Claim No. 1404028/2019

EMPLOYMENT TRIBUNAL

BETWEEN

CLAIMANT	AND	RESPONDENT
Mrs R. Davies		Gloucestershire Health and Care NHS Foundation Trust

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THE REMEDY JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The remedies hearing was held remotely on Friday, the 5th April 2024

Employment Judge: Mr David Harris

Members: Mr Kayvan Ghotbi-Ravandi
Mrs Yvonne Ramsaran

JUDGMENT

1. **The Claimant is awarded the sum of £18,000 for injury to feelings plus interest on that award in the sum of £8,454.60.**

2. **The Claimant is awarded the sum of £612.96 for loss of earnings plus interest on that award in the sum of £141.18.**

3. **There shall be judgment for the Claimant in the total sum of £27,208.74 (inclusive of the award for injury to feelings, the award for loss of earnings and interest).**

REASONS

Background

1. The Tribunal dealt with the issue of liability in this case over the course of seven days in 2020 and 2021. In its judgment dated the 28th March 2021 the claims of disability discrimination under section 15 of the Equality Act 2010 and constructive unfair dismissed were dismissed and the claim of breach of duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 succeeded to the extent that the Tribunal found that there had been a breach of that duty on the part of the Respondent during the period of the Claimant's employment with the Respondent from June 2018 to the 8th July 2019.

2. Accordingly, a remedy is to be awarded to the Claimant in respect of the breach of the duty to make reasonable adjustments as found by the Tribunal.

3. The following passages from the Tribunal's judgment dated the 28th March 2021 set out the Tribunal's reasoning in respect of its decision on the claim for breach of the duty to make reasonable adjustments:

> ***The claim that the Respondent had failed to comply with the duty to make reasonable adjustments***
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> **119. The Tribunal reminded itself that the Claimant must not only establish that the duty to make reasonable adjustments has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached.**
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> **120. Demonstrating that there is an arrangement causing substantial disadvantage envisages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.**
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> **121. That is not to say that in every case a claimant would have to provide the detailed adjustment that would need to be made before the burden will shift to a respondent. It will, however, be necessary for a respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.**
>
> **122. If the burden of proof shifts to the respondent, then it is for the respondent to prove that it complied with the duty to take such steps as were reasonable to avoid the substantial disadvantage or that that proposed adjustment could not reasonably be achieved.**
>
> **123. The alleged "provision, criterion or practice" ('PCP') in this case is that the Respondent imposed a requirement "that the workforce work in a common working area".**
>
> **124. The Respondent conceded that, at all material times, it had applied the alleged PCP.**

125. The Respondent also agreed that the Claimant's disability had the effect that she had a reduced ability to concentrate in noisy environments and that this was a substantial disadvantage. The Tribunal went further, however, and decided that the agreed PCP put the Claimant, having regard to the nature and extent of the disability as found by the Tribunal, at a substantial disadvantage over two distinct periods of time. The PCP put her at a substantial disadvantage in that she had difficulty, in the noisy environment in the small open plan office, on concentrating on her work, difficulty in hearing what other members of staff were saying to her, difficulty remembering instructions and she had to work out-of-hours to compensate.

126. In the judgment of the Tribunal there were two distinct periods of time when the agreed PCP put the Claimant at a substantial disadvantage. The first period of time was from August 2015 to March 2017. It was clear to the Tribunal that the substantial disadvantage to which the Claimant had been put by the agreed PCP was no longer present by March 2017. At that time, the Claimant was managing well with her work and was happy with her work. The substantial disadvantage to which she had been put by the PCP had fallen away, largely because the number of people working in the office had reduced, due to absences, with the result that the noise in the office, and its disabling effects upon the Claimant, had reduced.

