EMPLOYMENT TRIBUNALS

Claimant: **Ms J Gill**

Respondent: **BDW Trading Ltd**

Held at: **London South Employment Tribunals by video**

On: 13 January 2025

Before: **Employment Judge Burge**
Ms C Oldfield
Ms S Dengate

Representation
Claimant: In person
Respondent: Ms Ifeka, Counsel

RESERVED REMEDY JUDGMENT

1. Compensation for the successful complaint of indirect sex discrimination is assessed at **£13,407.01** as follows:

	Award	Interest
a. Injury to feelings	£5000	£1293.15
b. Financial losses	£6,299.27	£814.59

REASONS

2. Liability in this case was determined at a final hearing on 9 – 12 September 2024.

3. The Claimant succeeded in a complaint of indirect sex discrimination in relation to being required to work five days a week in the office/on site with no prior notice from October 2021. Her other complaints were not well founded and dismissed.

4. This hearing was listed to consider and determine remedy. The hearing

was originally listed for 3 hours but was extended to determine the Respondent's application for reconsideration.

5. The Claimant gave evidence on her own behalf. Peter Chisnall (Senior HR Business Partner) gave evidence on behalf of the Respondent. A remedy bundle of 205 pages was before the Tribunal. Both the Claimant and Ms Ifeka gave closing submissions.

Law

6. Section 124 Equality Act 2010 ("EqA") provides as follows:

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
(2) 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.
(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.
4) Subsection (5) applies if the tribunal—
(a) finds that a contravention is established by virtue of section 19 or 19A, but
(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).
(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the County Court …
(7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation, the tribunal may—
(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
(b) if no such order was made, make one.

7. For a claim of indirect discrimination, therefore, the Tribunal must first consider whether a declaration or a recommendation should be made before considering whether to make an order for compensation. The tribunal must approach the question of remedy in the prescribed order: *Wisbey v Commissioner of the City of London Police* [2021] ICR 1465.

   a. First, pursuant to s.134(4) EqA 2010, the tribunal must consider whether it is satisfied that the PCP was not applied with the intention of discriminating against the complainant.

   b. Second, the tribunal must consider whether to act under the other subsections, that is, to make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate (s.124(2)(a)) or to make an appropriate recommendation (s.124(2)(c) EqA 2010).

   c. Only after considering whether to act under these subsections can the tribunal go on to consider whether to make an order for compensation under s.124(2)(b) EqA 2010. The tribunal can decide that it is appropriate to order all three remedies.

8. In *JH Walker v Hussain* [1996] ICR 291 the Employment Appeal Tribunal considered the meaning of "intention" within s.57(3) RRA 1976 and said that intention is made out if (i) the respondent wants to bring about the prohibited result and (ii) knows that the prohibited result will follow from his acts.

> *"Intention is a state of mind commonly required in law to accompany the performance of a specified act in order to establish liability for that act. The crucial question is what state of mind is relevant to a respondent in the particular context of section 57(3)? In our view, as a matter of ordinary English, "intention" in this context signifies the state of mind of a person who, at the time when he does the relevant act (i.e., the application of the requirement or condition resulting in indirect discrimination) (a)* wants *to bring about the state of affairs which constitutes the prohibited result of unfavourable treatment on racial grounds;* and (b) knows *that that prohibited result will follow from his acts."*

9. In *JH Walker v Hussain* it was held that a tribunal may infer that a person wants to produce certain consequences from the fact that he acted knowing what those consequences would be. In that case, the tribunal was entitled to conclude that JH Walker had failed to establish that it did not intend to treat the applicants unfavourably on racial grounds since JH Walker knew that Eid was important to the applicants, that they were the only employees affected by the application of the condition concerning holidays and that they were required to work on Eid. It is important to note that the Respondent no longer bears the burden of showing that it did not intend to treat the employee unfavourably.

