

b. Interest thereon	£ <u>13,610.96</u>
Sub-total	£ 38,610.96
c. Loss of Earnings to October 2022 (taking into account amounts earned in mitigation)	£ 43,948.48
d. Interest thereon	£ <u>11,173.75</u>
Total Award for Loss of Earnings	£ 55,122.23
e. Loss of Statutory Rights	£ 500.00
f. Interest thereon	£ 127.12
g. Prescription Charges (pro-rated from 1 June 2018 to end of September 2022)	£ 497.90
h. Interest thereon	£ 126.59
i. Pension Loss (annual loss and pro-rated)	£ 34,105.75
j. Interest thereon	£ 8,671.27
Total	£ 113,104.82
k. Less already awarded and paid	£ 24,657.00
l. Grossing up	£ 149,224.27
m. Plus tax free	£ <u>30,000.00</u>
n. Total to be paid to the Claimant	£ 179,224.27

REASONS

1. The Employment Appeal Tribunal remitted this matter to this Tribunal having overturned the Tribunal's decision that there was no claim for a discriminatory constructive dismissal. It substituted a finding that the dismissal was a discriminatory constructive dismissal on the basis of disability.
2. The Tribunal had found two acts of disability discrimination prior to the claimant's resignation but found that they were out of time. The Employment Appeal Tribunal remitted the issue of whether the dismissal

now being held to be discriminatory, that altered the issue of whether there had been a continuing course of conduct within the meaning of s.123 of the Equality Act 2010.

3. The first act was the failure to make reasonable adjustments by requiring the Claimant to co-locate to specific desks for operational reasons and the tribunal found that the Respondent made its position clear on 19 and 27 December 2017 and refused from the latter date to make any reasonable adjustments.
4. The second act was a s.15 claim that the Claimant was told at the meeting on 31 January 2018 that she would not be returning to her existing role in any circumstances. The tribunal accepted after the previous remission that this was a one off act, but with continuing consequences.
5. For the Respondent it has been submitted that the resignation of the Claimant was not a positive act of discrimination by the Respondent and it was argued that the authorities on these points deal with positive acts of discrimination by the employer. Albeit we now have a discriminatory dismissal, this was not it was argued an act of the Respondent. In considering the concept of an act extending over a period it was of a wholly different character to the other two acts.
6. This Tribunal does not accept that can be a correct analysis in law. In a constructive dismissal situation it is always the resignation of the employee that brings the relationship to an end, but in law it is deemed to be a dismissal by the employer. But for the acts of discrimination, which the Tribunal found also amounted to a breach of the implied term of trust and confidence, the Claimant would not have resigned. She resigned in response to those breaches. The EAT has found that to have been a discriminatory constructive dismissal.
7. The continuing consequences of not being prepared to allow the reasonable adjustments of the Claimant to sit around the corner to the person she had brought a grievance against, at least during her phased return to work and then telling her that she would not be returning, continued up to and led to the resignation. There was also a common person involved in this chronology, referred to in the anonymised decision as W. It was he who took the decision that a trial at a different desk was not an option and he who told the Claimant she would not be returning.
8. It is correct, as the Claimant's husband has submitted, that in the case of Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, Tribunals were urged not to focus too literally on whether there was an ongoing policy or procedure, but to look at the substance of the allegations more holistically. Was the Respondent responsible for an ongoing state of affairs which resulted in less favourable treatment? It was here. That is not focusing on matters which form part of the chronology, but which the Tribunal did not find discriminatory.

9. It therefore follows that as the Employment Appeal Tribunal has found, there was a discriminatory constructive dismissal and the two acts of discrimination the Tribunal had found were in fact in time as forming part of a continuing act culminating in the Claimant's resignation.

Remedy

10. In the tribunal's Reasons sent to the parties on the 24 February 2019 the tribunal had found at paragraph 82 that the claimant had applied for and was successful in obtaining a role within the respondent of service desk analyst. She started the role on 1 May 2018 as a fixed term contract. She resigned from her permanent post on 1 June 2018.
11. At the Hearing on the 16 January 2023 the claimant gave evidence that the fixed term appointment having come to an end between March - April 2019 she had applied for a voluntary role at the local hospice. That assisted her in feeling able to then apply for a role in the NHS. Her role is as a systems analyst and she commenced it in December 2019. The tribunal did not however hear from the claimant in more detail as the statutory cap was then going to apply to the compensatory award. The claimant was therefore asked further questions at this Hearing on behalf of the tribunal.
12. The tribunal accepts the claimant's evidence that when she felt able to start new employment she did not want to put herself under too much pressure and therefore obtained what could be described as an easier role than the one she had with the respondent. She has chosen to remain in the NHS as she feels comfortable there and it is an organisation that 'reflects my values'. Although she does not have a formal flexible working arrangement she does work from home, hospital and central office and that can change in line with the needs of both the claimant and her employer. The claimant explained how she enjoys the fact 'I am making a difference in my work'.
13. During the COVID pandemic the claimant was running a local office and found she enjoyed that and felt 'highly motivated'.
14. The claimant is currently working on a health care system. She is back at Grade 5 (the grade she was at with the respondent) although that amounts to lower pay in the NHS. The claimant explained how she is not developing the new system but tries to translate what they do now into the new system. She finds it very interesting work particularly as it will make a great difference to clinicians and therefore to patient care. It was clarified later in the Hearing that the claimant had a secondment to Band 5 in her new job in June 2021 which ended in March 2022. She was then promoted to a permanent Band 5 role in October 2022.
15. The tribunal had regard to the medical reports of Dr Bellhouse in the original bundle and a recent report from him dated 16 September 2024. He describes the claimant as having reported classic symptoms consistent with a diagnosis of Major Depression of moderate to severe severity when

he first met with her in 2017. He reports that she had taken an overdose shortly before he saw her and made another attempt on her life in April 2023. At the time he saw the claimant however in August 2024 she was 'experiencing less low mood and was able to enjoy life, particularly when out of the workplace'. She was however experiencing flashbacks and found herself 'experiencing extreme emotional reactions'. It was agreed at that consultation that she has features typical of Post Traumatic Stress Disorder. He explained that :

