EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105322/2020

Final Hearing Held at Edinburgh by Cloud Video Platform on 14 and 15 September 2022

Employment Judge A Kemp
Tribunal Member L Brown
Tribunal Member A Matheson

Michael McCourt	**Claimant** **In person**
Tesco Distribution Ltd	**First Respondent** **Represented by:** **Mr M Brien,** **Counsel** **Instructed by:** **Ms L Finlayson,** **Solicitor**
David Weir	**Second Respondent** **Represented by:** **Mr M Brien,** **Counsel** **Instructed by:** **Ms L Finlayson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:

1. **The claim of victimisation under section 27 of the Equality Act 2010 against the first respondent succeeds.**

2. **The second respondent is liable for the same under the terms of sections 109 and 110 of the Equality Act 2010.**

3. The claimant is awarded compensation under section 124 of the Equality Act 2010 in the sum of TWENTY NINE THOUSAND TWO HUNDRED AND THREE POUNDS EIGHT SEVEN PENCE (£29,203.87), payable jointly and several by the respondents.

REASONS

Introduction

1. This was a Final Hearing on the claim made by the claimant that he had been victimised contrary to the terms of section 27 of the Equality Act 2010 ("the Act"). He acted for himself. The respondent was represented by Mr Brien.

2. There had been a number of earlier Preliminary Hearings, and the central issue before this Tribunal was whether the decision to prevent the claimant from returning to the first respondent's site at Livingston, taken by the second respondent, was because he had presented a Claim for discrimination in relation to disability under the Act against his former employers. The respondent disputed that, arguing that the decision was taken because there were concerns over the claimant's safety record, compliance record, the reputation of the second respondent, and of the first respondent.

3. The hearing took place by Cloud Video Platform remotely. At the commencement of the hearing the Judge explained to the claimant how the hearing would be conducted, the function of cross examination being to challenge any aspect of the evidence by the other party not considered accurate, otherwise it would be likely to be considered established, and putting to the witness any matter not in their statement they should know about which the claimant gave evidence about. He explained that documents in the Bundle required to be referred to by page number and that if not referred to in the evidence would not be part of the evidence considered; about Tribunal questions and re-examination; the closing of a case after which adding evidence was permitted only in exceptional circumstances, and about making submissions.

4. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence it heard.

Preliminary Issues

5. There were two preliminary issues that the Tribunal addressed prior to the hearing of evidence. They were as follows:

(i) Claimant's application to amend

6. The claimant sought to make an amendment which had been intimated a few days prior to an earlier Final Hearing in January 2022. That hearing had been adjourned when the claimant's then solicitor resigned from acting. Mr Brien opposed that, and in brief summary he argued that it had been delayed too long, that it had been mentioned in a previous Preliminary Hearing on 23 March 2021, that it had taken the claimant until four working days before the initial Final Hearing to conclude it, and was moved now. The Tribunal considered the cases *of* ***Selkent Bus Co Ltd v Moore [1996] IRLR 661,*** and ***Vaughan v Modality Partnership [2021] IRLR 97.*** Although the application to amend was indeed made later than it could and should have been, the possibility of the point was raised long ago, it is largely about attaching a legal label to the claim against the second respondent and clarifying the identity of his employer, which the first respondent itself had raised, it was made in January 2022 therefore long before the present Hearing, and there was no suggestion of time-bar being an issue. The prejudice suggested was of having to deal with the aspect raised by the amendment but that was we considered a very minor prejudice to the respondent, and there was a greater prejudice to the claimant if it were to be refused albeit that in our view there may be little practical difference made by the amendment. The factual part of the amendment was not disputed, nor was it disputed that the second respondent was the person who decided the matter which was admitted to be a detriment. In all the circumstances we considered that the amendment should be allowed.

(ii) Respondents' position

7. The respondents accepted that the second respondent had decided that the claimant should not be permitted to return to the first respondent's site. The respondents also accepted that the claimant had made a Claim against his former employers Carntyne Transport Ltd in the Employment Tribunal which alleged, amongst other matters, discrimination on the ground of disability under the Act. It was also accepted that by not permitting the claimant to return to the Livingston site the claimant had suffered a detriment. Although as a party the second respondent had an entitlement to be present throughout the evidence, Mr Brien confirmed that he was content that he did not do so, but would join the hearing when giving his evidence. That is what took place.

Issues

8. The Tribunal identified the following issues for determination during the preliminary discussions, and raised them with the parties. The list of issues is:

   (i) Did the first respondent and second respondent subject the claimant to a detriment by the instruction not to permit him to return to their site because he had done a protected act under section 27 of the Equality Act 2010?

   (ii) Is the second respondent otherwise liable for any detriment under section 109 of the Act

   (iii) If any claim is successful, to what remedy is the claimant entitled?

Evidence

9. Evidence was given by the claimant first, then by Mr Weir the second respondent and finally Mr Robert Milne of the first respondent..

10. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. Further documents were at the end from a series of additional documents the claimant had prepared for the hearing scheduled for January 2022. No Schedule of Loss had been provided.

Facts

11. The Tribunal found the following facts, material to the case before it, to have been established:

Parties

12. The claimant is Mr Michael McCourt.

13. The first respondent is Tesco Distribution Limited. It operates a depot at Livingston which transports goods for Tesco stores within Scotland and elsewhere, both receiving such goods and sending them out.

14. The second respondent is Mr David Weir. He is employed by Tesco Stores Ltd. He works at the said depot. He is the Lead Transport Manager.

Background

15. The claimant previously worked for an employer named Carntyne Transport Ltd ("Carntyne"). He commenced that employment in about March 2017. He was the driver of a heavy goods vehicle. Mr Weir was the Transport Manager at the same employer, commencing employment there a few months after the claimant had started in 2017. He was not the claimant's direct line manager, but the level of management above the supervisor who was a Transport Operator.

16. The claimant suffered from mental health difficulties, for which he received medication. His General Practitioner advised that a hot meal of some kind should be taken before taking that medication. The claimant raised the issue with his employer. He sought adjustments as a disabled person under the Equality Act 2010, as he perceived himself to be. The employer did not accept his status as that, including Mr Weir. The claimant commenced a grievance in relation to Mr Weir, who he thought was putting him under undue pressure. In about January 2019.

17. During his employment with Carntyne an incident occurred when the claimant did not use a tachograph, which is a legal requirement to record hours in a heavy goods vehicle. Mr Weir investigated the matter, but was not the decision-maker. The decision was to issue a final written warning rather than to dismiss having regard to the claimant's mental health difficulties. Mr Weir on occasion spoke to the claimant about deviating

from what he considered to be the appropriate route. One incident related to driving to Grangemouth docks, where the claimant had gone to Stirling Services to obtain a hot meal. Mr Weir told him that that was not appropriate, or words to that effect.

18. In around summer 2019 two incidents occurred when the claimant was driving a vehicle. In the first he did not properly affix a form of wedge to a whisky cask, shaped like a barrel, as a result of which it rolled off the vehicle and was damaged, with the contents lost. The customer, Diageo, was displeased and asked that the claimant not return to its premises. In the second the claimant did not lower legs required for a trailer, as a result of which it lowered onto its nose. The claimant reported that to the Workshop Foreman. He did not report it to Mr Weir or the claimant's supervisor. The claimant was called to a disciplinary hearing by his employer, which was not conducted by Mr Weir. The claimant was dismissed. An appeal he took did not succeed. Mr Weir was aware of the fact of dismissal and the background reasons to an extent.

19. The claimant thereafter commenced Employment Tribunal proceedings against Carntyne alleging discrimination on the protected characteristic that he was a disabled person under the Equality Act 2010. Mr Weir was aware of the fact of the Claim and that it included the said allegation. Carntyne asked him to be a witness at any hearing.

GJMC

20. In about July 2020 the claimant commenced to work for GJMC Transport Ltd ("GJMC"), a transport company operated by Mr Gary McGubbin. He worked for GJMC as a self-employed driver. About 90% of the work of GJMC was for the Tesco group of companies ("Tesco"). The claimant's work for GJMC was carried out under the GJMC Operator's Licence.

21. GJMC acted as a sub-contractor to a company named Millview Logistics Ltd ("Millview"). It in turn was a contractor to Tesco. Millview did not have vehicles or drivers of its own, but secured transport work from Tesco and sub-contracted that out to other companies, one of which was GJMC. In turn GJMC sub-contracted some work to self-employed drivers such as the claimant. GJMC considered the claimant to be a good worker and gave

him regular business. The claimant attended at the respondent's depot at Livingston on a regular basis as part of his duties. He attended with a GJMC vehicle, and if taking goods or food waste from the depot would use a trailer with the branding of Tesco on it.

Mr Weir

22. In January 2020 Mr Weir commenced employment with Tesco Stores Limited as Lead Transport Manager. As such, he required to comply with Statutory Document No. 3 for Transport Managers issued by the Senior Traffic Commissioner. That includes general duties set out in paragraphs 54 and 55.

Messages regarding claimant

23. On 23 and 24 February 2020 emails were sent within the Tesco group of companies with regard to a driver named as M McCourt, who had said that he could not do a run with a vehicle as it did not have tail lift capabilities. Mr Weir ascertained that that was the claimant, and emailed to state "Sounds like he tried to pull a fast one and try wriggle out of doing another run. Doesn't surprise me in the slightest."

24. Mr Weir concluded that he would prefer the claimant not to attend work at Tesco premises. He asked a colleague Stephen Brown to contact the contractor Millview to inform them of the same. Millview contacted Mr McGubbin, who sought to use the claimant less often at Livingston when Mr Weir was likely to be present. No one told the claimant of Mr Weir's stated preference. The claimant continued to work at Tesco premises from time to time, but not always at Livingston where Mr Weir was located. His runs included to a food waste facility at Daventry.

