



EMPLOYMENT TRIBUNALS

Claimant: Mr. G. R. Salietti
Respondent: London Underground Ltd

Heard at: Watford by CVP
On: 24, 25 June 2024 and 10 July 2024
Before: Employment Judge S. Matthews
Members: Ms. P. Alford
Mr. J. Hutchings

Representation

Claimant: In Person
Respondent: Miss Tharoo (Counsel)

JUDGMENT on remedy having been sent to the parties on 27 August 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a judgment on remedy following a judgment on liability dated 4 March 2024.
2. At the liability hearing the claimant was successful in his claim for unfair dismissal, failure to make reasonable adjustments and discrimination arising from disability.
3. The remedy hearing was listed for 2 days, during which we heard evidence and submissions. The case was listed for a further day. We set out our factual findings in the morning and heard submissions relating to the calculations arising from our findings in the afternoon.
4. We had a bundle of 1,743 pages. At the beginning of the first day of the hearing we dealt with preliminary matters, in particular, there was discussion about correspondence culminating in a letter from the respondent, dated 19 June 2024, with an attachment of 291 pages. This was data showing full-time and part-time roles since September 2021 which had been requested by the claimant. The respondent disputed the relevance of the data. We agree that it was not relevant to the findings we needed to make. We found in the liability hearing that the claimant should have been offered a role for 6 hours a week and that was identified as the

Coverage Administrator role (see paragraph 46 below). Documentation about the availability of other roles was therefore not relevant.

5. We heard oral evidence from the claimant and from the following witnesses on behalf of the respondent:

Penny Woods, Network Operations Coverage Manager,

Karen Henderson, Redeployment Specialist, Business Services team

Tim Hanley, Head of Pensions.

6. The claimant and the respondent's witnesses provided written statements in advance, and the tribunal took time to read them. Each witness was asked questions about the evidence contained in their statements.
7. We received an opening note from counsel for the respondent, a Schedule of Loss from the claimant and a Counter Schedule of Loss from the respondent.
8. References to pages in the bundle below are set out in brackets(x). References to paragraphs in the witness statements consist of the witness's initials and number of the paragraph (AB-YZ).

The issues

9. The issues for the hearing were as follows:

1. Remedy for unfair dismissal

If there is a compensatory award, how much should it be? The Tribunal will decide:

What financial losses has the dismissal caused the claimant?

Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

If not, for what period of loss should the claimant be compensated?

Does the statutory cap of fifty-two weeks' pay apply?

What basic award is payable to the claimant, if any?

2. Remedy for discrimination

What financial losses has the discrimination caused the claimant?

Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

If not, for what period of loss should the claimant be compensated?

What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

Should interest be awarded? How much?

10. We clarified the issues at the outset of the hearing in the light of the liability judgment. We had found that the claimant was unfairly dismissed (paragraph 188 of the liability judgment). He should have been offered a role working from home three days a week for two hours on each of those days as a reasonable adjustment (paragraph 189 of the liability judgment). We observed that we had not heard any evidence that the claimant would have been medically capable of performing his role over the longer term or increasing his hours (paragraph 190 of the liability judgment). In the case management order for the remedy hearing at 2.2 we said:

“In considering what financial loss the claimant has been caused the tribunal will expect to hear evidence on whether the claimant would have been medically capable of performing the role over the longer term or increasing his hours.”

11. The task for the tribunal was therefore to decide what would have occurred if the claimant had not been dismissed and instead had been offered a role for two hours a day on three days a week. That requires us to find what role he would have been offered, what his salary would be for that role, whether he would have been well enough to continue in that role and whether he would have increased his hours over the time. If he could not increase his hours would he have remained in that role indefinitely?

