Case No: 6002307/2023

EMPLOYMENT TRIBUNALS

Claimant: Miss Caroline Clements

Respondent: OVO Energy Limited

Heard at: Southampton **On:** 24 – 28 February 2025 and 14 April 2025

Before: Employment Judge D Gray-Jones; Mrs J Killick; Miss J Ratnayake

Representation

Claimant: In person (24 –28 February 2025); Mr I Wheaton (Counsel) (14 April 2025)

Respondent: Mr M Montgomery (Counsel)

RESERVED JUDGMENT ON REMEDY

The Claimant's claims for unfair dismissal and disability discrimination having succeeded, judgment on liability having been given orally to the parties on 28 February 2025, the compensation payable to the Claimant shall be **£33,409.01.**

REASONS

Background

1. This is a claim brought by Miss Caroline Clements against her former employer, OVO Energy Ltd. The complaints were of unfair dismissal and discrimination arising from disability and failure to make reasonable adjustments. The Claimant had been employed by the Respondent from March 2007 until 21 June 2023. At the time of her dismissal she held the role of Senior Business Change Analyst. She was dismissed because of disability related sickness absence. The Claimant was disabled by reason of Long Covid and Hyperthyroidism.

2. The Tribunal heard the claim from 24 – 27 February 2025 and handed

down judgment on 28 February 2025. In summary, the Tribunal found that the Claimant had been unfairly dismissed and had been the subject of disability discrimination under s.15 Equality Act 2010 ("the EqA") and by way of a failure to make reasonable adjustments under ss.20 - 21 EqA.

3. In its judgment on liability the Tribunal also considered, with reference to the cases of **Polkey v AE Dayton Services Ltd [1988] ICR 142** and **Chagger v Abbey National Plc [2010] ICR 397** the likelihood of the Claimant's employment continuing had she not been unfairly dismissed and subjected to discrimination and determined as follows:

   "5. Had the reasonable adjustments which have been the subject of successful complaints been made and had the Claimant not been unfairly dismissed or dismissed because of disability related absence in a way which was not a proportionate means of achieving a legitimate aim, the Claimant would have started the phased return to work plan prepared and recommended by Michelle Lennox, her Long Covid therapist, at the end of June 2023. Thereafter, had the Claimant remained in employment, her hours would not have increased to more than the 18.5 hours per week she would have been working by the end of the phased return.

   "6. Furthermore, there is a 50% chance that the Claimant would not have remained in employment after the end of the phased return finishing the end of September 2023. As such the Tribunal's conclusion is that the Claimant's loss of earnings claim should run from the end of June 2023 for three months, based on the hours of the phased return, and continue thereafter at the rate of 18.5 hours per week, but with a 50% reduction (in effect 25% of pre-dismissal earnings, adjusted for any pay rises which might have taken place since the Claimant's sickness absence). The period of loss will be determined at the remedy hearing."

4. As there was insufficient time to determine remedy a remedy hearing was listed on 14 April 2025. The Claimant was seeking reinstatement or re-engagement as well as compensation. Both parties were permitted to submit further documents relevant to remedy and these were added to the hearing bundle. The Claimant produced a witness statement for the remedy hearing and the Respondent submitted a witness statement from Mr Kelvin Moore, Interim Director of Portfolio and Transformation. Both gave evidence under oath and were cross-examined (Mr Moore gave his evidence remotely by CVP with the agreement of the parties). The Claimant produced an updated Schedule of Loss and the Respondent produced a Counter Schedule of Loss. Mr Wheaton for the Claimant submitted a written note and Mr Montgomery for the Respondent submitted a skeleton argument.

5. At the outset of the hearing the Claimant sought to introduce a further document as evidence, this being an email from Michelle Lennox at the Long Covid Vocational Rehabilitation Service at Solent NHS Trust dated 14 April 2025 which provided some clarification on the wording of a letter from Ms Lennox submitted by the Claimant in relation to remedy. The Respondent objected to this email being admitted. For the reasons we gave at the time the Tribunal decided to admit this document.

6. After discussion with Counsel at the outset of the hearing it was agreed by both parties that in light of the Tribunal's conclusions at the liability hearing set out earlier in this judgment there was no power to order reinstatement, as the Claimant could not return to work under the terms of her original role. As such the Tribunal had to consider whether to order re-engagement.