25. On or around 27 April 2020 Mr Weir noticed that the claimant had attended the depot at Livingston. He sent emails to colleagues to enquire about that. He emailed Millview that day and stated "Stephen Brown had previously asked on a couple of occasions I believe for a driver coming through yourselves not to be used going forward. Can you please ensure this happens I've noticed the driver was in dayshift all of last week."

26. No name was given in that email, and that was then checked. Mr Weir emailed Millview on 28 April 2020 to confirm that it was the claimant and added “Nothing but trouble please ensure that his employer knows not to send him into work for Tesco.”

27. That same day Mr Weir sent an email to his team with regard to the claimant stating “The above driver has been coming in through a subcontractor working for Millview, we have asked that he is no longer sent into work for Tesco. Should it slip through the net please turn him away and let him know. I have taken up with Millview who are aware.”

Requirement not to attend depot

28. On 1 May 2020 the claimant picked up his vehicle at about 3am and attended at the said depot. He was told that the transport manager had sent an email stating that he was not permitted to attend the site, and was required to leave. He informed Mr McGubbin of that, and was told to go home. Mr McGubbin sought to find out the reason for the decision.

Complaints

29. On 2 May 2020 the claimant sent a series of emails to senior managers in Tesco to complain of his exclusion from the depot. His email included that he was “currently considered a disabled person with a protected characteristic under the DDA. In my last workplace I was bullied, harassed and discriminated against by my transport manager and my tribunal was due to commence last month but is deleted due to Covid 19”. He set out his view that his exclusion from the depot was “further discrimination and harassment”.

30. Mr Matthew Rhind of the first respondent asked Mr Robert Milne, at that stage the Regional Transport Manager of the first respondent, to investigate matters. Mr Rhind sent him the claimant’s email. Mr Milne spoke to Mr Weir. Mr Weir explained that he had worked with the claimant at Carntyne Transport, that there had been a final written warning for a tachograph issue, that there had been incidents involving a dropped cask and a dropped trailer, that the claimant had deviated from proper routes, had a sign in his vehicle stating “Wee Meth” and that he had concerns

over his safety record, the potential impact on his own reputation as Transport Manager, and the Tesco brand.

31. In a further conversation held about a week later Mr Weir spoke to Mr Milne and told him that the claimant had commenced a claim for disability discrimination against Carntyne Transport in the Employment Tribunal.

Reasons' email

32. On 12 June 2020 the claimant sent a further series of emails to Tesco senior managers with regard to the situation. Mr Milne asked Mr Weir to set out the reasons for his decision to "bar" the claimant from the depot. Mr Weir did so in an email to Mr Milne that day. In the first paragraph he referred to the claimant's dismissal from Transport, that there was a challenge to that in the Tribunal, and that Mr Weir was likely to be called to give evidence. He set out details of the offences that led to discipline, saying that he was the discipline manager for the tachograph incident, and that the claimant was "ultimately dismissed for incorrectly dropping a trailer and again not notifying and dropping a cask of whisky (a sackable offence at Carntyne) from the rear of a trailer whilst unloading." He referred to a bad habit of deviating off route to have breakfast, a sign in his vehicle "Wee Meth", and of evidence of him drinking in an LGV vehicle in April. He mentioned body odour. He said that he had to protect the Tesco operator licence, the Tesco brand, and his own reputation.

33. That message was passed to Emma Ng and Mandy Beattie of the first respondent. Ms Beattie sent a message to the claimant on 15 June 2020 stating "Thank you for your message to our executives dated 12th June 2020. We have looked into your concerns and having reviewed David Weir's decision, we have considered as a company that you are no longer permitted to enter our Livingston Distribution Centre. We are satisfied that the reasons for this are substantial and this decision is final. Full reasons for this decision will be communicated to Millview Logistics Ltd in due course. Should you have any further questions or concerns please discuss these with Millview directly."

34. In late June 2020 Mr Weir and Mr Milne met Mr Lochore of Millview and explained that the claimant was not permitted to return to the depot. Mr Weir later spoke to Mr McGubbin about the reasons for his decision in relation to the claimant. He said that the claimant was a drug addict, had committed benefit fraud, had dropped a trailer when at his previous employer and suffered from severe mental health disabilities.

GJMC letter

35. In July 2020 GJMC wrote to the claimant to confirm the termination of their contract with him. It stated "……I contacted David Weir at Tesco to seek a reason for this and was advised that you were a drug addict, commit benefit fraud, dropped a trailer in a previous employment and suffer from severe mental health disabilities. This was all issues he had with you at Carntyne Transport." It referred to 90% of the work of GJMC being from Tesco Livingston, and that if he was able to resolve the issue with Tesco he would take him back, as he was a good worker.

