THE INDUSTRIAL TRIBUNALS

CASE REF: 83/15

CLAIMANT: **Marie-Claire McLaughlin**

RESPONDENT: **Charles Hurst Limited**

CASE REF: 1356/15

CLAIMANT: **Marie-Claire McLaughlin**

RESPONDENTS:
1. Charles Hurst Limited
2. Rosemary Chapman
3. Andrew Gilmore

DECISION ON REMEDY

The unanimous decision of the tribunal, on a hearing as to remedy, is that the respondents do pay to the claimant the sum of £11,500.00, together with interest thereon amounting to £340.28, in respect of injury to feelings and psychiatric injury sustained by her as a result of the respondents' breach of duty to make a reasonable adjustment for the claimant.

Constitution of Tribunal:

Employment Judge: **Employment Judge D Buchanan**

Member: **Mr R McKnight**

Appearances:

The claimant was represented by Mr G Grainger, Barrister-at-Law, instructed by the Equality Commission for Northern Ireland.

The respondents were represented by Mr P Bloch, Director, Engineering Employers' Federation, Northern Ireland.

1 These claims were heard *from 11 – 15 April 2016 inclusive*, and *17 – 19 May 2016 inclusive*. A decision, on liability only, issued to the parties *on 21 December 2016* ('the liability decision'). The parties were given a reasonable opportunity to agree

compensation among themselves (see : *Paragraph 33* of that decision). Unfortunately they were unable to do so, and the matter was therefore re-listed for a hearing on remedy.

2 As recorded *at Paragraph 1(vi)* of that liability decision, a sad feature of this case was that one of the panel members, Mr Joe Law, died before its issue. At that paragraph tribute was paid to him by the Employment Judge and the remaining panel member, Mr McKnight.

At the outset of this hearing, the legal representatives and their respective clients asked to be associated with the expressions of sadness at Mr Law's death and in relation to his contribution to the case.

3(i) The unanimous decision of the tribunal in respect of liability was that the respondents had failed in their duty to make reasonable adjustments for the claimant.

(ii) She was unsuccessful in the other claims which she brought. By a majority, the tribunal held that the respondents did not discriminate against her on the ground of her disability, or victimise her, in respect of her suspension from work, placing her on statutory sick pay, or removing her company car.

It decided unanimously that the respondents did not harass the claimant by holding meetings in the premises where she worked and, further, decided unanimously that the respondents did not discriminate against, victimise, or harass the claimant in any other respect.

4(i) The basis of the tribunal's decision that there had been a breach of the duty to make reasonable adjustments was that the respondents had failed to deal properly and adequately with her request to work reduced hours.

(ii) This is dealt with *at Paragraph 28(ii) at Page 20* of the decision where we stated:-

> *"The timeframe for dealing with the request for reduced hours – 14 months – was long drawn out. We have accepted that this was not all the fault of the respondents – and, it has to be said the fact that the respondents took so long is again not consistent with the claimant's allegation that they wanted rid of her.*
>
> *Her request for reduced hours was not considered in an appropriate manner. It was consistently dealt with as an application for flexible working, with an emphasis on the needs of the business. There was little or no focus on the needs of the claimant. There was also a disproportionate emphasis on job-sharing, with pressure to accept that arrangement as the only alternative to full-time work.*
>
> *Had the employer focused correctly on the concept of reasonable adjustments under the Disability Discrimination Act 1995 and taken a proactive approach to the matter, all members of the tribunal are satisfied that the claimant would have had the benefit of the reduced hours she sought at an earlier stage. We are therefore satisfied that the first-named respondent failed in its duty to make a reasonable adjustment and that those*

adjustments should have been in place by January 2015. In this respect we have reservations that we are here erring on the side of generosity towards the employer."

5 In dealing with remedy, we therefore keep in mind from the outset that the claimant succeeded only in her reasonable adjustments claim, and that the period of our focus is from January 2015, when we considered the reasonable adjustments should have been in place, until mid-May 2015 when they were put in place. This should not be taken, however, as in any way minimising the seriousness and effect of the breach which we have found to be proved. In this respect we respectfully differ from Mr Bloch in his contention that the claimant had failed on the serious aspects of her case.

6 At the hearing the claimant provided an amended and updated schedule of loss. The elements of this were:-

"(a) a claim for loss of earnings for the relatively modest sum of £706.25;

*(b) a claim for injury to feelings (mid-band **Vento**), as updated by **Da'Bell v NSPCC [2010] IRLR 19**;*

(c) a claim for psychiatric injury;

*(d) a 10% uplift (**Simmons v Castle [2012] EWCA Civ 1039**); and*

(e) plus interest at 8%."

