



EMPLOYMENT TRIBUNALS

Claimant: Miss M Doran

Respondents: Pearl Holdings NW Limited

RESERVED JUDGMENT

Heard at: Manchester

On: 18 May 2022

Before: Employment Judge Holmes
Mrs A Ashworth
Mr M Stemp

Representatives

For the claimant: In Person

For the respondent: No attendance or representation

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant was at all material times a person with a disability within the meaning of s.6 of the Equality Act 2010.
2. The respondent failed to make reasonable adjustments for the claimant's disability by failing on 10 April 2021 to allow her to go home following a migraine attack at work.
3. The respondent discriminated against the claimant because of something arising in consequence of her disability, by failing to allow her to return to work, and thereby dismissing her, which the respondent has not justified.
4. The claimant is entitled to a remedy.
5. The Tribunal awards the claimant the sum of **£12,000** in respect of injury to feelings.

6. The Tribunal further awards the claimant the sum of **£2,746.82** in respect of her loss of earnings as compensation for discrimination.
7. Further, the claimant's complaint of failure to pay to the claimant an amount due to the claimant under regulation 14 (2) or regulation 16 (1) of the Working Time Regulations 1998 is well-founded and the respondent shall pay to the claimant the sum of **£76.00** in respect of untaken but accrued holiday (holiday pay), which sum the respondent is ordered to pay the claimant, without deductions.
8. The claimant is entitled to interest upon the awards for discrimination.
- a) In relation to the award for injury to feelings, the Tribunal calculates interest from the date of the first act of discrimination, 10 April 2021 to the date of calculation, 18 May 2022, at 8%

Interest therefore:

$£12,000 \times 8\% \times 403 \text{ days} = \mathbf{£1059.95}$

- b) In relation to the award for loss of earnings, the Tribunal calculates interest from the half way point between the start of the loss of earnings, 28 April 2021 and the calculation date, 18 May 2022.

The mid point is 6 November 2021, and thus the number of days over which interest is to be awarded is

$£2,746.82 \times 8\% \times 193 \text{ days} = \mathbf{£116.19}$

9. The Tribunal's awards are accordingly:

Injury to feelings	£12,000.00
Loss of earnings	£ 2,746.82
Interest	£1,176.14
Holiday pay	£ 76.00
Total:	£15,998.96

REASONS

1. By a claim form presented on 2 July 2021 the claimant brings claims of disability discrimination, and for unpaid holiday pay. The claims arise from her employment with the respondent as a sales assistant at its Nisa Local store at King Street in Dukinfield from 1 November 2020 until her resignation on 30 July 2021.

2. The claims were served , and a response was due by 17 August 2021 , but none was received. The respondent was notified that no response had been received, and on 8 September 2021 Arif Khaliq of the respondent contacted the Tribunal by email to say that the respondent had not received any initial correspondence about the claim (though it had been in discussions with ACAS) , and that was why it had not responded. The respondent was then re-sent the claim form. A response was then submitted on 14 September 2021, albeit that it was then out of time. The email enclosing the response was from Kim Finnerty.

3. By letter of 17 November 2021 the Tribunal extended the time for presentation of the response, to 14 September 2021, and it was accepted. That letter also made reference to the preliminary hearing which had been listed in the case for 8 December 2021.

4. In the response filed, the respondent largely agreed with the details of her employment provided by the claimant , save that whereas the claimant had given 10 April 2021 as the date her employment ended, the respondent stated that the correct date was 30 July 2021. The claimant accepts that this is correct. Whilst the respondent had ticked the box at section 6.1 that it intended to defend the claim, it set out no details in the box provided for details of facts upon which it intended to rely, nor did there appear to be any Grounds of Resistance document attached to, or intended to be, the response.

5. Consequently , by a further letter of 17 November 2021 , the Tribunal alerted the respondent to this, and informed it that unless the respondent set out the basis upon which the claim was defended by 24 November 2021, the case would be treated as one which was not contested.

6. No reply was received to that letter, and the preliminary hearing listed for 8 December 2021, of which the respondent had been notified, twice, went ahead before Employment Judge Hodgson. The claimant attended, but the respondent did not, and was not represented. Case management orders were accordingly made, and it was recorded that the respondent had not replied to the Tribunal, and hence the case was being treated as one which was not contested. The claimant, however, would still need to prove her claims, and hence this hearing was listed, and she was directed as to the steps she needed to take to prepare for this hearing , which she has done. At the preliminary hearing the Employment Judge vacated the three day listing of the final hearing originally listed for August 2022, and by letter of 23 December 2021 , this hearing was listed as the final hearing for one day. The Orders, which included a List of Claims and Issues, were sent to the parties on 22 December 2021.