Further complaints

36. On 30 and 31 August 2020 the claimant sent a further email to Tesco senior executives seeking a review of the decision.

37. On 3 September 2020 the first respondent wrote to the claimant referring to the correspondence on 31 August 2020 confirming that the decision not to permit him to enter the Livingston Distribution Centre stood.

Impact on claimant

38. The claimant was distressed by the decision to prevent him returning to the depot. His mental health suffered from it. He continued to work for GJMC until July 2020. Thereafter he was not able to work because of his mental health difficulties. His medication was increased. He was not able to work from July 2020 to April 2021 as a result.

39. When working for GJMC the claimant was self-employed. His average income was about £42,345 per annum, the equivalent of about £814 per week. He paid his own income tax, which was a sum of about £6,000 per annum, and National Insurance Contributions of about £3,000 per annum

which left him with a net income of about £33,345 per annum or about £641 per week. In about July 2020 he claimed benefits, and received Universal Credit from around then onwards at an average rate of £433.80. In April 2021 he obtained work as a self employed person from Vantage Recruitment. He earned about £425 per week, the equivalent of about £22,100 per annum and paid his own income tax of about £1,900 per annum and national insurance of about £1,180 per annum, which left him with a net income of about £19,020 per annum or about £366 per week. He received reduced Universal Credit when commencing work at Vantage Recruitment to maintain the income he had had from such benefits.

This Claim

40. The claimant commenced Early Conciliation with both respondents on 31 July 2020. Certificates were issued on 31 August 2020 and the present Claim was presented on 30 September 2020.

Submissions for respondent

41. Most helpfully Mr Brien agreed to give his submission first as the claimant is a party litigant. The following is a basic summary of it. The issue was what was the reason for the treatment, with both the protected act and detriment being accepted. The question of law was whether the detriment was because of the protected act, or was the real reason for it. It was not a but for test. The claimant had not proved the claim such as to shift the burden. Mr Weir's evidence should be accepted. The reasons were safety, compliance and reputation both of Mr Weir and Tesco. That was consistent with the email on 12 June 2020. There were onerous obligations on Transport Managers, involving a need to take action where there were concerns. The claimant accepted to an extent the reasons given. He had not believed at the time that the Claim was a reason. His main concern was about the way the decision had been communicated to him by the first respondent, and a lack of investigation. There was no legal responsibility to do so, but not doing so was not indicative of victimisation.

42. Mr Weir had started in January 2020, there had been emails in February 2020, but he had not been aware of the claimant attending the depot until April 2020, and he sent the email on 28 April 2020. Mr Weir had been

aware of the Claim and that it included a disability discrimination element, but the fact that he disclosed that to Tesco is unsurprising. It would have been more surprising if he had not. There was no requirement of confidentiality. It was unlikely to have been mentioned when in conversation with Mr Milne if the reality was that this was the reason for his decision. If it was at the forefront of Mr Weir's mind it would be easier to keep quiet. All the evidence is consistent with that of Mr Weir, which includes the acceptance by the claimant of the tachograph issue and the dropped trailer, as well as the cask of whisky being dropped even if he disputed fault. The Tribunal may consider that there was some overreaction by Mr Weir but that did not mean that there was victimisation by him. The issue was the real reason for the treatment. It may be that the investigation could have been handled differently but that also did not mean that there was victimisation. Mr Weir's evidence was candid, consistent and compelling. On balance the claimant had failed to prove his case and the claim should be dismissed.

43. The Judge raised with him authorities on the test being a significant factor (authorities are addressed further below), and Mr Brien referred to the case of ***Bailey.***

Claimant's submission

44. The following is a basic summary of the submission. The claimant argued that the main reason for the treatment was the Claim made. He referred to inconsistencies and contradictions in the evidence of Mr Weir. He referred to the email on 12 June 2020 by Mr Weir, which included aspects that did not relate to competency. He argued that Tesco would not be liable for something done on another person's operator's licence. He did not understand why it took so long for the issue to be raised if it was truly one of health and safety. He felt that his making a Claim was a major part of the decision.

Law

45. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) Statute

46. Section 27 of the Act provides:

> "**27 Victimisation**
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act….."

47. Section 109 of the Act provides for the liability of employers and principals.

48. Section 110 of the Act provides for the liability of employees and agents.

49. Section 136 of the Act provides:

> "**136 Burden of proof**
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

50. The provisions of the 2010 Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC,*** as well as the ***Burden of Proof Directive 97/80/EC.*** The dismissal was prior to the United Kingdom withdrawing from the European Union, and those provisions remain part of the retained law under the European Union (Withdrawal) Act 2018.

(ii) Case law

51. There are two key questions – (i) has the claimant done a protected act (ii) if so did he suffer a detriment because he had done so. The second aspect is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ 425,*** in which the Court of Appeal reviewed the meaning of the

term “because”, and held that that was not a “but for” test. The judgment included the following:

> “It is also well-established that an act will be done ‘because of’ a protected characteristic, or ‘because’ the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, ***Nagarajan***, at p. 513B.”