The Law

7. S.112 - 113 Employment Rights Act 1996 ("ERA") provides that if a Tribunal finds a complaint of unfair dismissal well-founded it may make an order for reinstatement in accordance with s.114 or an order for re-engagement under s.115 ERA.

8. S.115 ERA provides,

   "(1) An order for re-engagement is an order on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment."

9. S.116 ERA provides that when deciding whether to make an order for re-engagement a tribunal must consider any wish expressed by the complainant as to the nature of the order made; whether it is practicable for an employer (or successor or associated employer) to comply with an order for re-engagement; and whether it would be just to order re-engagement where the complainant has caused or contributed to some extent to the dismissal.

10. When assessing practicability tribunals should not attempt to analyse in too much detail the application of the word "practicable" but should look at the circumstances of each case and take a "broad commonsense view": **Meridian Ltd v Gomersall & Others [1977] ICR 597**.

11. A complainant's ill health is likely to be relevant to the question of practicability. If an employer genuinely believes on rational grounds that an employee may not be capable of performing a role this would be a barrier to ordering re-engagement. See the judgment of the Court of Appeal in **Kelly v PGA European Tour [2021] ICR 1124**.

12. When a claim has succeeded before an Employment Tribunal under the EqA, s.124 provides that the Tribunal may order the Respondent to pay to the Claimant such compensation as it might have been ordered to pay by a county court. Such compensation can include damages for injury to feelings: s.119(4). Compensation for discrimination arises from a statutory tort on the part of the Respondent and the measure of damages in respect of which is to place the Claimant, so far as is possible, in the position that he would have been in but for the discrimination.

13. Placing a Claimant in the position he would have been in but for the discrimination will entail an assessment of what might have happened but

for the discrimination: see **Chagger v Abbey National Plc [2010] ICR 397**. The Tribunal has already made a determination in relation to this in its liability judgment.

14. Damages are assessed under two heads: general damages for pain, suffering, loss of amenity or injury to feelings and special damages in respect of financial loss flowing directly from the discrimination.

15. Where a Claimant has succeeded in complaints of unfair dismissal and discrimination the elements of the compensation inevitably overlap. In such cases, the Tribunal should award compensation under the discrimination legislation: **D'Souza v London Borough of Lambeth [1997] IRLR 677**.

16. Guidance on the appropriate level of awards for injury to feelings is given in the cases of **1) Armitage 2) Marsden and 3) HM Prison Service v Johnson [1997] IRLR 162** and **Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318**. When assessing injury to feelings awards Tribunals should bear in mind that:

    1) 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.

    2) Awards should not be too low as this would diminish respect for the policy of the 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 be seen as the way to untaxed riches.

    3) Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than any particular type of award.

    4) In exercising 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.

    5) Tribunals should bear in mind the need for public respect for the level of awards made.

17. Guidance on the range of awards for injury to feelings is given in **Vento v Chief Constable of West Yorkshire Police (No. 2). Vento** identifies three bands of injury to feelings awards, these being:

    1) The top band is for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of a protected characteristic.

2) The middle band should be used for serious cases, which do not merit an award in the highest band.

3) Awards in the lower band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

18. The ranges of the bands are amended each year by Practice Directions issued by the Presidents for the Employment Tribunals of England and Wales and Scotland. The amendments reflect the effect of inflation and apply from 06 April each year. For claims commencing on or after 06 April 2023 and before 04 April 2024 the bands are:

1) Lower band: £1100 - £11,200;
2) Middle band: £11,200 - £33,700;
3) Upper band: £33,700 - £56,200

19. Special damages, that is, the award for financial loss, falls into two categories, these being firstly loss to the date of the hearing and future loss, if there is financial loss after the remedy hearing. The latter category involves an element of speculation.

20. In relation to financial loss the Claimant is under a duty to mitigate her loss. The burden of proof is on the Respondent to show that the Claimant has failed in that duty. The question is not whether the Claimant has acted reasonably but whether he has taken reasonable steps to mitigate. It is not enough for a Respondent to show that there are reasonable steps which the Claimant has not taken; the Respondent must show that it was unreasonable for the Claimant not to have taken them. See **Wilding v British Telecommunications Plc [2002] ICR 1079**.