7. This procedural history is recited simply to demonstrate that the respondent has been made aware at several stages of the consequences of not providing its grounds for resisting the claims. It has failed to do so, nothing has been heard from it, so the claims have been treated as uncontested. No application has been made by the respondent to be permitted to take part in the proceedings, and it has been totally silent since it filed the response in September 2021. Whilst the company has on 3 March 2022 changed its registered office, which appears to coincide with a change in Directors and Persons with Significant Control from Mr Arif Khaliq to Mr Ali Azadin.

8. The claimant indeed has raised in the correspondence concerns that the respondent may have been sold, or some other changes may have occurred , which might have an

affect on her claims. The Employment Judge's enquiries at Companies House referred to above are doubtless what she is referring to. These changes, however, are all after the previous notifications to the respondent, and so none of this affects the status of the respondent, nor the claimant's rights against it. The claims have accordingly proceeded.

9. The claimant, in compliance with the Orders of the Tribunal, attended with three small bundles of materials. The first is entitled "Disability Issues", containing her Disability Impact Statement, a witness statement from Jasmin Doran, her daughter, and her medical records. The second, entitled Witness Statements, contains her own witness statement about the incidents she is claiming about, together with a letter from one Sarah Barber, who came to the store to take the claimant home on 10 April 2021. The third, entitled Employment Documents, contains the claimant's terms and conditions of employment, her P45, various payslips and text message evidence.

10. The claimant gave evidence on oath. Having heard that evidence, and considered the documents presented to the Tribunal, it now unanimously finds the following facts:

10.1 The claimant has since 2003 suffered from intermittent chronic migraines. A letter from her consultant neurologist dated 3 August 2021 confirms this diagnosis, and how her condition has been gradually deteriorating over the last 10 years. Her symptoms include visual disturbance, or loss of sight, for up to 20 minutes, numbness from the shoulders down bilaterally with weakness in both arms and legs, giving rise to the claimant collapsing. An attack also affects her ability to speak and she becomes uncoordinated and confused. She has on occasion had to lie down on the floor, and her balance can be affected for up to a day or so after an attack. The effects of an attack the claimant says mimic a stroke. She is often bedridden for 1 to 2 days with significant disruptions to her eating and sleeping patterns. During and after a migraine attack she experiences weakness, nausea, severe head pain, dizziness and disorientation. She also suffers long-term physical and cognitive impairment, due to impaired concentration and memory, making it difficult for her to learn new tasks and understand instructions. The claimant takes medication to control this condition, but still suffers attacks approximately once a week.

10.2 The consultant neurologist, and the claimant's GP, both express the opinion that the condition amounts to a disability under the Equality Act 2010, but this is of course a matter for the Tribunal to determine.

10.3 The claimant commenced employment with the respondent at the Nisa Local store in Dukinfield in January 2021. Initially she was employed to work 13 hours per week, but this was subsequently changed. At the time of the matters to which her claims relate she was working 24.5 hours per week. Whilst the timing of her shifts and what days and hours she worked each week could vary, this was not a zero hours contract. The claimant had an entitlement to work 24.5 hours per week. Her rate of pay was £8.72 per hour, the then applicable national minimum wage.

10.4 The manager was Mr Maher, and she informed him of her condition. She also gave him a leaflet about migraines. She experienced a migraine attack at work on 15 February 2021 and 23 February 2021. She was told by her manager they would need to discuss her condition upon her return to work, he being disapproving of her absence in the circumstances. Thereafter the claimant began to feel that she was being treated

differently by her manager, who became impatient with her and did not appear to take her condition seriously, on one occasion accusing her of being absent from work due to a hangover when she was in fact suffering from a migraine attack.

10.5 On Saturday, 10 April 2021 the claimant suffered another migraine attack. She has prior warning of these attacks, as she experiences an aura which precede them. She immediately informed the manager and asked if she could be sent home, but he refused. He said that it was “tough”, but he was not prepared to seek cover for her shift. The claimant began to experience visual disturbance, and could not see clearly enough to be able to serve customers. At this point her manager sent her to the stock room and told her to sit on a foot stool until she felt better. She lost her balance, and was forced to lie on the cold concrete floor using her handbag to support her head. This would be apparent to her manager as the stock room was subject to surveillance by camera. The claimant was in the stock room for some two hours. No medical help was sought by her manager, and eventually a friend, Sarah Barber, was called to take her home.

