EMPLOYMENT TRIBUNALS

Claimant:		Respondent
Mr J Morris	v	East Riding of Yorkshire Council

Heard at: Hull On: 21 October 2016

Before: Employment Judge Jones
Members: Mr C Childs
Mr G Hopwood

Appearance:
For the Claimant: Mr S Hoyle, Lay Representative
For the Respondent: Mr B Frew, of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the respondent shall pay to the claimant compensation and interest in respect of the unlawful discrimination in the sum of £8,842. The award is comprised of losses of earnings, and injury to feelings as set out below:

1.	Injury to feelings		£7,000.00
2.	Interest thereon @ 8%		£ 560.00
3.	Loss of earnings from 4/11/15 to 12/07/16 @ £117.69 per week	£4,211.61	
	Less mitigating earnings of £878 & £200 Less Job Seekers Allowance of £73.10 for 26 weeks, £1,900.60:	£2,978.80	
			£1,233.00
	Interest thereon from mid point, equates to half rate for entire period, 4%		£ 49.00
			£8,842.00

REASONS

The parties' respective positions

1. The claimant seeks an award for injury to feelings and losses of earnings which were attributable to the discrimination which we found he had been subjected to. The claimant's contention is that the injury to feelings fall within the highest bracket of the leading authority of Chief Constable of West Yorkshire v Vento and that there should be an award for aggravated damages because of the way in which the respondent, and particularly the respondent's representatives, have conducted the litigation. The claimant contends that he should be awarded losses of earnings until the liability hearing in this case in July.

2. The respondent contends that the injury to feelings award falls at the top of the lowest bracket in Vento or bottom of the middle bracket but that should be discounted by 60% because the injuries were partly attributable to other matters which were not discriminatory and not unlawful and the respondent contends that the award for losses of earnings should reflect the job the claimant might have been redeployed to. Furthermore, Mr Frew contends that after deduction of mitigating earnings have been taken into account a 50% deduction should be made to take into account the chance that the claimant may not have been able to work because of ill health in any event.

Evidence

3. We heard evidence from the claimant. There was very little documentary evidence available about the claimant's earnings since he was dismissed, about what alternative jobs might have been available and, in the form of medical evidence, about his health since August 2015.

Findings

4. In respect of the evidence, as we said, it is less than satisfactory. We have no documentation save for two payslips post dating the liability hearing when the claimant's work was farming, bringing in this summer's harvest. There are no payslips pre-dating July and, contrary to the initial suggestion that the claimant has not done any work prior to the July hearing, it was later agreed that the farming work had been undertaken since June. In his earlier evidence given in the liability hearing the claimant had said that he had undertaken farming work, that he was enjoying it, that he was doing 22 hours a week and had done so for four to five weeks. We were told later that he had earned £878. He also said that he was teaching a first aid course and we were told that he had earned £200; but in evidence today the claimant said that that was not the case.

5. The claimant had received Job Seekers Allowance of £73.10 per week. There was some confusion as to whether he might have in fact received Employment Support Allowance because in his evidence in the first hearing he had said initially received Employment Support Allowance in mistake then that had been changed to Job Seekers Allowance. We find it likely the claimant received Job Seekers Allowance for a period of six months, his entitlement then ceased. Although there had been reference to Employment Support Allowance it was a

confused account and we preferred the account we heard today and we accept that as a condition of receiving Job Seekers Allowance the claimant would have had to make a search for work.

6. In respect of alternative work during the period the claimant is seeking losses of earnings we think it right to acknowledge the evidence and argument advanced at the first hearing that he had received £878 and £200. There is clearly some confusion in the claimant's mind. We do not think he was seeking to mislead us intentionally but has difficulties with recollection. We do not accede to the suggestion that he had been working since April, as submitted by Mr Frew. Rather, we accept that he was working from the beginning of June because at 22 hours per week on the National Minimum Wage of £7.20, the period of time it would take to earn £878 would be 5.5 weeks. That would take one to the beginning of June, not into May or even April. There is no basis for plucking April out of the air as opposed to February or November the previous year.

7. We accept the claimant had been working in farming from the beginning of June and had earned £878. He had earned £200 in training. The £73.10 for Job Seekers Allowance for 26 weeks would amount to £1,900.60 so we take all of that mitigating income into account.