7(i) In order to determine this matter, we heard further evidence from the claimant, Ms McLaughlin, and her partner, Mr Ian Redpath.

(ii) No up-to-date medical report was provided, but we were referred again to the fairly comprehensive medical evidence in the form of the claimant's GP notes and records and reports on her from specialist Occupational Health (OH) consultants to which we had been referred to at the hearing.

(iii) We are also indebted to Mr Grainger BL and Mr Bloch for their thorough and helpful submissions. Mr Grainger BL had prepared a statement of the relevant law, which was accepted by Mr Bloch as an accurate reflexion of the legal position. The tribunal has drawn heavily upon it in its own statement of the law, but any errors in the latter are ours, not Mr Grainger's.

(iv) We find the facts relevant to the issue of remedy set out in the following paragraphs.

8(i) There is no doubt that the treatment which the claimant received affected her mental health and well-being. The medical evidence shows clearly that she suffered from depression and stress-related illness and that in its extent it was moderate to severe.

(ii) She described her illness and its symptoms to us in some detail. She was someone in a vulnerable state, with feelings of isolation, exclusion, worthlessness, loss of confidence, social awkwardness and an inability to function on a normal

day-to-day basis. She also experienced physical symptoms, such as light-headedness, dizziness and panic attacks.

All of this affected her personal relationships and her attitude to her children, who were young, and to her partner, Mr Redpath. In reality she had little home life.

When the adjustments were put in place she found it much easier to cope with her employment. She had little or no absences from work and she found it much easier to get the job done.

(iii) The claimant's evidence is largely supported by that of Mr Redpath. He spoke of the claimant as being totally withdrawn and unable to function, and described her as someone whose whole life was dominated by her difficulties at work.

(iv) We are satisfied that both the claimant and Mr Redpath attempted to portray for us an accurate and truthful account of the claimant's mental state, and that they did not misrepresent or embellish it.

9 There are, however, other factors affecting the claimant's mental state, which we must take into account:-

(i) She had a previous history of mental illness going back to 2011/2012. In 2011 she had a different employer. She also had an incident of depression in October 2013 before moving to Charles Hurst, Boucher Road. (See : Dr Brennan's written report of 29 December 2014.)

(ii) The claimant succeeded before us only on her reasonable adjustments claim. However, her mental state was also conditioned by her perception (which we do not doubt was genuine) about the validity of her other claims on which she did not succeed. These claims encompassed alleged direct discrimination, victimisation and harassment and related to matters including her suspension from work, with its serious financial consequence, and the removal of her company car and the inevitable inconvenience for someone who was travelling daily from Dundrum, Newcastle, to Belfast. These were matters which would clearly have caused her great distress.

(iii) At a consultation on 15 June 2015 with Dr Philip McGarry FRC Psych, he expressed the opinion that 'she did not appear currently severely depressed', but he qualified this by stating that 'she [was] on a significant dose of antidepressants'. By this time, however, her difficulties had on the face of it been resolved, so logically some improvement in her mental state was to be expected.

10(i) We are satisfied that notwithstanding what we have stated at *Paragraph 9 above*, the treatment which the claimant received at work (ie the failure to grant her a reasonable adjustment in terms of allowing her to work reduced hours) inevitably compounded and exacerbated to a serious degree any pre-existing condition, and was a major cause of her mental health issues at the relevant time.

(ii) Without in any way wanting to labour the point that we made at *Paragraphs 2(ii)* and *28(ii)* of our liability decision about the employer's managers' failure to grasp the reality of the situation which confronted them and the limited extent of their knowledge of the provisions of the Disability Discrimination Act 1995 and the concept of reasonable adjustments, it is significant that when the claimant met with Jeff McCartney and Rosemary Chapman to discuss the outcome of the former's investigation into the claimant's suspension, the discussion centred on a phased return to Toyota Boucher Road, building up to full-time work. Any discussion of variation of hours focussed on flexible working, as opposed to reasonable adjustments under the 1995 Act (*Paragraph 13* of liability decision). In March/April 2015, the focus was still very much on the needs of the business, and on 23 April 2015 the claimant was offered a job-sharing role (*Paragraph 16* of liability decision).

(iii) The basis of our liability decision was that the respondent company did not act promptly in putting the reasonable adjustment in place. The length of time involved was a period of four and a half months. The adjustment required was reasonably straightforward and should not have taken that amount of time bearing in mind the size of the respondent company. In dealing with this matter there was a failure in the respondent company's HR function, and, in effect, it dropped the ball, so to speak.