'Typically, PTSD is not extended to events that are not life threatening, but I think given the very high amounts of suicidality, including actual attempts on her life over the last few years, I think that she is well aware that work-related stress, in her case, could be life threatening and she has flashbacks which recapture emotions that she experienced at that time and dreams when triggered by certain events in the workplace'

He found that the claimant had ongoing symptoms and that it was likely that the 'ramifications of the experiences she had will be with her for years'.

16. Dr Bellhouse recorded how he was forwarded the claimant's GP medical records following the consultation and these showed that prior to meeting with her in 2017 she had never had contact with specialist mental health services. She had 'some input from her GP with respect to anxiety in the early 2000s, all managed within General Practice'.
17. Dr Bellhouse did note that the claimant had been diagnosed with hyperparathyroidism in or about April 2022 and a procedure carried out in relation to that. He also noted other problems in her life 'currently there is damp in her property, shared with the neighbours and they are being uncooperative in helping move this matter on'. In a report of the 25 August 2017 Dr Bellhouse did set out other stressors in the claimant's life.

Submissions on remedy

18. For the respondent it was submitted that there are now three acts of discrimination including that of constructive dismissal. Injury to feelings should fall somewhere between the top end of the lower band of Vento to the middle band. He considered the claim that had been put forward on behalf of the claimant of the top of the middle band was too high. The tribunal must focus on the three acts now found as discriminatory and not the original twelve acts the claimant had relied upon.
19. Mr Hodge did not take issue with the way the losses had been calculated in the claimant's schedule of loss and agreed with the calculations if not the principles.
20. The claimant seeks losses to the date of this Hearing and then a future loss. It was submitted that the claimant could have taken steps before now to fully mitigate her loss. It is already 4 years since the dismissal. Career loss cases are rare it was argued and given the claimant's health it was not appropriate to make an award to retirement.

21. Detailed written submissions were handed up on behalf of the claimant and it is not therefore proposed to repeat them all here. The tribunal was urged to consider Dr Bellhouse's reports who had seen the claimant from the start when the discriminatory acts were happening.
22. The claimant's schedule of loss totalled £717,036.50 after grossing up. In relation to past loss of earnings it was argued that known increments in the claimant's pay scale should be taken into account and that it was 'unreasonable to suggest that she would not have moved up several increments within that time also, maybe promoted'. The total claimed under this head of loss including interest was £68,343.21 (from 1 January 2018 to 30 September 2024)
23. In relation to future losses the claim was for career loss and applying the Ogden table multiplier and a discount rate of 0.25% future losses of £116,590.82 were claimed.
24. The schedule of loss then included a pension loss claim amounting to £194,912.75. Again, the respondent did not take issue with how this had been calculated but certainly disputed that it was an appropriate case where it should be awarded.

Conclusions on remedy

Injury to feelings

25. The tribunal had regard to the Vento Guidance and the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (16th Edition). It considers that this is an appropriate case for an award for injury to feelings at the top of the middle Vento band which at the time of issue of these proceedings (the relevant date) was £25,700 and awards £25,000. Dr Bellhouse did recognise that there were other stressors in the claimant's life.
26. In Vento the middle band was described as appropriate for serious case that do not merit an award in the highest band. Whilst the claimant had alleged other acts which she submitted were discriminatory that was not the conclusion reached by the tribunal. It found three, albeit serious, acts of discrimination including the dismissal. For that reason and taking into account the reports of Dr Bellhouse it concluded that £25,000 was an appropriate award for injury to feelings.
27. The tribunal cannot accept the submission made on behalf of the claimant at paragraph 64 of the closing submissions that 'there were a number of issues in the original hearing that the tribunal found not to be discriminatory – ie related to her disability – however reflecting on them again, the tribunal must consider them as pattern of unreasonable behaviour towards the claimant when deciding on an award'. The award must reflect the tribunal's decision which now is that there were three acts of discrimination including the constructive dismissal.

28. There is a further submission that the acts of discrimination should have warranted an apology (paragraph 75 of closing submissions). The tribunal cannot find that as an aggravating factor.

Loss of earnings

29. The claimant gave very honest evidence that she chooses to stay in the role she has found with the NHS finding it a fulfilling role and at a place where she feels comfortable. That is her choice. She could have chosen to look for other better paid employment to try and match the salary she was on with the respondent and clearly has transferrable skills. The claimant cannot be criticised for taking that decision but the duty to mitigate is on her.
30. Career loss cases are very rare. The tribunal has no evidence that the claimant would have remained with the respondent until retirement or that the claimant would have moved up several increments and/or been promoted (paragraph 101 of the closing submissions). The tribunal was invited to assume that the claimant would have been promoted to Band 6 during the past six years but it has no evidence to support that.
31. The tribunal therefore concluded it was just and equitable to award loss of earnings only up to the date on which the claimant rose to Band 5 in her new role which was October 2022. 4 years and 5 months from her resignation from the respondent.
32. As indicated in the judgment once this decision had been given the parties agreed the figures as set out in the judgment.

Employment Judge Laidler

Date:24 October 2024

Sent to the parties on: 5/11/2024.

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For the Tribunal Office

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