10.6 On arrival Sarah Barber found the claimant in the storeroom, unable to speak, and with a degree of paralysis which prevented her moving easily. She was able to get the claimant home, and to inform her daughter of the attack.

10.7 On 12 April 2021 the claimant received a text message from her manager asking her to cover a shift. He made no enquiry about her health. The following day the claimant saw her GP who issued her with a fit note for 14 days which has been produced at page 15 of the claimant’s disability issues bundle.

10.8 Upon expiry of that fit note on 27 April 2021 the claimant contacted Mr Maher to inform him that she was fit to return to work on restricted duties, with no going up and down stairs, and being allowed home in the event of a migraine attack. He replied by text message saying “*No hours available Mary*”. The claimant replied by text asking him why not, considering that she had regular weekly hours since the shop opened. He replied saying:

“OK, unfortunately I think you need to possibly step down from the role with all the health issues you have currently, also the impact not only to yourself but the store team and having to step in at short notice your level of sickness is very high, and the unpredictability of your health and safety is worrying for you and myself, when your sick note is up I won’t be able to guarantee you hours.”

This exchange of texts is at pages 16 and 17 of the claimant’s documents bundle.

10.9 Thereafter the claimant sent messages to enquire when she could return to work, but was informed by colleagues that Mr Maher had hired three new members of staff. The claimant was also deleted by him from the staff chat, despite still being employed by the respondent.

10.10 As the claimant could not resolve matters with Mr Maher, she contacted one of the owners, known to her only as John, by text on 25 May 2021. She informed him of the incident on 10 April 2021 and asked him to ring her but he did not do so.

10.11 On 6 June 2021 the claimant who had sought advice from the CAB commenced ACAS early conciliation. The point of contact was Kim Finnerty. There was no satisfactory resolution, and on 29 July 2021 the claimant resigned by email to Kim Finnerty, which unfortunately does not appear to be amongst the documents that the claimant has submitted. The resignation, however, was clearly accepted, as the respondent subsequently issued a P45 document (pages 5 and 6 in the claimant's documents bundle) in which her leaving date is given as 30 July 2021.

10.12 The effect of this treatment upon the claimant was that she had gone from being a confident person, who had previously held down employment in a jewellers, and had managed her condition successfully, to an untrusting and worried person. She feared that she may suffer another similar incident in future employment being left on the floor paralysed and unable to help herself. Whereas previously she had been surrounded by colleagues who were aware of her condition and would always offer her assistance, this type of "safety blanket" had been taken away from her by the actions of Mr Maher. From her discussions with Kim Finnerty it appears that Mr Maher had not been truthful about the incident, and was suggesting that her account was false.

10.13 Around this time her consultant decided to review her medication. Some changes were made, and at one point she was taken off all medications. Whilst she was signed off as unfit to work, she considers that the main problem for her was the damage to her confidence, and worry about what would occur if she had another attack in a work environment.

10.14 She accepted, however, that there did come a time when she had got over the incident, and felt able to put it behind her, and return to a work environment. Whilst she has not yet returned to work, she is currently involved in working with her daughter who is setting up her own business.

10.15 Both before and after her resignation the claimant did receive state benefits, and these were:

5 May 2021 - £319.29

5 June 2021 - £647.64

5 July 2021 - £811.49

5 August 2021 - £157.06

3 September 2021 - £749.76

5 October 2021 - £746.76

5 November 2021 - £676.09

5 December 2021 - £676.09

10.16 whilst the claimant did receive some payment in respect of her accrued but untaken holiday, in the sum of £321.77, this was short by some £76, and the claimant claims this sum.

Disability

11. Whilst the respondent has not responded to the claims, the claimant must still prove her case. The starting point for this is whether she has established she was at the material time a person with a disability within the meaning of s.6 of the Equality Act 2010. In order to do so she has to establish that at the material time she had a physical or mental impairment which had a substantial long-term adverse effect on her ability to carry out normal day-to-day activities. The Tribunal is quite satisfied that she had the requisite physical or mental impairment, in the form of her hemiplegic migraines, which she had clearly had for more than 12 months. It is also satisfied that this impairment had a substantial (which means more than merely trivial) adverse effect upon her normal day-to-day activities. Her evidence and the medical evidence clearly establish significant effects upon her vision, balance, speech and mobility. The Tribunal has no hesitation whatsoever in finding that this condition satisfies the definition of disability.