127. The second period of time when the agreed PCP put the Claimant at a disadvantage was from June 2018 and it persisted up until the Claimant and the Respondent finally agreed the adjustments that were to be made to the Claimant's work and her workplace on the 8th July 2019. It was in June 2018 that a new Patient Advice & Liaison Officer began work in the office with the result that the noise levels in the office increased to the point that the Claimant, once again, was put to a substantial disadvantage by the ongoing requirement that she had to work in the common working area. That substantial disadvantage persisted until July 2019 when agreement was finally reached as to the adjustments that were required. By that stage it was agreed that the Claimant could move to the quieter desk of her choice, that she would be provided with noise-cancelling headphones and a flashing phone system and that partition screens would be installed around her desk.

128. The next question for the Tribunal to consider was whether the Respondent, during the two periods of substantial disadvantage identified above, had taken such steps as were reasonable to take in order to avoid the substantial disadvantage. On that question, the Tribunal was satisfied that the Respondent had not taken such steps as it was reasonable to take to avoid the substantial disadvantage to which the Claimant was put by the

agreed PCP. The Respondent's case was that it had taken reasonable steps throughout the period of time that the Claimant had complained about the difficulties she was encountering in the office environment. The Tribunal disagreed. The Tribunal was satisfied that the provision of noise-cancelling headphones, access to a quieter part of the office and the provision of partition screens were reasonable steps that it was reasonable for the Respondent to have taken within a short period of time of the Respondent becoming aware of the problems that the Claimant encountered during the first period of substantial disadvantage identified above and then, again, within a short period of time after the start of the second period of substantial disadvantage identified above. The Respondent did not take those steps until July 2019 when it agreed to implement the adjustments sought by the Claimant.

129. Agreement having been reached as to the adjustments that were to be made to enable the Claimant to return to work in the open plan office, the Claimant then, in the judgment of the Tribunal, put up unnecessary barriers to her return to work. Her position was that she wanted to be satisfied that the agreed adjustments had been implemented before she returned to work. The Tribunal, however, was satisfied that there were no reasonable grounds for the Claimant to doubt that the Respondent would implement the agreed adjustments before the Claimant returned to work. The Tribunal was satisfied that the Respondent was genuine in its assurances to the Claimant that the agreed adjustments would be implemented before her return to work and what delayed the Claimant's return to work, thereafter, were the Claimant's unfounded concerns that the agreed adjustments might not be implemented.

130. It follows that the Tribunal was satisfied that there were two distinct periods when the Respondent was in breach of the duty to make reasonable adjustments. The first period was from the 1st September 2015 (i.e. a short time after the start of the first period of substantial disadvantage identified above in August 2015) to March 2017 and the second period was from the 1st July 2018 (i.e. a short time after the start of the second period of substantial disadvantage identified above) to the 8th July 2019.

131. In respect of the first of those periods of breach of the duty to make reasonable adjustments, the Tribunal was satisfied that the Claimant's claim was out of time. The Tribunal was satisfied that there was no continuing breach of the duty to make reasonable adjustments from March 2017 to June 2018. During that period, the Claimant was not being put to a substantial disadvantage by the agreed PCP. The failure to make reasonable adjustments during the period from September 2015 to March 2017 had become a past failure by the end of March 2017.

132. The Tribunal was also satisfied that it was not just and equitable to extend time to bring the claim for disability discrimination arising from the breach of the duty to make reasonable adjustments during the period from September 2015 to March 2017. The reasons for the Tribunal so finding was because of the passage of time and because the Claimant had the benefit of Union advice throughout the period from September 2015 to March 2017 and beyond. In those circumstances, it was not, in the judgment of the Tribunal, just and equitable to extend time to bring the claim of breach of the duty to make reasonable adjustments in respect of a breach that had come to an end by the end of March 2017.

133. As to the breach of the duty to make reasonable adjustments during the period from the 1st July 2018 to the 8th July 2019, the claim in respect of that period is not out of time and the Claimant succeeds in that claim.

4. The Claimant requested, as a reasonable adjustment, that the remedies hearing be conducted "on the papers" without further oral evidence and without oral submissions. The Respondent consented to that approach and so the remedies hearing took place in the absence of the parties.