52. That is a reference to ***Nagaragan v London Regional Transport [1999] IRLR 572*** in which the act complained of was not discriminatory per se, but was rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. Lord Nicholls said,

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

Burden of proof

53. There is normally a two-stage process in applying the burden of proof provisions in discrimination cases, including for victimisation, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved that guidance. The law on the shifting burden of proof was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal, which said the following (in a case which concerned direct discrimination on the protected

characteristic of disability, but where the comments are equally apt for a claim of victimisation):

> "In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

54. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In ***Igen*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

55. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

56. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It had also been an issue addressed in ***Nagarajan.***

Remedy

57. In the event of a breach of the 2010 Act compensation is considered under section 124, which refers in turn to section 119. That section includes provision for injured feelings under sub-section (4). The first issue to address therefore is injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

58. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of

the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

59. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2020, the Vento bands include a lower band of £900 to £9,000, a middle band of £9,000 to £27,000 and a higher band of £27,000 to £45,000. Subsequent updating does not affect the present claim given the date of its presentation.

60. Consideration may also be given to an award in respect of financial losses sustained as a result of the detriment. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. It addressed the issue of dismissal, but the same principle applies in relation to detriment. The question is

> "what would have occurred if there had been no discriminatory dismissal ……. If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

61. There is a requirement that the loss (and detriment) complained of is not too remote from the wrong to attract compensation, and that the chain of causation between the two is not broken. That was addressed in ***Bullimore v Pothecary Witham Weld (No 2) [2011] IRLR 18*** where it was held that when an adverse reference, given for an illegitimate reason, led to an employer deciding not to make, or to withdraw, an offer of employment, "it was hard to see why that consequence should be regarded as too remote to attract compensation from the giver of the reference".

62. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

63. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 apply to claims such as the present. Different provisions apply to different aspects of the award. The awards made for interest can include for injury to feelings, and for past financial losses. No interest is due on future losses.

64. A claim under section 27 of the Act does not fall within the provisions of the Employment Protection (Recoupment of Benefits) Regulations 1996. Benefits paid fall to be deducted from losses suffered accordingly.

Observations on the evidence

65. The Tribunal's assessment of each of the witnesses who gave oral evidence is as follows:

The claimant

66. We were satisfied that Mr McCourt sought to give honest and reliable evidence. He gave evidence in a straightforward manner. It was suggested that his complaints at the time did not refer to a protected act, but we do not agree with that. In his email of 2 May 2020, for example, he referred specifically to the Employment Tribunal Claim. Whilst that claim was not before us, nor was either the letter of dismissal by Carntyne, or the claimant's grievance, it was not in dispute that there had been a Claim, and that it included a breach of the Act such as to amount to a protected act. It was also not disputed both that the Claim was on the basis of alleged disability, and that Mr Weir knew that, as well as that he had informed Mr Milne of the same in a conversation. It was not entirely clear whether the Claim included unfair dismissal or other issues, but that is not relevant for the purposes of this Claim. There was some evidence of financial loss, but not complete as we address further below.

The second respondent

67. We were unfortunately not satisfied that Mr Weir gave credible and reliable evidence. We were concerned at several aspects of his evidence. Most significantly, in our view, he had claimed in his own evidence that he had informed Mr Milne in both February and April 2020 that the claimant had been on site, and that he regarded him as not appropriate to do so because of concerns over safety, compliance, and reputation for Tesco and Mr Weir personally, and that Mr Milne had in effect approved his decision. But Mr Milne contradicted that evidence. He said that the first he was aware of the issue was on 2 May 2020, the day after the claimant had been prevented from attending the site. There were other points of detail that concerned us. An example is that in the email of 12 June 2020 Mr Weir said that he had been the disciplining officer who had imposed the final written warning in relation to the tachograph matter, but he later accepted that he was the investigator, not the decision maker.

68. Mr Weir disputed that he had made many of the points attributed to him by Mr McGubbin who wrote to the claimant setting out what he said Mr Weir had given as reasons for the decision, which included issues including alleged drug use, benefit fraud, and serious mental health problems. From all the evidence we heard, albeit that that did not include Mr McGubbin himself, we concluded that it was likely that Mr Weir had said what was attributed to him in that letter, and we did not accept Mr Weir's evidence on that to the contrary. It appeared to us unlikely that Mr McGubbin would do other than report what had been said to him, as the letter bears to do, particularly when Tesco was by far his biggest source of work.