21. The principles relevant to mitigation were summarized and set out in **Cooper Contracting Limited v Lindsey UKEAT/0184/15** and can be stated as follows:

1) The burden of proof is on the employer.

2) The burden of proof is not neutral. If no evidence is offered the employment tribunal does not have to find a failure to mitigate.

3) What has to be proved is that the Claimant acted unreasonably.

4) There is a difference between acting reasonably and not acting unreasonably.

5) What is reasonable and unreasonable is a question of fact.

6) The views and wishes of the claimant is one factor to be taken into account, but it is the tribunal's assessment of reasonableness that counts, not the claimant's.

7) The tribunal should not apply too exacting a standard on the claimant: he or she is the victim.

8) It may have been reasonable for the claimant to have taken a better paid job, that is important evidence but is not in itself sufficient.

22. If the Claimant is successful in a claim for unfair dismissal they are entitled to a basic award, calculated in accordance with ss.119 - 122 ERA.

23. The parties agreed that the basic award would be **£10,288** (16 years x £643, this being the statutory cap at the date of the Claimant's dismissal).

The Evidence

24. We found that the Claimant was an honest witness but this did not mean that every part of her evidence was reliable. We found that there was an element of wishful thinking in her approach to her capability and what the Respondent would reasonably be able to accommodate.

25. Kelvin Moore's evidence was not particularly helpful in relation to the wider organization of the Respondent or the opportunities which may have been available for the Claimant. He accepted that he had no insight into the Claimant's personal circumstances and suitability for roles. He accepted that he had not reviewed this when preparing his witness statement or for the remedy hearing. We did not find that a witness he lacked credibility, but the evidence that he could give was of limited assistance.

26. The Claimant relied on a letter from Michelle Lennox, her Long Covid therapist at Solent NHS Trust and an email clarifying the wording of that letter. Michelle Lennox's qualifications were not fully clear and she did not appear to be a doctor. Some of the wording in the letter was pro forma. However, this was the only medical evidence that the Tribunal had in relation to remedy. The Respondent had not submitted any medical evidence. The Tribunal had to do the best with the material available to it.

27. The Claimant was not employed at the date of the remedy hearing and had not worked since her dismissal from the Respondent. She had not applied for any other roles. She said her aim had always been to achieve reinstatement or re-engagement and that the Respondent had always been aware of this. She said she had prepared a CV and a covering letter and looked for vacancies for potential alternative roles.

28. She said that she continued to experience symptoms of Long Covid and Hyperthyroidism. She said that any new role for her would require reasonable adjustments due to the ongoing effects of her disabilities, which would include a phased return/start, part-time hours and working from home. She also said that for any new role to be suitable there would need to be familiarity with the role/industry. She said that suitable opportunities for her appeared to be minimal.

29. The Claimant said that she believed that the Respondent would be able to support her in relation to the adjustments required and that she would be working for an employer and in an industry that she was familiar with. These were her reasons for seeking reinstatement/re-engagement.

30. The Claimant said that the Respondent's treatment of her had impacted her mentally and physically. She said that the way she had been treated had caused her extreme worry, stress, upset and anxiety and that this was still continuing.

31. Kelvin Moore's evidence was that the Claimant's role no longer existed due to a restructuring of the Change Team in November 2023. He said that as a result of this restructuring the number of employees in the team had been reduced from 70 – 80 staff to 26. He said some people had gone to different roles and some had been lost through "attrition", by which he said he meant employees leaving roles and choosing to work elsewhere.

32. Mr Moore said that there were no suitable vacancies for an employee on part time hours in his part of the business. He was unable to give evidence on whether there would be suitable roles elsewhere in the business. His evidence initially suggested that it was unlikely that an application for part time hours would be granted by the Respondent but he backtracked on this to an extent and said that each case would be considered on an individual basis. He accepted that requests for reasonable adjustments would be considered.

