EMPLOYMENT TRIBUNALS

Claimant: Mrs K Keighley

Respondent: HF Trust Limited

HELD AT: Leeds **ON:** 18 April 2017

BEFORE: Employment Judge D N Jones
Ms J Lancaster
Mrs E C McAvoy

REPRESENTATION:

Claimant: In person, assisted by Ms S Weira and Ms M S Delmas (students at the BPP)

Respondent: Mr C Sparling of Counsel

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

1. The respondent shall pay to the claimant compensation in the sum of £14,000 (which includes £2,000 to reflect aggravated damages) and interest thereon of £1,766.

2. The respondent shall pay to the claimant the fees incurred in respect of the issue and hearing of the claim of £1,200.

3. The application of the claimant for the fee for her reconsideration application of £350 is dismissed.

REASONS

1. This is a remedy hearing to consider the claimant's request for compensation for injury to feelings and an order for a recommendation.

The Law

2. Section 49 of the Employment Rights Act 1996 provides that a tribunal shall make a declaration that a complaint brought under Section 48 is well founded and may make an award of compensation in respect of the act or deliberate failure to act. Such compensation has been held to include an award for injury to feelings, see **Virgo Fidelis Senior School v Boyle [2004] ICR 1210**

3. In respect of injury to feelings, the appropriate guidance is set out in the authority of **Chief Constable of West Yorkshire Police No. 2 v Vento [2003] ICR 318** and **Da'Bell v NSPCC**, updating those brackets. Albeit those were cases for discrimination which would now fall under the provisions of the Equality Act 2010, the same principles of evaluation of compensation apply to protected disclosure detriment claims.

4. In respect of an award for aggravated damages which is a species of injury to feelings Mr Justice Underhill P, as he then was, gave guidance in **Commissioner of Metropolitan Police v Shaw**:

> "*Aggravated damages are an aspect of injury to feelings. They are not a conceptually different creature. Rather they refer to the aggravation – etymologically, the making more serious - of the injury to feelings caused by the wrongful act as a result of some additional element. Whether the Tribunal makes a single award for injury to feelings reflecting any aggravating features or splits aggravated damages as a separate head should be a matter of form rather than substance*."

Evidence

5. The claimant has produced an impact statement and a number of documents including medical reports from her General Practitioner, Dr Richard Vautrey, dated 4 April 2017, 16 December 2016, 29 June 2016 and 10 May 2016.

6. The respondent presented written and oral submissions. The claimant presented oral submissions. Mr Sparling indicated on behalf of the respondent that he did not require the claimant to give evidence under oath and to be subjected to cross examination, but he was content to make submissions in respect of her impact statement.

Findings

7. As is apparent from the impact statement, and we accept, the claimant suffered significant injury to her feelings as a consequence of the two unlawful acts which we found took place in this case. She felt, as she says in paragraph 1 of her impact statement, angry and upset and had not understood that reporting the bruising she had seen to the service user R would cause her to lose her job and suffer ill health. The impact upon her was significant and, we are satisfied, long

lasting. It affected her confidence and her health. She felt ignored and humiliated and a sense of shame believing, correctly, that the protected disclosures she made had affected and influenced the decisions.

8. In paragraphs 19 and 21 of her impact statement her feelings are reflected: she believed Ms Kirkbright wanted to make an example of her for whistle-blowing and she believed that Ms Kirkbright refused to listen to her reasons at the registration review meeting on 29 June 2015. She found the experience humiliating and hostile, felt sad and angry, and after months of frustration she felt fear and anger at the deregistration which she described as her "worse nightmare". She felt it was predetermined and unjust. She felt grief stricken, unable to console herself and had been driven to seek State Benefits, ultimately on Employment Support Allowance because she was diagnosed by her GP as suffering from depression. The relevance of her medical condition, however, is a matter we return to in due course.

9. The claimant was told by Tim Vincent of Unison that she might never work in the care industry again because she had been labelled as a whistle-blower. She started to hate herself. She believed that she had brought the stress on herself because she had been told so by family and friends. She stopped answering the phone and her neighbours avoided speaking to her because they did not know what else to say. She was without work and not in receipt of an income and had to borrow money from her mother and brother. She had to care for her 14 year old son as a single parent.

10. In respect of her mental health the claimant had endured a significant depressive condition and post traumatic stress prior to the deregistration and appeal. Her General Practitioner has said in his report that she attended the surgery after a sexual assault in 2014. She attended again after the subsequent loss of her job. He said that caused her significant mental and physical stress and in particular that the manner of the way she lost her job, being the only employee to do so and the concerns about the way the CQC responded, added to the stress and upset. He said the stress related to her court case had impacted adversely as well and she felt suicidal after her appeal was unsuccessful. He explained how the claimant had seen doctors in the Practice for some time to treat her anxiety and depression and she had attended a primary mental health service and received treatment for post traumatic stress. The claimant is taking amitriptylene and citalopram antidepressant tablets. He said that the claimant felt ashamed and upset at having to sign on for Jobseeker's Allowance and that she believed that her history of whistle-blowing was counting against her.