Submissions

12. We heard submissions from the claimant and from Miss Tharoo on behalf of the respondent.
13. The claimant says that he was improving at the time of his dismissal, but his health deteriorated afterwards. He says that if he had not been dismissed his health would not have deteriorated and he would have been able to progress to work three full days a week within about a year. He asserts that because of the discrimination he is unable to work again. He claims full loss of earnings up to the age of 65.
14. The respondent's case is that the claimant's health did not improve and he would have been fairly dismissed on the grounds of capability within a short time of starting the new role. It was not viable to employ him in a role working from home for six hours a week. It would have been too challenging in terms of training and workload management.
15. The respondent set out three scenarios in their Counter Schedule. In each case the employment is terminated after 12 weeks. The scenarios are:

Scenario A: Coverage Administrator paid six hours a week.

Scenario B: Coverage Administrator paid the full-time rate for this role while he attempted a phased return.

Scenario C: a Business Support role which was advertised at 19 hours a week. He would have started working in this role for 6 hours a week and attempted to increase his hours to 19 hours. He would commence on the full salary for the role while he attempted to build up his hours.

Legal principles on remedy

16. The remedy for complaints of discrimination at work is set out in section 124 of the Equality Act 2010. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision, as there has been here, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.
17. The aim of compensation is that *'as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct'* (*Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position they would have been in if the discrimination had not occurred. This requires the tribunal to look at what loss has been caused by the discrimination.
18. Loss includes past and future financial losses and injury to feelings.
19. In *Prison Service and others v Johnson* [1997] ICR 275 EAT, the EAT set out the following principles that the ET should consider in making an award for injury to feelings:
 - (i) *Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.*
 - (ii) *Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination 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, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."*
 - (iii) *Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.*
 - (iv) *In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*

(v) *Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made."*

20. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 the Court of Appeal dealt with compensating injury to feelings; subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression. It identified three broad bands of compensation. For claims presented on or after April 2021 as the claimant's was, the lower band is £900 to £9100 (less serious cases); the middle band £9100 to £27,400 (cases that do not merit an award in the upper band); and the upper band £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.
21. The tribunal have the power to award compensation for personal injury both physical and psychiatric, in addition to any award for injury to feelings. The tribunal has to decide what personal injury the claimant suffered from and carefully look at the cause of that personal injury. If the injury or harm is caused by multiple factors, the respondent is only liable if its contribution has been material, and to the extent of its contribution, the harm needs to be dividable. The tribunal must identify a rational basis on which the harm can be apportioned. The tribunal must take care not to double compensate.
22. Section 118 of the Employment Rights Act 1996 provides that compensation for unfair dismissal consists of a basic award and a compensatory award.
23. Section 123 of Employment Rights Act says that the compensatory award shall be:

"Such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".

Factual Background

24. We set out the relevant findings of fact. These are facts taken from the liability judgment and from the evidence before us at the remedy hearing.
25. The claimant commenced employment on 9 May 2016. He contracted Covid on 6 April 2020 and commenced sickness absence. He was diagnosed with Long Covid syndrome on 28 February 2021.
26. Mr Hillman (Consultant in Respiratory Medicine) prepared a report on 28 February 2021 stating that the prognosis of post Covid patients is notoriously hard to estimate and opining that the claimant may enter into a state of chronic fatigue (paragraph 62 of the liability judgment).
27. The respondent implemented their Attendance at Work procedure which culminated in the claimant going into the Redeployment Unit on 11 May 2021. The purpose of the move to the Redeployment Unit was to see if

another role could be found for the claimant.

28. In oral evidence at the liability hearing the claimant explained that the move to the Redeployment unit was attractive to him because it meant that his pay would continue. He said that he needed more time, and he hoped he would get better, although with the benefit of hindsight he did not get better, (paragraph 70 of the liability judgment).
29. Another role was not offered to the claimant, and the claimant's employment was terminated on 25 September 2021. The claimant was paid sick pay until termination of his employment.
30. At that point in time the prognosis was unclear. The claimant had told Deborah Bowen that he became exhausted after two hours (paragraph 92 of the liability judgment), and the union representative asked if he could work from home for a few hours a week (paragraph 105 of the liability judgment).
31. We found that, as a reasonable adjustment, the claimant should have been considered for the Coverage Administrator (CA) role or another role where he worked two hours, three days a week.