8. In respect of the amount of the lost earnings, Mr Frew rightly points out that we had not found that the claimant could have returned to his previous job. There had been evolution of the role and the way the service was delivered had changed. It was simply not going to be possible, given the claimant's limitations, for him to return to the previous job but we found there was every possibility the claimant would be redeployed into other work such as driving or catering. The earnings the claimant had received were £117.69 per week as a Youth Worker. He had worked 10 hours per week. The hourly rate for a Driver was £7.79 and for a Caterer/Cleaner £6.99 so that the weekly wage would be £77.90 or £69.90 respectively had the claimant worked 10 hours as he had in the earlier job. However, we accept the argument that it would not inexorably follow that the claimant would work only 10 hours if he were redeployed. If the 10 hour limitation were a condition of his mental health that might be true, but it is more than apparent over the Spring and Summer weeks of this year that the claimant has been able to manage 22 up to 38 and 39 hours per week. We therefore accept the argument advanced that he may have been able to achieve more than 10 hours. Some of the jobs were likely to have required more than 10 hours. The claimant would have achieved the same weekly rate of £117.69 if he worked 15 hours on the rates of £77.90 per week and we therefore accede to the argument that he should receive losses of earnings calculated upon the same weekly wage he had been in receipt of before he became ill, not because he would have undertaken that job but had he been redeployed as we find that he probably would have been, because he would have been working a greater number of hours.

9. The claimant was very upset and distressed because he had lost his employment and there had not been adjustments made for him as a disabled person, as there should have been. He had worked for the respondent for six years. This setback was particularly hard for him because it took place at the time he was recovering from an exacerbation in his condition of Post Traumatic Stress Disorder. He described himself as having been in a dark place, having a temporary separation from his partner as a consequence and such was his unhappiness and the state of depression that he was at times unable to get out

of bed at all. However, the fit to work notes, which is the only medical evidence we received in respect of the claimant's condition at this time, indicated both in July and August running through to October that the claimant was fit to work but not in his previous role, but as a driver. We find the claimant was emerging from an episodic relapse in his condition at the time he was dismissed but that he continued to improve such that he was able to pick up work in the way we have describe the following year. The dismissal was a blow to his self-esteem and confidence. He could not reasonably have found work earlier and he reasonably mitigated his loss.

The Law

10. The law concerning remedies for discrimination is set out in section 124 of the Equality Act 2010. We may award compensation as would be awarded by the county court; such compensation includes an award for injury to feelings. The Court of Appeal has given guidance in respect of the latter and provided a series of categories into which any award might fall. The lowest category, as updated is from approximately £650 to £6,500, the middle category is £6,500 to £20,000 and the top category £20,000 to £30,000. The top category is awarded in cases of long standing and serious discrimination; this is discrimination which continues over many months and years. Ms Vento herself suffered discrimination over a period of 18 months and was awarded £18,000. That was then at the lower end of the top bracket. The lowest bracket is for one off events and the middle bracket is for acts of discrimination falling between the two. We have to take into account inflation.

Discussion and conclusions

Loss of earnings

11. For reasons we have set out we accept that the claimant suffered losses of earnings of £117.69 for the period from his dismissal on 4 November 2015 until the date of the Liability Hearing on 12 July 2016. Subject to the deductions we shall make that would give rise a claim for £4,211.61, according to Mr Hoyle's schedule, submitted at today's hearing. We deduct from that however, the mitigating earnings of £878 and £200 and the Job Seekers Allowance for £1,900.60 which gives rise to a loss of earnings claim of £1,233.

12. We do not accept that there should be any reduction to quantify the risk that the claimant may not have secured such employment or if he did his state of health was such he may not have been able to retain it. We reject that argument because firstly, there were a series of jobs advertised by the respondent during the redeployment process and we are satisfied that such possibilities would have continued after the notice period had the claimant remained in employment and we are satisfied, given his history, including working in another limited driving job elsewhere, the claimant would have achieved such alternative work. We are also satisfied that the claimant would have held down that job. There is no medical evidence frankly to suggest the opposite. The medical fit to work notes said the claimant was not fit to work save for driving. In the circumstances we are satisfied that the claimant would in all likelihood have continued to work and we do not think it just and equitable to include a potential

chance he would have lost that work for the reasons advanced and as contemplated in the Court of Appeal authority of Chagger v Abbey National.

13. The award of losses of earnings is £1,233 to which we add interest at 4% being half the rate for the entire period, the regulations providing we award interest from the mid point; but applying half the rate of 8% achieves the same result, £49.