10. In *British Medical Association v Chaudhary* [2007] C.L.Y. 1390 Mummery LJ revisited his guidance in Hussain and held as follows (albeit obiter dicta):

> "*We think that for the respondent to intend to treat the applicant unfavourably on racial grounds, he would have to have actual knowledge or conscious realization that the condition he had imposed would have disparate impact on one racial group and that he that [sic] positively wished it to have that effect."*

11. The Equality and Human Rights Commission's Code of Practice on Employment provides guidance at 15.45:

> *"Indirect discrimination will be intentional where the respondent knew that certain consequences would follow from their actions and they wanted those consequences to follow. A motive, for example, of promoting business efficiency, does not mean that the act of indirect discrimination is unintentional."*

12. In addition to pecuniary losses, the Tribunal may make an award for injury to feelings. The guidance in *Prison Service and ors v Johnson* [1997] ICR 274 remains relevant:

    a. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;

    b. an award should not be inflated by feelings of indignation at the guilty party's conduct;

c. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches;

d. awards should be broadly similar to the range of awards in personal injury cases;

e. tribunals should bear in mind the value in everyday life of the sum they are contemplating; and tribunals should bear in mind the need for public respect for the level of the awards made.

13. The Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following De *Souza v Vinci Construction* (UK) Ltd [2017] EWCA Civ 879 for claims presented on or after 6 April 2021 is as follows:-
    a. a lower band of £900 to £9,100 (less serious cases);
    b. a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and
    c. an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600

14. The aim of compensation is to put the Claimant in the position they would have been in but for the unlawful conduct in so far as that can be achieved with financial compensation (*Ministry of Defence v Cannock [1994] ICR 918).*

    "*Tribunals [should] … not simply make calculations under different heads, and then add them up. A sense of due proportion, and look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed.*"

15. The loss must flow directly and naturally from the tort. When assessing discrimination it is necessary to ask what would have happened had there been no unlawful discrimination/harassment and to adjust the compensation appropriately in light of the answer **(***Chagger v Abbey National PLC* [2010] IRLR 47).

16. In *BAE Systems (Operations) Ltd v Konczak* [2018] ICR 1 the Court of Appeal reviewed the authorities, resolved certain conflicts between them, and gave guidance which can be summarised as follows:

    a. assessment of damages would take account of any pre-existing disorder or vulnerability, and of the chance that the claimant would have succumbed to a stress related disorder in any event;

    b. where psychiatric harm had more than one cause, the employer should only pay for that proportion attributable to his wrongdoing, unless the harm was truly indivisible;

    c. in conducting the apportionment exercise the question was whether the tribunal could identify, however broadly, a particular part of the

suffering which was due to the wrong; not whether it could assess the degree to which the wrong caused the harm;

d. where a claimant suddenly tipped over from being under stress into being ill, the tribunal should seek to find a rational basis for distinguishing between a part of the illness due to the employer's wrong and a part due to other causes; that, if there was no such basis, the injury would be truly indivisible, and the claimant was required to be compensated for the whole of the injury.

17. Pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, Regulation 2 provides that the tribunal may include interest on any sums awarded in discrimination claims, and must consider whether to do so without the need for any application by a party in the proceedings. Parties may agree interest: Reg 2(2). If they do not, interest is calculated as simple interest which accrues from day to day at the rate (currently 8%): Reg 3(1). Interest on injury to feelings awards is to be interest beginning on the date of contravention or act of discrimination complained of and ending on the day of calculation (Reg 6(1)(a)). Interest on all other sums is calculated from the mid-point date between the date of contravention and the date of calculation (Reg 6(2) and 6(1)(b)).

18. Where the tribunal considers that in the circumstances serious injustice would be caused if interest were to be awarded in respect of the periods specified in Regs 6(1) and (2), the tribunal may calculate interest in respect of such different period as it considers appropriate (Reg 6(3)). The tribunal's written statement of reasons for its decision must contain a statement of the total amount of any interest awarded and how it has been calculated (Reg 7(1). If the tribunal does not award interest then it must provide reasons for doing so (Reg 7(2)).