Medical evidence up to date of dismissal in September 2021

32. The GP notes from 1 April 2021 to 1 April 2023, (946 to 986) record a diagnosis of chronic fatigue syndrome from 12 March 2021 (986).
33. On 17 August 2021, just over a month before termination of his employment, the claimant had a telephone consultation with his GP. The entries leading up to the consultation suggest this was ostensibly about completion of his pension fund form. She records that he is suffering less fatigue and dizziness and that he 'maybe work from home/stations if breaks and phased return' (989). We find that this is the GP reporting what was said by the claimant rather than her independent opinion. The claimant was hoping he could retain a job and wanted to be optimistic about his chances of recovery.
34. The claimant also relies on a letter dated 8 January 2024 from the Mr. Kiashek, the osteopath that treated him between 5 March 2021 and September 2021. It covers the period to September 2021. He reports that the claimant had made good progress, but fatigue was still a relevant factor (680).

Medical evidence for the period from September 2021 to 1 April 2023

35. The claimant's case is that his health deteriorated after his dismissal (GS/79 to 91). He suffered from a rash and weight loss after dismissal which the claimant attributes to stress.
36. We carefully reviewed the medical notes from around the time of dismissal (25 September 2021) to August 2023.
37. Just before the date of dismissal on 16 September 2021 there is a reference to scabies on the claimant's trunk and arms (982).

38. On 3 December 2021 the claimant had a telephone conversation with Dr Bajaj (a specialist in chronic fatigue and fibromyalgia), in which he records the claimant reporting that he cannot use his brain or remember things. He does not refer to deterioration since September 2021 but 'he feels that his physical fatigue is still the same' (342 to 344).
39. A physiotherapy report dated 7 December 2021 does not refer to deterioration; it refers to persistent fatigue and other symptoms such as unexplained weight loss and altered gait (339-340).
40. On 26 January 2022 Dr Devaraj (clinical fellow in the Post Covid Clinic) has a telephone consultation with the claimant in which the claimant refers to himself as two percent better (368-373).
41. On 14 February 2022, the claimant attended Accident & Emergency (A&E) due to shortness of breath. He was discharged with no follow up (389). A diagnosis of anxiety disorder is referred to; there is no reference to the cause (390).
42. On 1 March 2022, two weeks after attending A&E, the claimant was seen in the follow up clinic by Dr Price, Consultant Respiratory Physician. She refers to him suffering from symptoms of breathlessness which have got worse on exertion, although the claimant himself thinks his breathing pattern has improved (412).
43. On 21 August 2023 there is a letter from Dr. Bax in support of the claimant's application to the local authority for housing. It refers to the need for a ground floor flat due to breathlessness and significant fatigue which is unlikely to improve in the foreseeable future (600).
44. The symptoms evidenced to August 2023 are consistently symptoms of persistent fatigue. There are minor improvements at times but, overall, from February 2021 when the claimant entered a state of chronic fatigue, the symptoms are maintained at a level that mean that the claimant would not have been able to work more than a few hours a week. We do not find evidence of a deterioration in September 2021 after dismissal. We do not therefore accept the claimant's contention that he was getting better and that he deteriorated because of the dismissal.

Our factual findings taking into account the medical evidence

45. We next considered what would have happened if the claimant had taken on a role working two hours a day, three days a week. On a balance of probabilities we find that the role the claimant would have taken on would be the CA role. That was the role that was under discussion at the time (paragraph 81 of the liability judgment). We find that role is the most likely because the advert referred to it being possible to work from home; the claimant had managed to do some courses while in the Redeployment unit and the respondent had managed to train one person remotely. We find that he would have tried out the role with a view to a phased return. During that time both he and the respondent would be assessing if he could get better so that he could do more hours a week (scenario B on the Counter schedule).

