took the view that, as this was primarily about the Claimant's working pattern, it should be dealt with as part of her appeal. However there was no attempt to deal with all those parts of her grievance which were not directly connected with her working pattern. As such we find that the Respondent did not comply with the ACAS code on discipline and grievances at work because it did not arrange for a formal grievance meeting or deal with those aspects of her complaint that were not related to the flexible working policy.

19. We also find that this failure was unreasonable. We find that an uplift of 10% is appropriate under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

20. We do not consider that an uplift of 25% is appropriate because the Respondent did hold a meeting to deal with the major part of her grievance, namely her desire to work compressed hours over four days a week. It matters not that the meeting to deal with that part of her grievance was technically an appeal provided that the matter was appropriately discussed.

Calculation

21. We award the following:

a.	Injury to feelings	£3,500
b.	Interest at 8% (7 December 2022- 27 February 2024)	- £342.9
c.	£3,842.9 +10%	£384.3
d.	TOTAL	£4,227.19

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Employment Judge Spencer
4 April 2024

JUDGMENT SENT TO THE PARTIES ON:
11 April 2024

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FOR THE TRIBUNAL OFFICE