19. The usual principles of mitigation of loss apply (*Citibank NA v Kirk [2022] EAT 103*, [2022] IRLR 925.

Findings

20. The Claimant was auto-enrolled into a pension in May 2021. On 29 July 2021 the Claimant opted out of the pension. She does not recall doing this. She did not complain in the subsequent months when the pay slips stopped showing pension contributions and so the Tribunal finds, on balance, that the Claimant opted out and so was not entitled to pension contributions once she had opted out.

21. The Respondent's Driving on Company Business Policy and Procedures provides that a car allowance is to cover the costs of an employee using their private car for work. The Claimant did not have any "other form of independent transport", her partner having taken the car. The Claimant is therefore not entitled to a cash allowance for the use of a private vehicle. The Respondent's Driving Policy states that employees can choose between a company car or a cash allowance. The Claimant chose to receive a company car rather than a cash allowance. Unfortunately there were delays to the provision of the company car caused by the pandemic.

There was no provision for a cash allowance while waiting for a delayed company car. Further, the delays in the company car being provided were not caused by the Respondent's conduct. The Claimant is therefore not entitled to financial compensation for the delay of the company car.

22. Mr Power, the Claimant's manager, had concerns about the Claimant's performance. He did not mind where the work was being done from, he allowed her to work flexibly to accommodate her difficulties with childcare - she could do some drop offs/pick ups and could work back the hours. On 7 October 2021 the Claimant had told Mr Power that she "had issues at home" and was "really struggling with things at the moment". Mr Power, under pressure to deliver, said that the work had to be done, "no excuses".

23. On 13 October 2021 the Claimant got a fit note from her doctor signing her off her anxiety stress and low mood. The Claimant's evidence is accepted that she was depressed, anxious and not sleeping properly. She did not give the fit note to the Respondent and continued to work. At around that time she had two counselling sessions which helped a little bit.

24. On 21 October 2021 Mr Power told the Claimant that she had to come into the office 5 days per week going forward (two days in the office and three days on site) from 9 – 5.30. The Claimant took this to mean from the following Monday (25 October) and this was confirmed on Friday 22 October by Ms Foley, HR. Mr Power wanted the Claimant to work from the office because of concerns about her performance. He knew that the Claimant would be unable to comply with the directive due to her childcare arrangements. While the Respondent knew that certain consequences would follow from their actions, the Tribunal concludes that it cannot be said that they wanted those consequences to follow. What they wanted was for the Claimant's performance to improve. They did not want to make the Claimant unwell and for her to not comply with the mandate. The discrimination was therefore unintentional.

25. The Claimant was already unwell when the discriminatory act occurred on 21 October 2021. She was in a busy demanding job, was the carer for her young school age daughter and she had separated from her partner in July 2021, although she did not tell anyone at the Respondent. The Claimant's GP notes, disclosed for the purposes of the remedy hearing, show that she told the GP that she was still with her partner and her home life was stable. The Tribunal accepts her evidence that this was not true, she was worried about the GP's perception of her care of her daughter when she was unwell and without support. The Tribunal also accepts the Claimant's evidence that the ex partner would come and go and did not help her with childcare. The Respondent had also not provided her with a company car, due to a shortages caused by the pandemic, she lived 1 ½ hours commute away and so she had transport issues also. If the Respondent had not mandated her to work in the office 5 days per week going forward (two days in the office and three days on site) from 9 – 5.30, the Claimant would have continued to struggle but she would not have become so unwell and would have continued working.

26. On 22 October 2021 the Claimant commenced sickness absence, she forwarded a Med 3 from her GP at 10.26 to Ms Foley in HR. She remained off work until her employment terminated and was paid sick pay.

27. Sometime between 22 October 2021 and entering her grievance the Claimant formed the view that she wanted to be released from her contract. The Tribunal found as a fact, that from the midpoint date, namely 14 November 2021, the Claimant decided that no matter what the outcome of the grievance due to the discriminatory treatment of her, she considered the contract to be at an end. The Claimant's evidence at the remedy hearing does not alter that finding. However, at that time the Claimant was not well enough to work or to look for other employment. In evidence at the remedy hearing the Claimant said that she did not think about applying for other jobs, she eventually obtained the new job by being contacted through linked in. When challenged that she did not apply for jobs between November to March 2022, the Claimant said she would have done but she did not remember clearly. At that time the job market was for good for architects.