11 **Compensation for injury to feelings and psychiatric injury**

(i) In assessing the award to be made to the claimant, we have kept in mind that the respondent's liability is to compensate the claimant for injury to feelings and psychiatric injury suffered as a result of the discriminatory act (see : ***Skyrail Oceanic Ltd v Coleman [1981] ICR 864 CA***). There is a period of four and a half months, referred to above, during which, as we have found, the employer failed in its duty to make the reasonable adjustment.

(ii) Injury to feelings encompasses 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression'. ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318 CA***, per Mummery LJ at *331*.

It is for the claimant to establish the nature and extent of injury to feelings caused by her knowledge of the fact that she had been discriminated against.

(iii) In a discrimination case it is 'almost inevitable' [***Murray v Powertech Scotland Ltd [1992] IRLR 257 EAT***], but not 'automatic' (***Ministry of Defence v Sullivan [1994] ICR 193 EAT*** that injury to feelings has been sustained. In ***Ministry of Defence v Cannock [1994] ICR 918 EAT*** it was suggested that injury to feelings will be easy to prove, as a tribunal will be easily persuaded that the anger and distress caused by the discriminatory act has injured the claimant's feelings. (See also ***Abegaze v Shrewsbury College of Arts and Technology [2010] IRLR 238 CA***.)

(iv) An award for injury to feelings does not depend on any financial loss being suffered by the claimant. By its nature it is not an award which is capable of objective proof or measurement in monetary terms (***Vento (No 2) op. cit***).

Injury to feelings is not a medical term, so there is no need to produce medical evidence.

The tribunal has to make a reasonable assessment of compensation on the basis of the evidence and information it has before it. Any such award is to be compensatory, not punitive (***Armitage, Harsden and HM Prison Service v Johnson [1997] IRLR 162 EAT***). An award should be neither so low nor so high as to undermine public confidence in, and respect for, the administration of justice. The tribunal, having regard to the amount it is minded to award, should bear in mind the value of that amount in everyday life. The award should also bear some relation to similar awards in personal injury cases.

(v) Other factors to be taken into account in assessing the award include the following : the vulnerability of the claimant, his or her loss, the position of the person discriminating, the duration of the unlawful treatment, and the nature and seriousness of that treatment.

(vi) Bands of compensation for injury to feelings were set out in ***Vento***. They were updated in ***Da'Bell v NSPCC [2010] IRLR 19***, and are as follows:-

£18,000 - £30,000 – the top band - is appropriate in the most serious cases, for example, a prolonged campaign of harassment;

£ 6,000 - £18,000 – serious cases, but not in the top band;

Under £6,000 - less serious cases involving isolated, one-off acts of discrimination (though awards of under £500 should be avoided as tending to undermine respect for anti-discrimination law).

(vii) There are conflicting decisions of the EAT in Great Britain as to whether or not there is a requirement to apply the 10% uplift in injury to feelings cases. At the moment of writing, this matter remains to be resolved by the Court of Appeal in England and Wales. The 10% minimum formed part of the general reforms to civil justice in England and Wales and there are no decided cases in this jurisdiction on this matter.

12(i) A claimant may also recover damages if he or she has suffered any personal (ie psychiatric) injury as a result of the discriminatory act (see ***Sheriff v Klyne Tags (Lowestoft) Ltd [1999] ICR 170 CA***. This is over and above any compensation payment for injury to feelings, and constitutes a separate head of loss in its own right.

(ii) Notwithstanding this, it may not always be easy to distinguish where injury to feelings stops and injury to mental health begins and there is consequently a danger of double-recovery.

In ***HM Prison Service v Salmon [2001] IRLR 425***, the EAT suggested that it was open to a tribunal to make a single award for injury to feelings and to include an element for psychiatric harm. Tribunals should make it clear which they are doing. (*Tolley's Employment Law Handbook, 2016 (3rd Edition) Page 337 Paragraphs 13 – 17*.)

(iii) Damages for personal injuries are recoverable for any harm caused by the discriminatory act, and not simply for harm which was reasonably foreseeable (***Essa v Laing Ltd [2003] ICR 1110 EAT***).

The emphasis is on the effect on the victim.

The specific causes of psychiatric illness are often unclear and it will not always be obvious to what extent such a condition may have been influenced or exacerbated by other factors such as pressures at home or work which have nothing to do with the discrimination suffered. The claimant will have to show that the discriminatory act(s) also caused the psychiatric harm (see generally : *Discrimination at Work – IDS Employment Law Handbook Page 1322 at Paragraph 36.91*).