11. In respect of the medical evidence, we do not attribute the onset of any mental health condition to either of the unlawful acts. However, we accept that the claimant was in a low state of health psychologically prior to the deregistration. This was for events for which the respondent was not legally liable. She was, though, more vulnerable at the time of the deregistration and rejection of her appeal. The unlawful actions led to an enhancement of the physical stress and anxiety she had been undergoing and added to the symptoms she has described in her statement. This is apparent from the observation in Dr Vautrey's report to the effect the manner in which she lost her job, being the only employee to do so, caused stress and upset.

Discussion and Conclusions

12. We remind ourselves that in evaluating compensation for injury to feelings our focus is solely upon compensating the claimant and not in any respect to punish the respondent.

13. We are satisfied that this is a case which falls within the middle of the three brackets of the guidelines. Initially Mr Sparling had suggested in writing that this fell at the top of the lowest bracket but in submissions he conceded, in our judgment sensibly, that this was a middle bracket case. He contended it should fall towards the lower end.

14. The claimant said this was a top bracket case. Such awards are appropriate for cases of lengthy campaigns of discriminatory behaviour. It is worth bearing in mind that Ms Vento was subjected to harassment for 18 months and received an award in 2003 of £18,000, what would now be in the top bracket. This is not a case which is comparable to that type of long and sustained discrimination. The events were not individual, one-off, but involved both the deregistration decision and the dismissal of the appeal. That spanned some time. It takes the case outside the bottom bracket.

15. We do not accept the submission that this falls towards the lower end of the middle bracket because the impact upon the claimant has been significant. We bear in mind our finding that the claimant would not have continued to work for the respondent for other circumstances which we highlighted in our previous reasons. Nevertheless there is a significant difference between losing one's registration for reasons connected to the making of protected disclosures and the parting of the ways for other reasons. We do exclude from our assessment the impact of becoming unemployed, which would have occurred regardless of the unlawful conduct.

16. The appropriate award for injury to feelings is £14,000. That includes £2,000 for aggravated hurt relating to the manner of the detrimental conduct.

17. The one feature which rendered the impact to the claimant greater than would otherwise have been the case was referred to in paragraphs 43, 51 and 99 of our previous reasons. The Leeds City Council Safeguarding Team had advised that there had been a failure to record and report bruising consistently and that the respondent had recognised that and rectified the deficit in reporting and recording. In the proceedings to deregister, the claimant had said that there was a wide scale reporting problem. Rejecting that proposition Ms Kirkbright stated that thorough investigations into practices at Highmoor Avenue had not evidenced any concerns about reporting.

18. Whilst no culture of non-reporting had been found by the Leeds City Council Safeguarding Team, it was wholly to mislead the claimant to suggest there was no evidence of concerns around reporting. Not only was there evidence of inconsistencies in that regard, the respondent had acknowledged them and set about rectifying the deficit. We have not made a finding that such a remark was made in the letter written by Ms Kirkbright because she intentionally or malevolently wished to hurt the claimant, but we do consider that a legitimate consideration advanced by the claimant was misleadingly dismissed in a high-handed manner.

That falls into the type of category which warrants an award for aggravated damages: the basic concept being that the stress caused by the unlawful act was made worse by it being done in an exceptionally upsetting way. It would of course have been upsetting for the claimant to believe that she had been deregistered because she had raised concerns about the health of an individual regardless of any other factor, but to be told that in fact there was no problem with reporting contrary to her suggestion did enhance the claimant's feelings of upset. That is reflected in the comment in her impact statement that she felt the manner the proceedings were dealt with was unfair and her views were not even considered.

19. We add interest at 8% for a period of 82 weeks, being from the date of the determination of the appeal and this hearing, being a further £1,766.

20. In respect of the request for a recommendation the Tribunal has no jurisdiction to make such an order.

21. In respect of the Tribunal fees it is accepted the respondent should pay the issue and hearing fee. In respect of the reconsideration fee the Employment Judge dealt with the reconsideration application on 9 August 2016 and set out at paragraphs 8 and 9 the considerations. The Employment Judge was critical of the claimant in failing to ensure that a friend notified the Tribunal of her inability to attend on 29 April 2016, thereby occasioning further delay and expense. Although the application for reconsideration was successful in part it was not successful in whole and this Tribunal is not satisfied in the circumstances that it would be just for the claimant to recover the fee for that application.

Employment Judge Jones

Date: 25 April 2017