Injury to feelings

14. Mr Frew drew our attention to a number of authorities. Every case is very much dependant upon its own facts. We agree with the categorisation of this case as being at the top of the bottom range and bottom of the middle range of the guidelines. That is because it was a one off event but it was clearly a serious one off event because it involved the termination of the claimant's employment. One feature which is intermingled amongst the arguments, by both parties, is the claimant's psychiatric condition. We reject the submission that we should apportion the award to recognise the fact that the claimant had already been depressed by reason of earlier acts which were not unlawful; principally the change to his previous job which he had complained about. The reason we reject that argument is because although the claimant had advanced in his schedule of loss a claim for psychiatric injury that has not been pursued and it would have fundamentally floundered for want of medical evidence. There is no medical evidence to explain to the Tribunal what the psychiatric reaction of the claimant was to the events of the summer of 2015. There is of course the claimant's own recollection but in order to succeed in a personal injury claim it would be necessary to adduce some sort of psychiatric opinion evidence. If a claim for psychiatric injury had been advanced we would have agreed with Mr Frew's submission that it would have been necessary to apportion any such award so that the extent to which the exacerbation of the claimant's Post Traumatic Stress Disorder was attributable to non-discriminatory factors would have to be discounted and only that part of the exacerbation attributable to the loss of his employment would sound in compensation.

15. In the absence of such a claim we are awarding injury to feelings which, as the Court of Appeal recognised in Vento, is distinct and separate from psychiatric injury. Of course when one is dealing with a person who is disabled and the disability is a psychiatric injury then there will be some overlap between the injured feelings and the psychiatric condition and we take that into account; but we are very mindful of the fact that we are able to evaluate the claimant's injured feelings solely by reference to the loss of his work down to the respondent's failure to take reasonable steps under its statutory duty. We do not evaluate this head of loss upon the claimant's description of the psychiatric consequence of his condition including the fact that he was at times bedridden. He had injured feelings and they were significant. The claimant felt particularly hurt, he believed his employers did not recognise the difference between physical and mental disabilities, mental disabilities often being unseen, and that fed into his injured feelings when he lost his job.

16. We consider that the appropriate award for that hurt, which clearly lasted some time until he was able to move on and obtain alternative work, should be £7,000. That is just at the top of the lowest bracket and bottom of the middle bracket. It is compatible with the awards Mr Frew referred to. The suggestion

this award should fall in the top bracket was one which was, not to put too finer point on it, misconceived. This is wholly distinct and separate from those cases where for months and years individuals in the workplace are subjected to repeated and frequent harassment and acts of discrimination and it is not comparable to those cases which fall at the middle to top of the middle bracket.

17. Mr Hoyle advanced an argument that we should award aggravated damages because the respondent should have settled this case but went on to fight it and therefore to exacerbate the claimant's hurt feelings. An award is, in principle, permissible and has been subject to guidelines too. If an employer by high handed conduct aggravates that injury to feeling which arose in the first instance through an act of discrimination an award for aggravated damages is appropriate. But we are not satisfied that this one of those cases.

18. We set out in our earlier reasons that although the respondent's managers discriminated against the claimant they made a misjudgement in their exercise of the redeployment policy. They did not act highhandedly or spitefully. Most cases which conclude after a contested hearing do not involve aggravated damages. Not conceding to a complaint of disability discrimination without any specific aggravating features is unlikely to give rise to such an award. We do not accept the way in which the case has been advanced, nor the strong criticisms which were made of the respondent's managers both before and during the hearing. Mr Hoyle says that for the respondent to seek to strike out the claim was itself a factor which aggravated the injured feelings of the claimant. But that application has to be considered against the context of the way in which the claimant's representative was conducting the litigation. It necessitates reference to the letter Mr Hoyle wrote on 25 May 2016. He said this

"*I honestly now believe that you are a dysfunctional organisation with staff who are barely able to turn into work unaided let alone do anything proactive and certain persons have been recruited or promoted well above their level or their ability and occupy positions of responsibility. I am giving you this one chance only, respond to my email of 29 April or reap the whirlwind which follows because I will be attending Counsel [sic] meetings to speak in public and communicating with the Chief Executive and your instructed Barrister directly. If you are not willing to take the hit for this institutional incompetence then I suggest, very strongly, that you have someone with some authority backed up with an education and ability to respond to me by the end of this week. If you have exhausted your authority, knowledge, ability and competence now is the time to go on record and say so. A complaint of misconduct in public office is a very real possibility if this matter continues. Aside from disability discrimination, you are squandering public funds*".

19. The Tribunal was asked to strike out the claims because of this letter. Recognising that the interests of justice would not be met if the claimant's right to pursue his claim were derailed by such inflammatory intemperate language of his representative, the application was rejected. But that language was inappropriate. An application to strike out was fully understandable in response to the conduct of the claimant's representative at that time. It did not, in the circumstances, amount to conduct which warrants an award for aggravated damages.

20. To the award for injury to feelings we add 8% interest being £560 so the respondent shall pay to the claimant compensation and interest in the sum of £8,842.

Employment Judge Jones

Date: 21 July 2016