46. We have considered whether the claimant would have taken on the Business Support role (Scenario C) but decided the CA role was more likely. That was the role identified as potentially suitable for the claimant in September 2021. The full-time pay for the CA role was comparable to the claimant's salary in his former role. The Business Support role was 19 hours a week and would not have been attractive to the claimant as he would not have been paid a rate comparable to his previous salary.
47. We accept the respondent's evidence that it was not viable for the claimant to work in the CA role for six hours a week over the long term. Ms. Woods described the role as 'full-on' for seven hours a day. It required a careful analysis of constantly updated information. It would not be suited to stopping and starting which would be necessary if the claimant was only doing it for two hours at a time.
48. Having decided that doing the role for only 6 hours a week was not viable over the longer term, we have considered how long the claimant would have been kept in that role. The secondment was for six months with a view to permanency. One employee who was ultimately deemed not suitable did remain seconded for six months (Ms. Woods' oral evidence) but that person was working full-time. The claimant's circumstances were different. We decided that the most likely scenario was that the claimant would have attempted the role for 12 weeks, until 17 December 2021, before it was realised that it was not going to work out long-term. That is consistent with him reporting to Dr. Bajaj at that time that he could not use his brain or remember things (paragraph 38 above). It is reasonable to infer he would have been struggling in the role.
49. On termination of the secondment an employee in the claimant's circumstances would return to the Redeployment Unit, ostensibly under their original line manager, and be paid for their substantive role while the Attendance at Work Policy was followed (Ms. Henderson oral evidence).
50. Therefore, on 18 December 2021 the claimant would have returned to the Redeployment Unit and be paid the salary for his substantive role while the Attendance at Work procedures were followed. It is likely that the respondent would have obtained another Occupational Health report and written to the claimant's consultant and GP. This would have taken approximately 12 weeks. The information received would have confirmed that the claimant's condition was not improving. His employment would then be fairly terminated on 12 March 2022 on the grounds of capability.
51. We find that the claimant has not been well enough to return to any form of work since his employment was terminated by the respondent.

Injury to feelings

52. In deciding on compensation for injury to feelings we have given careful consideration to the divisibility of the claimant's feelings which arose out of the discrimination and the feelings which arose out of the fact that he has been diagnosed with a chronic illness with a very uncertain prognosis.
53. We find that the feelings that arise from the discrimination account for considerably more than 50% of the upset and mental distress that the

claimant is suffering from. We found that the claimant has to an extent come to terms with being diagnosed with Long Covid, but he has not come to terms with the way he was treated by the respondent. The discrimination has caused him to feel humiliated, stressed and anguished. The anxiety which he suffered as a result of losing his income is clear from the evidence we heard about how he was feeling even before his employment was terminated during the Attendance at Work procedures.

54. In making an award for injury to feelings we are not compensating the claimant for the fact he contracted Covid and everything that flowed from that. We are compensating him for the discrimination which occurred arising from the disability and the failure to make reasonable adjustments. The claimant said in his statement and closing submissions that the respondent has a moral obligation because he considers that his Covid was caused by the respondent but that is not a matter for the tribunal to decide.
55. We decided to award £25,000 for injury to feelings which is near the top of the middle Vento bracket. We do not consider this is a case warranting an award in the upper bracket; there was not sustained long-term discrimination, but there is no doubt that at the time, and since, it has caused him considerable distress.
56. We have decided not to award a separate award for personal injury. We have not received any medical evidence to indicate a separate psychiatric injury. The distress, depression and anxiety is reflected in the injury to feelings award.

Calculations

57. We set out below calculations based on our factual findings. These calculations were discussed during the hearing and agreed by the parties except where we have indicated otherwise.
58. The claimant was 46 years old at the time of the dismissal on 25 September 2021. He had five years of continuous service at the time of his dismissal. He was paid in lieu of notice for his contractual entitlement of 5 weeks.
59. In his substantive role the claimant's gross weekly pay was £678.02 and his net weekly pay was £506.42.
60. The salary for the CA role was £35,926 per year. That is equivalent to net weekly pay for the tax year 2021 to 2022 of £540.22.

Loss of earnings

61. If the claimant had been offered the CA role he would have been entitled to pay for the period of 12 weeks from 25 September 2021 to 17 December 2021. This means that the net loss for this period is $£540.22 \times 12 = £6,482.64$.
62. Following his return to the Redeployment unit he would have been paid for 12 weeks at the salary for his substantive role. This means that his loss of net pay for this period is $£506.42 \times 12 = £6,077.04$.