69. That conclusion that Mr Weir's evidence that he had not said such details to Mr McGubbin was not reliable was in our view supported from the evidence as a whole, which included an email dated 28 April 2020 in which the claimant was described by Mr Weir as "nothing but trouble". That is a very wide generalisation, which is apt to include both issues of disability status and adjustments required, as well as making the Claim in the Tribunal against Carntyne alleging breaches of the Equality Act 2010, amongst other perceptions of issues. That phrase was also more consistent with Mr McGubbin's relaying in the letter of what Mr Weir had said than Mr Weir's evidence on that point to us.

70. That phrase was in itself we considered at the least consistent with a reference to the making of the Claim against Carntyne alleging breaches of the Act on the basis of being a disabled person, in our view the phrase was intended to include reference to that Claim of which Mr Weir was admittedly aware..

71. The assertion in his evidence that the Claim did not form any part of the decision he made is also contradicted in our view by his email of 12 June 2020. He had been asked to set out the reasons for the decision to prevent the claimant from returning to the depot. The first paragraph referred specifically to the Claim. If the reasons were safety, compliance and reputation only, there was no need to refer to the Claim, and no benefit in doing so. The reference to it in the first paragraph was therefore in our view significant.

72. That was not however an isolated reference to the Claim, as Mr Weir had told Mr Milne of the Claim in a conversation before that email was sent, and that the Claim included discrimination on grounds of being a disabled person, in about mid May 2020. If again the discussion was on the reasons for the decision, as we understood the context to be, there was no need or benefit to mentioning that. The fact that the second respondent referred to the Claim twice in these contexts of discussion over the reason for the decision was we considered strongly indicative that the Claim had been a substantial part of his thought processes. We concluded that he regarded the claimant as a source of trouble, a material part of which was because he had asserted breaches of the Equality Act 2010 in the Claim.

73. We do accept that Mr Weir had some genuine concerns about the claimant. We do not suggest that the Claim was the only factor bearing on his decision. The claimant had been given a final written warning for breach of tachograph rules, he was at fault for that to an extent at least, he had caused a trailer to drop because he forgot to put out the legs required for it, as he accepted, which again was indicative of a degree of fault, and Mr Weir thought that he had been at fault for dropping a whisky cask, which had happened, although we accepted the claimant's evidence that that had not been a part of the reason for dismissal as it was accepted that he had not been trained on such a task adequately. The claimant is

not by any means beyond criticism. There was accordingly more than one reason for the decision, apart from the question of the Claim. The test however is not what is the only reason, or the principal reason, for the decision.

74. Against what were admittedly failings by the claimant, it is relevant that he had been attending the depot for a period of about 10 months, there had been no incidents during that time, and GJMC considered him a good worker.

75. Mr Weir referred to the claimant' sign in his vehicle. No suggestion was made that someone had told him to remove the sign Mr Weir considered, not unreasonably, to be a risk to reputation. The claimant said that it was a reference to a character in the programme "Still Game" with no teeth, like him, but that is not the only meaning and it could be understood to be a reference to unlawful drugs. If there was a concern about it, it could have been raised with him. It appeared to us to be make-weight.

76. A Transport Manager does have general duties set out in the Senior Traffic Commissioners document. We accept that it is not beyond the possibilities that if a driver working for another operator was stopped, and the vehicle effectively impounded, that that could affect the Tesco trailer being moved to their detriment, but we did not consider that the evidence Mr Weir gave of putting his own reputation or that of Tesco as operators was made out. It did not appear to us to accord with the terms of the document, or common sense, and Mr Weir accepted in cross examination that the issue was essentially for GJMC in so far as the claimant was concerned, as they were the operator under whose licence he was then driving. We concluded that some parts of the reasoning given by Mr Weir were exaggerations at best, and adding make-weight arguments to seek to justify the decision. That caused us concern over the credibility and reliability of that evidence.

77. The additional remarks made by Mr Weir in the email of 12 June 2020 about a social media post or body odour we also considered to be make-weights added to seek to support the reasons. They had not been mentioned to Mr Milne in the initial conversation. That adding of makeweight arguments appeared to the Tribunal to have been likely to be

the case more widely. If there were genuine and serious concerns over compliance, safety, and effects on reputation, it would be expected that a clear instruction not to return to site, setting those out as the reasons, would have been given to Millview in February 2020. But Mr Weir accepted that he had not phrased it in such terms, and had made it as a kind of preference. He had also had a colleague pass on the message, and did not do so himself. That initial attitude of a preference appeared to us to be more consistent with a material part of the decision being that the claimant had pursued complaints of disability discrimination, such that he was viewed as a trouble-maker.

78. Taking account of all of the evidence we heard, the Tribunal concluded that the evidence of Mr Weir was not credible or reliable in relation to the reasons he gave for his decision.

Mr Robert Milne

79. We were satisfied that Mr Milne sought to give honest and reliable evidence. His evidence contradicted that of Mr Weir as referred to above, and we had no hesitation in preferring Mr Milne. He had undertaken an investigation into the issues alleged, which was not as complete as it might have been expected to be, but the information he had was all from Mr Weir. He did not enquire beyond that. He was aware of the term protected characteristic, but not that of protected act.