5. The documents before the Tribunal at the remedies hearing were as follows:

   5.1 a 330-page hearing bundle that had been prepared by the Claimant;

   5.2 a 283-page hearing bundle that had been prepared by the Respondent, which contained (at pages 244-267) the Claimant's written submissions on remedy dated the 27th July 2023 and (at pages 277-283) the Claimant's updated Schedule of Loss dated the 31st August 2023;

   5.3 a letter from the Claimant dated the 31st August 2023 regarding the contents of the bundle prepared by the Respondent;

5.4 a letter from the Claimant dated the 22nd September 2023 containing further submissions on remedy;

5.5 the Respondent's written submissions on remedy.

6. The heads of loss claimed by the Claimant are as follows:

6.1 an award for injury to feelings over the period from March 2014 to October 2019 in the sum of £52,300;

6.2 loss of earnings in the sum of £25,675.84 that post-dated her resignation from her employment with the Respondent on the 24th October 2019;

6.3 miscellaneous disbursements in the sum of £924.00 in presenting her claim and an appeal to the Employment Appeal Tribunal;

6.4 a 25% increase in the award to the Claimant pursuant to the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 for unreasonably failing to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

7. Having reminded itself of its liability decision, the reasons for the decision and its findings of fact in relation to its liability decision and having carefully considered the written evidence in the parties' hearing bundles and their written submissions on remedy, the Tribunal's decision on remedy is as follows:

7.1 <u>Injury to feelings</u>

7.1.1 The Tribunal was reminded by the Respondent, in its written closing submissions, that an award for injury to feelings is compensatory and that it should be just to both parties. The award should fully compensate the Claimant without punishing the Respondent. The award must compensate only for those unlawful acts for which the

Respondent has been found liable and the burden of proving injury to feelings lies upon the Claimant.

7.1.2 The starting point when assessing an award for injury to feelings is the guidance given by the Court of Appeal in the case of *Vento v. Chief Constable of West Yorkshire Police (No. 2)* [2003] IRLR 102. The Court of Appeal identified three bands for awards for injury to feelings: the top band being for the most serious conduct, such as a lengthy campaign of harassment; the middle band for those acts which are serious but not within the top band; and the bottom band for those acts which are less serious, one-off or isolated. The guideline awards have been periodically updated by means of Presidential Guidance and at the time with which this case is concerned the lower band is from £900 to £8,800, the middle band is from £8,800 to £26,300 and the upper band is from £26,300 to £44,000, and for very exceptional cases, an award over £44,000 is justified.

7.1.3 On the basis of the Claimant's contended figure of £52,300 for injury to feelings, the Claimant contends that this is a very exceptional case justifying an award in excess of the upper band.

7.1.4 Through its contended figure of £2,000 for injury to feelings, the Respondent submits that the award for injury to feelings should lie towards the bottom end of the bottom bracket. For the reasons set out in its written closing submissions, the Respondent contends that this a less serious case of discrimination.

7.1.5 In assessing the award for injury to feelings, the Tribunal had regard to the substantial period of time over which the breach of the duty to make reasonable adjustments occurred. That period was approximately 13 months. It began when a new Patient Advice & Liaison Officer began work in the office in which the Claimant was based with the result that the noise levels increased to the point

that the Claimant, as a result of her disability, was put to a substantial disadvantage by the ongoing requirement that she had to work in that environment and it did not end until the 8th July 2019 when agreement was reached between the parties as to the reasonable adjustments that were required. The Tribunal was satisfied that throughout that period the Claimant felt unsupported, upset, frustrated, worried, anxious and stressed. The impact upon her of the discrimination is evidenced, at least in part, by her sick leave for one week in early July 2018, her long term sick leave from the 1st November 2018 onwards and the grievance that she submitted in February 2019, which related in part to events that had occurred from June 2018 onwards.