Disability Discrimination

12. Having established disability, the next question is whether the claimant has established any claim of disability discrimination. In the List of Claims and Issues annexed to the record of the preliminary hearing held on 8 December 2021, the claims were framed as direct discrimination (s.13), and discrimination because of something arising in consequence of disability (s.15).

13. In the view of the Tribunal there are two quite separate and distinct issues here. The first is the claimant's treatment on 10 April 2021, and the second is the treatment in the ensuing three month period, which led to her resignation on or about 29 July 2021. The claimant lacks qualifying service to present a claim of constructive unfair dismissal. The term "constructive dismissal" has been used in the discussion of her claims. In discrimination claims, if the claimant resigns as a result of any discriminatory treatment, it is not necessary for them to establish that they have been constructively dismissed on the strict legal test that would be applied in unfair dismissal, it is sufficient if their resignation is a consequence of the discriminatory treatment to which they have been subjected.

14. Whilst the incident on 10 April 2021 may amount to an instance of direct discrimination, that would require the Tribunal to conclude that Mr Maher would not have treated a non-disabled employee who was suddenly taken ill at work in a better manner. That may or may not be so, but it seems to the Tribunal that the facts established by the claimant fall more readily within the ambit of s.21 of the Act, failure to make reasonable adjustments. Once it is established that the claimant has a disability which put her at a disadvantage in the workplace, in this case by reason of her susceptibility to debilitating migraine attacks, the respondent came under a duty to make reasonable adjustments to avoid the disadvantage to which the claimant was thereby put. That duty arises under s. 20 of the Act. Failure to comply with that duty creates the liability under s.21.

15. On these facts, it is clear to the Tribunal that the respondent was under a duty to make reasonable adjustments in respect of the claimant's disability, the reasonable adjustments being the obvious ones being not requiring her to work, and of allowing her to go home in the event of an attack. Requiring her to remain at work (which, given that she could not do any work, was rather pointless) as the respondent did clearly amounts to a failure to comply with that duty. Thus rather than an instance of direct disability discrimination (which it may well also be) the Tribunal is quite satisfied that the respondent's treatment of the claimant on 10 April 2021 amounts to a failure to make reasonable adjustments. Whilst this may not have been the way in which the claims were characterised the Annex to the record of the preliminary hearing, these facts were clearly alleged by the claimant in her claim form. The Tribunal is doing no more than attaching the correct legal label to them.

16. The second aspect of the claimant's claims is the respondent's subsequent treatment of her which led to her resigning. That treatment was to offer her no more shifts, and to refuse to allow her to return to work. That, as Mr Maher's text messages show, clearly was treatment to which the claimant was subjected because she had had the migraine attack on 10 April 2021, and then had been absent from work as a consequence of it. The treatment to which she was then subjected was thus clearly because of something arising in consequence of her disability, and falls squarely within s.15 of the Act.

17. As the respondent cannot justify that treatment, that claim too must succeed. Consequently, the Tribunal finds that the claimant's claims of disability discrimination in the form of failure to make reasonable adjustments, and unfavourable treatment by reason of something arising in consequence of the claimant's disability are established, and succeed.

18. Additionally the Tribunal finds the claimant's claim of failure to pay (in full) holiday pay well-founded, and this succeeds as well.

Remedy.

(i) Injury to feelings.

19. The Tribunal accordingly now turns to the remedy to which the claimant is entitled. A claimant who succeeds in disability discrimination is entitled to seek an award for injury to feelings, if the Tribunal is satisfied that such injury has been sustained. The Tribunal is quite satisfied that the claimant has established injury to feelings in this case.

20. Injury to feelings awards fall within bands that were set many years ago in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102**, and are hence known as the Vento bands. These have been subject to revision over the years, and the relevant bands for this case are those set in the Fourth Addendum to Presidential Guidance originally issued on 5 September 2017, which provides that in respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows:

a lower band of £900 to £9,100 (less serious cases);

a middle band of £9,100 to £27,400 (cases that do not merit an award in the

upper band);

and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

21. The Tribunal has considered how it should approach the assessment of injury to feelings in this case. Whilst there are two claims that have succeeded, and the Tribunal could take the approach of making a separate award in respect of each, the Tribunal considers that would be the wrong approach, and may lead to overcompensation, as the two claims are clearly very closely linked, and the second arises out of the first. Thus we consider the correct approach is to make one award for injury to feelings in respect of the whole of the claimant's treatment from 10 April 2021 to her resignation on 30 July 2021. That said, whilst each of those incidents separately may merit awards in the lower band, we do consider that when conjoined, they move the claimant's entitlement into the middle band. The initial incident, whilst a one-off and short lived, was clearly very frightening for her, and severely dented her confidence, and her ability to return to a working environment. She had previously managed to work perfectly satisfactorily despite her condition, but this incident, then the respondent's subsequent treatment of her set her back considerably.