33. The letter from Michelle Lennox, at pages 581 – 585 of the bundle, suggests that the Claimant was well enough to return to work with support from her employer and the Long Covid Vocational Rehabilitation Service. The email dated 14 April 2025 states that the use of the words "when you feel ready to return to work" was a standard letter wording and also confirmed Michelle Lennox's view was that the latest return to work plan prepared for the Claimant *"will give you the best option to go back and remain in work."*

Conclusions

34. The Tribunal first had to decide whether it was appropriate to order re-engagement.

35. Much of the evidence and submissions before the Tribunal concerned the question of whether re-engagement was practicable. However, in the Tribunal's view the answer to this was relatively straightforward and flowed directly from the Tribunal's finding at the liability stage that there was only a 50% chance that the Claimant would have remained in employment at the end of the phased return.

36. The Claimant's evidence and the evidence from Michelle Lennox submitted by the Claimant in relation to remedy were in our view entirely consistent with that conclusion, namely that there was only a 50% that the Claimant would be able to remain in employment with the Respondent even with medical support and reasonable adjustments. The Tribunal was of the view that it was not practicable to order re-engagement where there was only a 50% chance of the Claimant being able to remain in any post to which she was appointed.

37. As such the Tribunal had to assess the compensation which the Claimant should be awarded. As stated above it was agreed that the Claimant was entitled to a basic award of £10,288. The Tribunal also decided to award the sum of £500 for loss of statutory rights. The remaining awards were made in respect of the successful discrimination claim.

38. Both parties agreed that the Claimant's gross salary was £812 per week, or £578.58 net of tax.

39. In her Schedule of Loss the Claimant sets out claims for what are described as non-consolidated payments and home worker allowances as well as pay rises. There is no reference to these in the Claimant's witness statement, other than to refer to the Schedule of Loss, and so the basis upon which these are claimed is unclear. The Respondent's counter schedule of loss makes no reference to them, and nor was this evidence challenged in cross-examination. The Tribunal concluded that it was not appropriate to make an award in respect of losses where there was no evidence to explain or support the loss claimed and no material from which the Tribunal could infer that the loss had been suffered.

40. Based on our conclusions at the liability stage the Claimant would, if not dismissed, have completed her phased return to work from June until September 2023. This would have involved 139 hours work. This amounts to a net figure of **£2173.58**. Pension contributions over this period, at 12% of earnings, would have amounted to **£362.43**.

41. We now have to calculate whether there was any loss arising from the end of the phased return to work and if so for what period. The Claimant's case was that she would have remained in work. The Respondent's position is that she would not have worked beyond the end of the phased return.

42. The Respondent also argued that the Claimant had failed to mitigate her loss, in that she had not applied for any alternative roles prior to the remedy hearing.

43. The Tribunal's conclusion is that there was a 50% chance that the Claimant would have remained working for the Respondent from the end of the phased return until 14 April 2025, the date of the remedy hearing.

44. The 50% deduction we had determined at the liability hearing encompasses the possibility of the Claimant having to leave her employment after the end of the phased return due to ill health. We don't consider it appropriate to make any further deduction.

45. We have considered the Respondent's evidence that the Claimant's role no longer existed after November 2023. We did not consider that the Respondent had provided any evidence that the Claimant would have been made redundant in the restructure. Indeed, the Respondent did not actually submit that the Claimant would have been, or may have been,

dismissed by reason of redundancy after the conclusion of the phased return. We think it unlikely that she would have left the Respondent's employment of her own volition.

46. We then considered whether the Respondent had shown that the Claimant had failed to mitigate her loss. We accept the Claimant's evidence that her aim was always to be reinstated or re-engaged. In these circumstances we don't find that it was unreasonable of the Claimant not to apply for other roles, particularly given the restrictions on what positions would have been suitable for her. As such we don't consider that the Claimant failed to comply with her duty to mitigate her loss between September 2023 and 14 April 2025.

47. The period of loss from 13 September 2023 until 14 April 2025 is 82.4 weeks. The loss for that period is £47,674.99 but this has to be reduced by 75% to reflect that the Claimant would only have been working for 18.5 hours per week and also the 50% chance that her employment would have terminated. As such loss of salary for this period is **£11,918.75.** Loss of pension contributions amounts to **£1430.25**. Total loss for this period therefore amounts to **£13,348.99**.

48. We then had to determine how long the award for loss of earnings should run after the remedy hearing. This is inevitably speculative. We consider it appropriate to award loss of earnings for a further year, on the basis that by this point it is likely that the Claimant would, or should be, in a position to mitigate her loss. She will be aware of the Tribunal's decision not to order reinstatement or re-engagement and with that knowledge will be in a position to start applying for suitable roles.