7.1.6 It is right to say, as the Respondent reminds the Tribunal in its written closing submissions, that the Claimant believed, and continues to believe, that she was subject to a lengthy campaign of disability discrimination and unfair treatment from March 2014 to October 2019. The Tribunal must therefore be on its guard, when assessing the award for injury to feelings, and bearing in mind that the burden of proof rests upon the Claimant, that the injury to feelings for which the award is to be made must be attributable to those acts for which the Respondent has been found liable and no more than that.

7.1.7 Excluding the hurt and injury to feelings attributable to the Claimant's belief that she had been subjected to a long campaign of disability discrimination from 2014 to 2019, her complaints about the reference that the Respondent provided for her when she applied for a new job and her complaints relating to her resignation, the Tribunal was satisfied that the award for injury to feelings in this case lies in the Vento middle band. In the judgment of the Tribunal, the acts of the Respondent for which it had been found liable, bearing in mind the lengthy period of time over

which those acts occurred, cannot be said to be less serious, one-off or isolated. Equally, this cannot be said, in the judgment of the Tribunal to be a very exceptional case justifying an award in excess of the Vento upper band. In the judgment of the Tribunal, the appropriate award for injury to feelings in this case is the sum of £18,000: that is to say, an award in the middle of the Vento middle band. This was, in the judgment of the Tribunal, a case that involved, in the language of the Vento guidelines, serious conduct on the part of the Respondent over a 13-month period which resulted in substantial injury to the Claimant's feelings. Though the Respondent's conduct as set out in the liability judgment, was serious, the Tribunal was not satisfied that the conduct was calculated to injure the feelings of the Claimant and could amount to a "campaign" of harassment or discrimination. It is for that reason that the Tribunal places the award for injury to feelings in the middle of the Vento middle band.

7.2 Loss of earnings

7.2.1 The Claimant's claim for loss of earnings post-dating her resignation must fail, given the Tribunal's decision on liability, but it is nevertheless clear that the Claimant did suffer a loss of earnings over the period from May 2019 to the 8th July 2019 in the sum of £612.96 (net). That sum is evidenced by the witness statement of the Respondent's witness, Ms Lynch, and by the payslips that the Respondent has produced. There will accordingly be an award to the Claimant in the sum of £612.96 (net) for loss of earnings.

7.3 The uplift under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992

7.3.1 There being no finding by the Tribunal of any failing by the Respondent in relation to the grievance processes in this case, an entitlement to an uplift under section 207A of the Trade Union

and Labour Relations (Consolidation) Act 1992 has not been established.

7.4 The claim for miscellaneous disbursements

7.4.1 The sum of £924.00 for disbursements appears to be a claim for costs but the Tribunal is satisfied that the conditions for making a costs order against the Respondent under Rules 76(1) and (2) of the Employment Tribunal's Rules of Procedures have not been met in this case. Accordingly, the sum of £924.00 is not awarded to the Claimant.

7.5 Interest

7.5.1 Interest is awarded on the sum of £18,000 for injury to feelings at the rate of 8% from the 1st June 2018 to the date of the Tribunal's assessment: namely, the 5th April 2024. The period of time over which interest is awarded is 2,135 days. The daily rate of interest is £3.96 (at 8% on the sum of £18,000) and so the total interest on the award for injury to feelings is £8,454.60.

7.5.2 Interest is awarded on the sum of £612.96 for loss of earnings at the rate of 8% from the 15th April 2021 (that being the midpoint between the start of the acts for which the Respondent has been found liable and the date of the Tribunal's assessment). The period of time over which interest is awarded is 1,086 days. The daily rate of interest is £0.13 (at 8% on the sum of £612.96) and so the total interest on the award of £612.96 is £141.18.

8. In conclusion, there shall be judgment for the Claimant in the total sum of £27,208.74 (inclusive of the award for injury to feelings, the award for loss of earnings and interest).

Employment Judge David Harris
Dated: 1st May 2024

Judgment sent to the Parties on 18 September 2024

For the Tribunal Office

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