Discussion

80. The Tribunal decision is unanimous. For completeness we would record that we were satisfied that the claim was within our jurisdiction and no argument as to time-bar was made. We address each of the issues before us in turn:

(i) Did the respondent subject the claimant to a detriment because he had done a protected act under section 27 of the Equality Act 2010, by not permitting him to attend the first respondent's premises?

81. Firstly it was not disputed that the claimant was "barred" from attending the site, in the sense of not permitted to attend it to uplift Tesco goods at the least, if not to attend at all, and that that was a detriment. We then considered whether that detriment had been "because" of the Claim he had presented, which was accepted to be a protected act, or not. As is made clear in the authorities, the protected act does not require to be the sole reason, or the principal reason. It must however be a significant influence on the decision. We considered that the suggested terminology of the "real" reason that Mr Brien referred to in submission did not capture the test fully accurately.

82. We concluded that the claimant had established a prima facie case that the Claim had been a significant influence on the decision. It was not the sole reason, but a substantial one in our view. We did so for the following reasons –

(i) The Claim to the Tribunal was referred to specifically in the first paragraph of Mr Weir's email of 12 June 2020, which he had provided when asked to set out the reasons for his decision in writing. We concluded that that indicated that it was a significant factor when that was the context. Its prominence was striking. It followed the earlier reference to that Claim in discussion with Mr Milne about the reasons for the decision.

(ii) Mr Weir referred to the claimant in the email of 28 April 2020 as "Nothing but trouble". That phrase can include reference to his allegations that he was a disabled person and that he had pursued the Claim on that basis. It can easily encompass the making of the Claim.

(iii) Mr Weir told Mr Milne that the Claim was for disability discrimination in a conversation in about mid May 2020. There was no reason to do so in the context of a discussion as to the decision made if the reasons were only those Mr Weir claimed as to safety, compliance and reputation.

(iv) Mr Weir had been inconsistent in his evidence, particularly in relation to the evidence of Mr Milne, as set out above.

(v) The reasons given verbally to Mr Milne were expanded when the email of 12 June 2020 was written.

(vi) The reasons given to Mr McGubbin were expanded again, and were not fully consistent with those given to Mr Milne.

83. We then considered whether the respondents had discharged the onus of proof. We concluded that they had not. For the reasons given above in our observations we did not accept the evidence of Mr Weir that the Claim played no part whatsoever in the decision. His evidence was inconsistent, and contradicted by both Mr Milne on an important aspect, and the terms of the documents referred to. If, as Mr Weir claimed, the comment on the Claim was only background it is notable that nothing of that nature was said in the email of 12 June 2020, and its prominence at the start does not support the suggestion that that is all it was. The phrase “Nothing but trouble” we concluded, from the evidence we heard, included making the Claim. We were further concerned by the differing reasons given at different times, which we did not consider was evidence of a reliable witness at best.

84. Taking account of all of the evidence we heard, we concluded that the claimant had been prevented by the first respondent from attending the first respondent’s depot at Livingston because, in the sense that this was a significant influence on the decision, but not the only reason for it, he had done the protected act of presenting the said Claim against Carntyne which alleged breaches of the Act. The claimant had therefore suffered a detriment, in breach of section 27 of the Act.

85. The person who took that decision was admittedly Mr Weir. He took that decision for the first respondent, albeit not employed by them. No argument was raised that the first respondent would not be liable for the second respondent’s decision. The first respondent was written to by the claimant seeking to have the matter addressed, and it declined to do so on at least two occasions.

86. That decision taken by the second respondent did not confer direct liability on him but we concluded that that liability arose from the terms of section 110, with its reference to the terms of section 109. The amendment did

not specify section 110, referring rather to section 109, but we consider that it was reasonably clear from the terms of the Claim that the argument was that the second respondent was the decision maker, that was not disputed at any stage, and we consider that it is appropriate to make our findings on the basis of the terms of section110 of the Act. That is attaching what we consider to be the correct legal label to the facts pled. The second respondent is therefore jointly and severally liable with the first respondent, although that is not anticipated to make a practical difference as we understand that the first respondent will meet the award we make. They have (entirely properly) not sought to rely on any statutory defence.

(iii) If any claim is successful, to what remedy is the claimant entitled?

87. We considered firstly the issue of injury to feelings. We concluded that there was more than one element to this, not just the immediate upset at the time, but that it later led to the termination of the contract from GJMC, and a deterioration of his mental health. The evidence for this was however limited. There was some evidence given orally, and some support from the various emails of complaint that the claimant sent. There was no medical report, no records, and no supporting witness. The precise nature of the mental health issues was not specified in evidence, nor was the nature of the treatment given for it, the medication received from time to time, details of the change to medication, or otherwise. We require to consider matters on the basis of the evidence we heard, not what might have been produced.