22. The claimant, who impressed the Tribunal as a reasonable, sensible and measured individual, who did not seek any more than she felt entitled to, very fairly accepted that the effects the treatment as a whole probably had evaporated by the end of 2021. We consider that the seriousness of the initial incident, coupled then with the respondent's wholesale failure to even address the issues that the claimant tried to raise with it, which left her with no choice but to resign, do merit an award in the middle band. That said, we have to be proportionate, and to that end we consider that the appropriate award for injury to feelings for the totality of the discrimination she suffered is £12,000.

(ii) Loss of earnings

23. In addition to injury to feelings, the claimant is also entitled to compensation for any financial losses that she sustained by reason of the respondent's discrimination. Those losses are loss of earnings, initially in the period until her resignation, and thereafter for such period as the Tribunal considers appropriate.

24. Turning to the first. The claimant did receive SSP, but this was limited to £48.18 paid on 8 May 2021. Thereafter the claimant did not receive SSP. Her absence, of course, was not then covered by any sick note. The reason for her absence was that the respondent would not "offer" her any hours, and so did not pay her, and she did not qualify for, and was not paid, SSP.

25. The respondent accordingly was responsible for her loss of earnings during this period, and should pay for them. Further, and to be factored into the calculations, the rate of the NMW which applied to the claimant's employment increased from 1 April 2021 to £8.91 per hour. Her weekly wage accordingly should have been $24.5 \times £8.91 = £218.29$.

26. The initial period, therefore is from 28 April 2021 to 30 July 2021, some 13.5 weeks, which at £218.29 per week produces a figure of £2,946.91

27. The question then is for what period of loss of earnings should the Tribunal compensate the claimant after her resignation? She accepted that the effects of the discrimination had gone by just before Christmas 2021, and thereafter her inability to work was probably more due to the changes in her medication, and her plans to help her daughter in her business. It therefore seems reasonable for us to compensate her loss of earnings up to Christmas 2021, but no further.

28. That period is therefore 30 July 2021 to 24 December 2021, 21 weeks, which at £218.29 per week produces a figure of £4,584.09.

29. The claimant's total loss of earnings figure, therefore is:

$$£2,946.91 + £4,584.09 = \underline{£7,531.00}$$

30. The claimant, however, did receive benefits over this period, and must give credit for them. They were:

5 May 2021 - £319.29

5 June 2021 - £647.64

5 July 2021 - £811.49

5 August 2021 - £157.06

3 September 2021 - £749.76

5 October 2021 - £746.76

5 November 2021 - £676.09

5 December 2021 - £676.09

Total: £4,784.18

Award therefore : £7,531.00 - £4,784.18 = £2,746.82

31. The claimant is entitled to interest upon the awards for discrimination. In relation to the award for injury to feelings, the Tribunal calculates interest from the date of the first act of discrimination, 10 April 2021 to the date of calculation, 18 May 2022. At 8% the interest therefore is:

$$£12,000 \times 8\% \times 403 \text{ days} = \mathbf{£1059.95}$$

32. In relation to the award for loss of earnings, the Tribunal calculates interest from the half way point between the start of the loss of earnings, 28 April 2021 and the calculation date, 18 May 2022. The mid point is 6 November 2021, and thus the number of days over which interest is to be awarded is 193. That gives interest payable as:

$\pounds 2,746.82 \times 8\% \times 193 \text{ days} = \pounds 116.19$

33. The Tribunal also awards the claimant $\pounds 76.00$ in respect of unpaid holiday pay. As the claimant will have been under the limits for payment of tax and national insurance, no deductions need be made from this sum, which should be paid gross.

34. Tribunal's awards are accordingly:

Injury to feelings	$\pounds 12,000.00$
Loss of earnings	$\pounds 2,746.82$
Interest	$\pounds 1,176.14$
Holiday pay	$\pounds 76.00$
Total:	$\pounds 15,998.96$

Employment Judge Holmes
DATE: 30 May 2022

RESERVED JUDGMENT SENT TO THE
PARTIES ON 6 JUNE 2022

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2408156/2021**

Name of case: **Miss M Doran** v **Pearl Holdings NW Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 6 June 2022

"the calculation day" is: 7 June 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".
3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.
4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).
5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.
6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.