49. We should add that the Claimant, in her Schedule of Loss, sought future loss lasting for the rest of her career, that is, 28 years. We did not consider that there was evidence to support an award reflecting loss of earnings for the rest of the Claimant's working life.

50. A further year's loss of earnings, reduced to reflect the 18.5 hours per week that the Claimant would have been working and the 50% Polkey/Chagger reduction, is **£7521.54,** and loss of pension contributions over the same period amounts to **£1266.72**. The total loss for this period is therefore **£8788.26**.

51. We deduct from this the sums received by the Claimant by way of mitigation. These are a termination payment from the Respondent of £10,009.37 in respect of PILON. This would have amounted to £7132.04 after tax. The Claimant also received ESA payments from August 2023 to 14 April 2025 amounting to £12128.21. ESA received for the period 15 April 2025 to 15 April 2026, at the rate of £138.20 per week, would be £7186.40.

52. The total of the award for financial loss is £25,173.26 and the total of the sums received in mitigation is £26,446.65. This reduces the compensatory

award to nil.

53. In relation to the injury to feelings award the Claimant was dismissed from employment which she had held for most of her working life. There was no medical evidence as such in relation to injury to feelings, but we accept her evidence that the Respondent's failure to make the reasonable adjustments which we found should have been made and to dismiss her from her employment in these circumstances caused significant anxiety and distress. She was not afforded the level of support that should have been provided. This significantly undermined her feelings of self-worth.

54. We take into account that the difficulties with the Claimant's health which led to her dismissal were not the fault of the Respondent, and these health problems in themselves significantly impacted the Claimant's wellbeing.

55. The Claimant was seeking an award for injury to feelings in the upper Vento band whereas the Respondent was arguing for an award in the lower band. Having regard to the principles which provide guidance on the appropriate level of award for injury to feelings and in particular the need to have in mind the value of the award in everyday terms we consider that an award in the middle Vento band is appropriate and award the figure of **£20,000**.

56. The Claimant was also seeking an award for personal injury. There was no medical evidence supporting this and no evidence from which we could infer that the Respondent's treatment had caused personal injury or exacerbated the symptoms of Long Covid or Hyperthyroidism. Accordingly we don't consider that there is the basis for an award for personal injury.

57. The Claimant also sought an uplift to the awards for breach of the ACAS Code. In her Schedule of Loss this was referred to as the ACAS Code of Practice on Flexible Working. The only ACAS Code for which an uplift can be awarded is the ACAS Code of Practice on Disciplinary and Grievance procedures. This Code does not apply to dismissals unless the disciplinary procedure is used in relation to misconduct or culpable poor performance. See **Holmes v Qinetiq Ltd UKEAT/0206/15/BA**. This did not happen in the Claimant's case. We don't consider that the Code applied to the process which led to the Claimant's dismissal and as such there is no basis to make any uplift to the awards.

58. Finally, the Tribunal awards interest in respect of the discrimination award. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provide that interest is payable on awards of compensation in cases of discrimination. The rate of interest payable stands at 8%. Interest should be calculated in the case of injury to feelings, over the period beginning on the date of the contravention or act of discrimination complained of, through to the date of calculation. In respect of other damages, interest is calculated from the mid-point, half way through the period in question, to the date of calculation.

59. In relation to the injury to feelings award it is appropriate to calculate interest from the date of the Stage 4 meeting on 03 May 2023 (when the

Claimant's reasonable adjustment requests were refused) to 14 April 2025 (712 days). £20,000 x 8% = £1600 per annum or £4.38 per day. The total interest award is therefore £3121.01.

60. The total award is therefore as follows:

1) A basic award of **£10,288**
2) A compensatory award for unfair dismissal (loss of statutory rights) of nil.
3) An award for financial loss of nil
4) An award for injury to feelings of **£20,000**.
5) An award of interest in respect of the injury to feelings award of **£3121.01**.

6. The total award is therefore **£33,409.01**.

Employment Judge Gray-Jones
Date: 23 May 2025

JUDGMENT SENT TO THE PARTIES ON
09 June 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Note
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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