88. Against that background we concluded that the case was towards the lowest part of the middle band of ***Vento***, and we awarded the sum of £10,000. Interest is due on the same for the period from 1 May 2020 being the date of the detriment to the expected date of payment, which is assessed as 30 September 2022. That is a period of two years and four months. Given the date of the decision and expected date of payment we calculate the period at 28 months, and the award for interest calculated at 8% per annum is the sum of £1,600. The total award for this head of loss is therefore £11,600.

89. We turn to the claim for financial loss. We did not have the benefit of a Schedule of Loss, and the evidence before us was not complete. We had documents showing the payments from GJMC, which varied from time to time, from which an average was taken, but the claimant did not provide details of the amounts paid for income tax or national insurance contributions. It is possible that some of the income may have been offset by expenses but without the evidence of that we could not calculate it, and have taken a broad but conservative approach to the calculation of the income before the detriment, erring on the side of that being at a lower level in light of the limited evidence the claimant put before us. We did not have before us, similarly, clear evidence of what, if any, earnings the claimant lost when still working with GJMC in the period to July 2020. We have considered the documents that there are, but have not been able to decern sufficiently clear evidence of loss at that stage. We therefore can make no award for loss for that period.

90. We then considered the position from July 2020 onwards. Initially the claimant claimed benefits, and received Universal Credit. There was documentary evidence for some of that, but we considered that it was not fully complete as the first entry in time appeared to be from September or perhaps August 2020, and the claimant accepted that he had received some payments in July. We therefore used the information that we had, and extrapolated from that to cover the period from July onwards. The basic payment appeared to be £1,668.71 per month, from the document before us, together with some small additional payments.

91. The claimant commenced working for Vantage Recruitment in April 2021. We had evidence of the payments from them to him in the period to November 2021, but not thereafter. The payments changed from time to time. There was no evidence as to what income tax or national insurance contributions he had, or would, pay. The claimant said that latterly his hours had reduced as he had separated from his wife and was caring for his 12 year old son, such that the income from earnings reduced to about £140 per week, but there was no documentation about that to verify the amounts, when it occurred, or what the benefits were changed to. The benefits details ceased in January 2021.

92. This all meant that ascertaining the nature of the loss, and what award was just and equitable, was particularly difficult. We did however take into account firstly that the claimant is a party litigant, secondly that there was very little cross examination on loss, and thirdly that there was no submission on loss. We have sought to utilise the documents we have, and the evidence given, and then work out what the net income was before the detriment, and thereafter what loss was suffered, if any.

93. We concluded, for the reasons set out above, that there was no loss proved until July 2020, and that the loss was for the period from then until November 2021. We did not consider it appropriate to extend loss beyond that date as there was no documentary evidence at all. We also took into account in restricting loss to that period that the claimant was a self-employed contractor, that such a role has little protection against fluctuations in demand and that it may have ended at some point in any event, and we considered that taking loss from July 2020 to November 2021 in all the circumstances was just and equitable.

94. The evidence for that period is partly present, but not complete, however in general terms we accepted the claimant's evidence on the position as being reasonably credible and reliable. We have worked out the net income before and after July 2020 from the documentary evidence, and using details of the sums payable for income tax and national insurance contributions as a matter of judicial knowledge. We have utilised figures supported by documentation where available, and if not supported by documentation have used the most reliable figure from the evidence before us which is not to the claimant's undue advantage. That meant that we erred on the side of lower earnings at GJMC, and higher income from benefits or Vantage Recruitment or a combination of the two.

95. We calculated the sums as set out in the facts above. We then took into account that his earnings at Vantage as being lower than those when in receipt of benefit, his evidence that he continued to receive benefits, and considered it likely that he would have had Universal Credit to supplement that income. We have taken the full period of loss as July 2020 to November 2021 at a net loss of £207.20 per week on the basis that the total income either from benefits alone or the Vantage Recruitment net

earnings and additional Universal Credit was the same throughout that period. That may well be lower than the actual loss, but as we do not have sufficient evidence, including documentary evidence, of all benefits paid over the period of loss we have required to do the best we can on what is before us, which we have sought to do on the basis set out above. There was no evidence as to any pension loss. The respondent did not make any argument over lack of mitigation of loss.

96. The total award is accordingly the sum of £15,263.62. On that interest is due, which we calculate to be from the mid point of the period of loss to the present time, which is a period of a month short of two years, at the judicial rate of 8% per annum. That we calculate to be the sum of £2,340.25. The total for financial loss is £17,603.87.

97. That is added to the sum for injury to feelings of £11,600, and leads to a total award of £29,203.87.

Conclusion

98. In light of the findings made above, the Tribunal concluded that the claimant had been victimised under section 27 of the Equality Act 2010 on which we make an award as above.

Employment Judge: Sandy Kemp
Date of Judgment: 23 September 2022
Entered in register: 26 September 2022
and copied to parties