63. As there are no recoupment provisions in respect of compensation for discrimination, the claimant must give credit for state benefits received (as he would not have received those benefits if he had remained at work). The claimant did not provide precise details or documentation relating to the state benefits that he received after termination of his employment to 12 March 2022, the date we found the respondent should compensate him to. During the course of the hearing counsel for the respondent confirmed that the respondent was prepared to agree the sum at £2047.
64. We do not make an award for loss of earnings after 12 March 2022 because we found that the claimant was not capable of working in any role after that date.

Other financial losses

65. We do make an award for compensation for health insurance as the claimant did not receive this as part of his remuneration. Further we do make an award for compensation for the removal of the claimant's travel card as he has not provided evidence of actual loss, such as receipts for journeys undertaken.

Pension

66. Mr. Hanley's calculations demonstrate that if the claimant's employment had been terminated at a later date (as the tribunal found it should) the claimant's annual ill health retirement pension would have been £395.11 higher.
67. At the respondent's suggestion we made an order that the pension fund pay the claimant the differential between this figure and the amount paid to date, and then pay the new increased figure moving forward. We were satisfied that this was a more proportionate way of dealing with the shortfall than awarding a lump sum as the pension will be paid over the long term.
68. The claimant would have made pension contributions between September 2021 and March 2022. This is money which he not would have received and must be deducted from his loss of earnings. That amounts to the sum of £365.45. It is also necessary to deduct the IHR pension which was paid to him up to 12 March 2022 as he would not have received this sum if he had continued to work during that period.
69. We award interest on the financial losses award. Interest on financial loss is payable at a rate of 8% from the midpoint of the period which runs from the date of the discrimination to the date of calculation. The discrimination started on 25 September when the respondent failed to offer the claimant the CA role. That is therefore 510 days.
70. Interest on injury to feelings awards is payable at a rate of 8% for the whole period from the date of the discrimination to the date of calculation. That is therefore 1020 days.
71. For compensation for unfair dismissal the claimant is entitled to a basic award of 7 x £544, because of his length of service and age at dismissal. That amounts to £3808.

72. The claimant has lost his statutory rights as a result of the dismissal. We award £500 as compensation for loss of statutory rights to reflect the loss of statutory protection (*Countrywide Estate Agents and others v Turner* UKEAT02/08/13/LA).
73. The claimant's award for the discrimination complaints includes compensation for other elements of financial loss which he would have received in the compensatory award for unfair dismissal such as financial loss and pension loss. To avoid double recovery (compensating for the same losses twice) these losses are not included in the compensatory award for unfair dismissal.
74. No interest is payable on the unfair dismissal or statutory rights elements of the award.
75. Awards may be grossed up by a tribunal where the sum to be received by the claimant will be taxed. The claimant did not make any representations about grossing up to compensate for taxation at the hearing. Since giving Judgment the tribunal has been copied in to correspondence that the respondent has had with the claimant immediately following the hearing in which the respondent agreed to pay an additional sum to compensate the claimant for the sum he will have to pay for tax on the damages over £30,000.
76. The calculation, save for the grossing up is summarised as follows:

Calculation

Loss of earnings 12 weeks for at CA rate (net)	£6,482.64	
Loss of earnings 12 weeks at substantive role	£6,077.04	
Less pension contributions that C would have paid until 12/3/22	£365.45	
Less IHR pension paid to C up to 12/3/22	£3,330.06	
Sub total of past losses		£8,864.17
LESS benefits received by C	£2,047.00	
Total past losses		£6,817.17
Interest on past losses (510 days at 8%)		£762.03
Basic award		£3,808.00
Loss of statutory rights		£500.00
Injury to feelings		£25,000.00
Interest on Injury to Feelings (1020 days at 8%)		£5,589.04
GRAND TOTAL		£42,476.24

Employment Judge S Matthews

Date: 2 September 2024

Judgment sent to the parties on
12 September 2024

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For the Tribunal office

Recording and Transcription

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