28. The Claimant had been resistant to taking anti-depressants but decided in December 2021 to start taking them. She stopped after a month. The Tribunal finds that the Claimant started to look for other jobs from late January 2022.

29. The Claimant decided not to appeal on 22 February 2022. When requesting fit notes thereafter she said that she was still in the grievance procedure which was not true. The Tribunal rejects her explanation to the Tribunal that she meant she was still suffering the effects of the grievance procedure as this is not what she said. The Tribunal finds that the Claimant was well enough to return to work, or work elsewhere by 22 February 2022.

30. The Claimant resigned on 23 March 2022. In her resignation letter she said "I now feel my continued employment, following dismissal of my grievance, is completely untenable." Her employment terminated on 22 June 2022.

Conclusions

31. As the indirect discrimination was unintentional, by virtue of s.124(4) and (5) EqA the Tribunal first considers whether or not to make a declaration or a recommendation before awarding any financial compensation. The Tribunal has already reached the conclusion that the Claimant was indirectly discriminated against in relation for her sex in relation to being required to work five days a week in the office/on site with no prior notice from October 2021 and the Tribunal makes a declaration to that effect.

32. The Claimant confirmed that she was not seeking a recommendation. The Tribunal declines to make a recommendation.

33. The Claimant seeks financial losses, namely the difference between her sick pay and full pay, a car allowance and unpaid pension contributions. She also seeks an award for injury to feelings. The Tribunal is satisfied that it is appropriate to make a compensatory award as not doing so would not mark the seriousness of the discrimination we have found in this case.

34. The Claimant was already unwell when the PCP was applied to her. However, she was still in work. The application of the PCP made her more unwell and she became unable to work. The financial consequences of that were that she ceased to receive full pay and instead received sick pay. As stated above, she was not entitled to receive pension payments nor a car allowance. The Respondent submits that there should be a reduction due to the Claimant's contributory conduct in not submitting her sick note. The Tribunal rejects this. Having sought a sick note the Claimant decided that she was feeling well enough to work. This is not contributory conduct.

35. The Tribunal concludes that the Claimant is entitled to her financial losses from the first day of her sickness absence (22 October 2021) to 22 February 2022 (being the date she declined to appeal the grievance outcome, was well enough to start mitigating her losses by returning to work or starting new employment). That is 123 days or 4 months x £4,349.27 = **£17,397.08**. The Claimant received **£11,097.81** for salary, company sick pay and SSP during the period 22 October 2021 to the last day of her employment, 22 June 2022. The Claimant's past financial loss are therefore **£6,299.27**. Interest is awarded from 3 June 2023 which is the midpoint between last act of discrimination (21 October 2021) and the date of calculation of interest (13 January 2025). This is 590 days which equates to **£814.59**. The Claimant's total financial loss is therefore **£7,113.86**.

36. For injury to feelings, the Tribunal takes into account the exacerbation of the Claimant's depression, anxiety and sleep issues that caused her to be unable to work from 22 October 2021. She trialed antidepressants in December 2021. She was well enough to start working from 22 February 2022. These are significant injuries but we conclude they are appropriately situated within the middle of the lower *Vento* band and so the Tribunal awards the Claimant £5000 by way of injury to feelings. Interest on injury to feelings, from the last act of discrimination (21 October 2021) to the date of calculation (13 January 2025) is 1180 days at 8% which equates to **£1293.15**. The total award for injury to feelings is therefore **£6,293.15.**

37. Standing back and looking at the amounts, the Tribunal is satisfied that the award is appropriate.

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Employment Judge **Burge**
Date: **16 September 2024**

JUDGMENT SENT TO THE PARTIES ON
28 January 2025

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FOR EMPLOYMENT TRIBUNALS

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