Medical evidence, while clearly desirable and advisable, in a claim for psychiatric injury, is not required as a matter of law (see : ***Hampshire County Council v Wyatt [EAT/0013/16***). In this case we did not have up-to-date medical evidence, but as indicated at *Paragraph 7(i)* above, medical report etc adduced in evidence at the liability hearing, were available to us.

13. We turn to compensation. The claimant's claims are set out at *Paragraph 6* above.

(i) The claim for loss of earnings

The evidence in respect of this is unclear, and the claimant has not satisfied us that she did indeed suffer any loss of earnings. We therefore make no award under this heading.

(ii) The claims for injury to feelings and psychiatric injury

We adopt the approach permitted by ***HM Prison Service v Salmon*** *(op. cit, Paragraphs 12(ii) above)* and make a single award to encompass both injury to feelings and psychiatric injury. In ***Salmon***, it was stated by Mr Recorder Underhill QC, : at *Page 430, Paragraph 29*:-

> *" … No doubt in principle 'injury to feelings' and psychiatric injury are distinct. In [**Alexander v Home Office [1988] IRLR 190 CA**] May LJ clearly distinguished them when he said (at Page 193):-*
>
> > *' … Injury to feelings, which is likely to be of relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life … . [Our emphasis]*
>
> *…*
>
> *[I]n practice the two types of injury are not easily separable. In a given case it may be impossible to say with any certainty or precision when the distress and humiliation that may be inflicted on the victim of discrimination becomes a recognised psychiatric illness such as depression. At the lower end are comparatively minor instances of*

impact or distress, typically caused by one-off acts or episodes of discrimination : this appears to be the type May LJ had in mind. But at the upper end the victim is likely to be suffering from serious and prolonged feelings of humiliation, low self esteem and depression; and in these cases it may be fairly arbitrary whether the symptoms are put before the tribunal as a psychiatric illness, supported by a formal diagnosis and/or expert evidence. … It appears … that tribunals in such cases do sometimes treat 'stress and depression' as part of the injury to be compensated for under the heading 'injury to feelings' and we can see nothing wrong in principle in a tribunal taking that course provided it clearly identifies in the victims' condition which the award is intended to reflect (including any psychiatric injury) and the findings in relation to them'."

The EAT went on to caution against 'double counting' where separate awards were made, ie the risk that what was essentially the same suffering may be compensated twice under different heads, and spoke of 'the artificiality' of trying to divide [the] injury into two separate boxes.

14 We now assess the amount of compensation which we consider the claimant, Ms McLaughlin, should receive:-

(i) As we have stated earlier, awards of this nature cannot be calculated with mathematical precision. Mr Grainger BL, for the claimant, did however, refer us to the cases of ***Angela McCracken v Northern Health & Social Care Trust [Case Reference Nos: 806/122 and 1726/13***] a first instance decision of an industrial tribunal in this jurisdiction chaired by the Vice President of the Tribunals, and ***Da'Bell v NSPCC [2010] IRLR 19 EAT***. These were both reasonable adjustment cases where it was held that the duty to make a reasonable adjustment was not made for a period of approximately six months in the former case and six to eight months in the latter. Awards of £6,000 and £12,000 were made respectively. We do, however, concede that decisions of this nature are of limited assistance. Every case depends on its own facts, but in both cases the period during which there was a failure to make a reasonable adjustment bears some similarity to the instant case.

(ii) We again refer to our finding at *Paragraphs 8 - 10 above*, and we bear in mind particularly that the claimant in this case had a pre-existing medical condition.

We are satisfied that this case falls in the middle band of ***Vento***. We consider, having regard to all the facts and circumstances that £11,500 is an appropriate award of compensation for the injury to feelings and psychiatric injury that the claimant has suffered. We do not consider such sum to be either excessive or overgenerous.

(iii) Interest on this award is calculated in accordance with the Industrial Tribunals (Interest on Awards in Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996, for the period **1 January 2015 to 15 May 2015 inclusive**, as follows:-

$^{135}/_{365}$ days x $^{8}/_{100}$ x £11,500 = £340.28

(iv) The total award is therefore £11,840.28

15 This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge
(Acting under Section 27 of the Judicial Pensions and Retirement Act 1993)

Date and place of hearing: **13 March 2017, at Belfast**

Date decision recorded in register and issued to parties: