Appeal No. UKEAT/0090/14/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 1 August 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

INTERACTION RECRUITMENT PLC APPELLANT

MS L MORRIS RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ANDREW GILCHRIST (Representative) Interaction Recruitment plc Interaction House 43 High Street Huntingdon Cambridgeshire PE29 3AQ
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

SEX DISCRIMINATION - Injury to feelings

INJURY TO FEELINGS AWARD

Appeal allowed and – the Appellant consenting to this approach – the sum of £6,000 substituted as the award for injury to feelings in place of the Employment Tribunal's award of £12,000.

Recognising that that Employment Tribunal was best placed to assess the injury to feelings in any particular case and should be permitted a considerable margin in carrying out this assessment; awards for injury to feelings generally would not be susceptible on appeal unless manifestly excessive or wrong in principle.

That said, in a case where the Claimant had put the level of award she was seeking under this head as falling towards the upper end of the lowest band in **Vento (No 2)**, whilst the Tribunal was not bound by that, the Respondent was entitled to understand what factors had persuaded the Tribunal to then make an award falling in the middle band.

Awards for injury to feelings should serve to compensate for that injury and should not be used as a means of punishing respondents or deterring them from particular courses of conduct, **Ministry of Defence v Cannock** [1994] IRLR 509. Further, a Tribunal should not allow its feelings of indignation and outrage towards a Respondent to inflate the award, see e.g **Corus Hotels plc v Woodward and Anr** UKEAT/0536/05/LA.

Whilst the Reasons did not disclose an attempt to punish the Respondent, the factors referred to would seem more naturally to support an award of aggravated damages but the Tribunal had not said that this was what it was doing. Otherwise the Reasons were inadequate to support such a high award in this case. With the Appellant's consent, it was appropriate to substitute an award of £6,000, which fell at the top of the lower **Vento** band.

HER HONOUR JUDGE EADY

Introduction

1. In this Judgment, I refer to the parties as the Claimant and the Respondent as they were before the Tribunal below. The appeal is that of the Respondent against a Judgment of the East London Employment Tribunal ("ET"), Employment Judge Jones sitting with members on 8 March 2013 and 11-12 April 2013, and sent with Reasons to the parties on 25 April 2013.

2. The Claimant represented herself before the ET. The Respondent was, and is, represented by its Managing Director, Mr Gilchrist.

3. The Claimant, having failed to file an Answer to the Notice of Appeal or to respond to correspondence from the EAT was debarred from taking part in this appeal by order of the Deputy Registrar, seal dated 29 May 2014.

4. It was the ET's unanimous judgment that the Claimant had been unfairly dismissed and that her claim of sex discrimination was made out. On the question of remedy the Respondent was ordered to pay to the Claimant compensation in the total sum of £23,798.37, of which £12,000 was for injury to feelings. It is in respect of that injury to feelings award, that this appeal has been permitted to proceed. The Respondent first sought to pursue a wider challenge, but that was refused, first on the papers by HHJ Peter Clark and subsequently at the Respondent's Rule 3(10) Hearing by the President, Langstaff J. It was, however, at the Rule 3(10) Hearing that the President identified that one permissible point of challenge might arise in respect of the injury to feelings award, and the appeal was permitted to proceed on revised grounds in relation to that part of the Judgment only.

The Background Facts and the ET's Findings

5. The Respondent is a recruitment consultancy business and approached the Claimant, who worked in that field, with a view to appointing her as a recruitment consultant. On 11 June 2012 the Respondent offered the Claimant a position subject to references. On 12 June 2012 an oral reference was taken from a Mr Strong, the Claimant's last employer who she had identified as someone would give a negative reference, which he did. Two of the Claimant's former clients were, however, also approached by the Respondent and they both gave positive references.

6. In any event, on 13 June 2012, after taking those references, the Respondent confirmed its offer of employment to the Claimant, to start the following day. The Claimant duly started working for the Respondent on Thursday, 14 June 2012, but was dismissed on the following Monday, 18 June. The issue for the ET was why?

7. The Claimant's case was that, first thing on the Monday she had told the Respondent that she was pregnant. The ET found that she had known of her pregnancy before she had accepted this job, but had been concerned about telling the Respondent at that stage. Although only employed a short period, on the Friday she had brought in an important client and so was feeling more confident as to her position and thought she could share the news. On the Claimant's case, it was only after she had done that she was dismissed. She considered that her pregnancy was the reason for the dismissal.

8. Initially, however, the Respondent said it dismissed the Claimant because of its view as to the lack of economic viability of employing a recruitment consultant at that particular office.

9. The reason for the dismissal was, however, seen by the ET to have shifted over time. In its ET3, the ET noted the Respondent was saying that the reason was the Claimant's appalling references. During the hearing the Respondent's position was seen to have shifted again, with it now saying that the dismissal was due to the Claimant's poor performance.

10. The ET concluded that the Claimant was right. It rejected the possibility that the dismissal was to do with lack of economic viability. If that had been so, that would have been apparent to the Respondent before appointing the Claimant. It further did not find that it was the Claimant's performance; simply not enough time had passed for the Respondent to change from positively approaching the Claimant with a view to recruiting her to it being established that her performance was so unsatisfactory that she could not continue in that employment.

11. As the unsatisfactory references, it was true that Mr Strong had, as the Claimant had predicted, given a negative reference. That, however, was known about - along with the positive references - prior to the Respondent's confirmation of the Claimant's appointment and could not have been the reason for the dismissal.

12. There was one additional point in respect of references. On Thursday, 14 June 2012, the Respondent had approached another previous employer, which had confirmed the Claimant's employment dates but had not been able to provide anyone who considered they might be an appropriate referee for the Claimant. This, however, was simply inconclusive. It was not pursued further and gave no additional credence to the Respondent's case.

13. The Respondent sought to rely on one further matter arising out of the references. That related to an allegation that the Claimant had some kind of involvement in a reference fraud.

This, however, was information that the Respondent said it had obtained from Mr Strong *after* it had taken the decision to dismiss, so it could not go to the reason for dismissal, and the Respondent sought to rely on it solely as going to the Claimant's credit. That did not assist the Respondent in terms of establishing the reason for the dismissal and the ET had other evidence to corroborate the Claimant's case that her pregnancy was the real reason for her dismissal, not least the coincidence in timing and the lack of any plausible alternative explanation put by the Respondent along with what it saw as the shifts in the Respondent's position.

14. Moreover the ET found there was some inconsistency as to what Mr Strong was alleged to have said. The Respondent had no signed statement from him and he was not prepared to give evidence at the ET unless under order. He had also e-mailed the Claimant directly suggesting that he had not made such an allegation. In the circumstances the ET declined to issue a witness order against Mr Strong, although it allowed the Respondent to give evidence as to what it said it had been told by him. Ultimately the ET considered this did not undermine the Claimant's case. It accepted that the reason for her dismissal had been her pregnancy, which rendered the dismissal unfair and amounted to sex discrimination.

15. Having found against the Respondent on the question of liability, the ET went on to consider the question of remedy. Specifically, on the question of compensation for injury to feelings, it concluded:

> **"88. This was not a 'one off' event as described by the Respondent. The Claimant was dismissed which is an event in time but it has continuing effects for her. It is likely to affect her career, her self-esteem and her standing within what is a small industry. The Respondent has apparently slandered her name elsewhere apart from in this Tribunal. In addition to the way she was dismissed and the reason for it we have already drawn conclusions about the way in which the Respondent's defence to these proceedings was conducted. It is always appropriate and right for a Respondent to defend employment tribunal proceedings. It is not necessary in so doing to refer to the Claimant in the disparaging and derogatory terms such as used by the Respondent which amounted to character assassination with no basis for doing so. The Respondent has used totally inflammatory language to describe the Claimant and in addressing her, thereby slurring her character and in doing so, in our judgment, has perpetuated and compounded the discrimination.**

89. Even after the liability judgment was given the Respondent began its cross-examination of the Claimant about remedy by asking her to confirm that she had been dismissed for fraud and that everyone at her former employer knew that she was a fraudster.

90. The Claimant did nothing wrong during her short employment with the Respondent. The facts are that she was headhunted and had not applied for work with them. This was appalling treatment in those circumstances. The Claimant had always been open with the Respondent even volunteered information when she was not required to do so.

91. The Claimant gave evidence that Mr Gilchrist had spoken to her last employer about her and that she suspected him of trying to get her sacked. There was no reason for this. It is entirely inappropriate."

The Appeal

16. As already noted, this appeal was permitted to proceed in respect only of a challenge to the injury to feelings award and on the basis of revised grounds of appeal, which can be summarised as follows:

(1) That the award was excessive, because the ET took a punitive approach rather than a compensatory approach.

(2) That the award for injury to feelings was too high.

The Relevant Legal Principles

17. In a discrimination case such as this, an ET has the power to award compensation for non-pecuniary losses, which can include injury to feelings.

18. Guidance as to the approach to be taken in making such awards was provided by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police** (**Vento No 2**) [2002] EWCA Civ 1871, [2003] IRLR 102. The Court of Appeal in **Vento** recognised three bands of potential award. The most serious, falling between £15,000 to £25,000; for less serious cases, £5,000 to £15,000; and for one-off acts of discrimination or otherwise less serious cases, £500 to £5,000. Those figures were subsequently revised, to allow for inflation, in the case of **Da'Bell v NSPCC** [2010] IRLR 19, in which the EAT (HHJ McMullen QC presiding) held that the lower band should go up to £6,000, the middle to £18,000 and the upper band to £30,000.

19. Awards for injury to feelings should serve to compensate for that injury and should not be used as a means of punishing Respondents or deterring them from particular courses of conduct (see **Ministry of Defence v Cannock** [1994] IRLR 509 at 524). As to the precise level of award under this head, much will obviously depend upon the particular facts of the particular case, which in turn will depend on the evidence given and the injury found to have been suffered by the particular individual. Discriminators must take their victims as they find them. Once liability has been established, compensation should not be reduced because, for example, the victim was particularly sensitive. Moreover, the issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct (see **Essa v Laing Ltd** [2004] ICR 746 CA).

20. The question of compensation for injury to feelings will not, however, be simply a matter for submission. A claim for injury to feelings requires evidence as to that injury (see **Esporta Health Clubs v Roget** UKEAT/0591/12, [2013] EqLR 877 EAT). Given the fact-sensitive nature of an injury to feelings award, caution needs to be exercised when looking for comparable cases, particularly as judicial attitudes have changed over the years. That said, indications or past awards can be helpful, at least in general terms. In this case, the Respondent has provided a number of illustrative cases, which I understand to have been derived from *Harvey on Industrial Relations and Employment Law*, on which it relies on as comparable and which all fall within the lower **Vento** bracket.

21. Awards for injury to feelings generally will not be susceptible to challenge on appeal unless manifestly excessive or wrong in principle. It is the ET that hears and sees the Claimant giving evidence; it is obviously best placed to assess the effect of the injury upon her feelings and there has to be a considerable margin for the ET in carrying out this assessment.

Submissions and Discussion

22. On the revised Grounds of Appeal the Respondent has referred me to general statistics showing that average injury to feelings awards fall within the bracket £5,000-£6,000. As recognised in oral submissions before me, however, that is of limited assistance. It might give a sense of the value of such awards in a real world context, but it does not assist as to the level of award that should be made in any individual case.

23. The Respondent makes the general point, that any award for injury to feelings must be compensatory and not punitive. I agree. It further makes the point that the ET's feelings of indignation and outrage towards an employer should not be allowed to inflate such an award (see **HM Land Registry v McGlue** EAT/0435/11). Again, I agree. That is a point that has been recognised in previous authorities, for example **Corus Hotels plc v Woodward and Anr** UKEAT/0536/05/LA, in which the EAT (per Bean J, as he then was) expressed concern that the ET had allowed its sense of disquiet at the Respondent's conduct to inflate the award. **Corus** is, however, not precisely on point in this case. The conduct in issue in **Corus** did not relate to the Claimant personally. The conduct of the Respondent disapproved of by this ET was plainly linked specifically to the Claimant.

24. In this case, however, the Respondent relies on a number of factors as evidencing that the ET wrongly allowed its apparent sense of indignation to inflate the award and/or that the award was manifestly excessive.

25. First, it notes that and informs me that the Claimant's Schedule of Loss, drawn up by her solicitor, put the injury to feelings award claimed at £5,000: i.e towards the upper end of the

lowest **Vento** band. A similar point was taken in the **Corus** case (see paragraph 9) and I agree with how the issue was addressed by the EAT there:

> **"We think that the Tribunal were obliged to, and did, have regard to the fact that that was the band of appropriate awards suggested by the Claimant's solicitor; but they were certainly not bound by it. They were entitled to take the view that the injury to feelings figure suggested in the Schedule was too modest. It was a decision for them, not for the Claimant's solicitor, and it was open to them to go above £2,000 if they saw fit."**

26. The Respondent also sought to again make the point that it considered that the Claimant had been involved in a fraud and the ET might have been seen as in some way condoning such behaviour. That is a bad point. No fraud was found and, in any event, the ET at no stage suggested it would condone any fraud. What the ET did was make findings open to it on the evidence. On the question of liability, there was no basis for challenging the conclusion reached. There were legitimate findings of fact and conclusions reached on those findings by the ET, which were (and are) not susceptible to challenge.

27. The Respondent also made the point that the Claimant had called no additional witnesses on the question of any injury to feelings. It was, however, accepted that she had given evidence herself and Mr Gilchrist conceded that, indeed, the Claimant might have been best placed to give evidence as to the injury that she had suffered.

28. The Respondent's better point was that, given that the only evidence was from the Claimant and she had put her case in the lower **Vento** band, there was no evidence to justify an award in the middle of the middle band. I agree that that is a potentially relevant factor, albeit that it will depend on the evidence and the findings of fact made in any particular case.

29. The Respondent also makes the point that the Claimant had only worked for it for three days. The award made amounted to effectively half a year's pay. That, it is submitted, was necessarily disproportionate.

30. I do not agree that there is a necessary link. It might be the case that there will be a more serious injury to feelings if there is a discriminatory course of conduct which takes place over a longer period of time. The question will always remain, however, what was the effect on this Claimant? A discriminatory decision to dismiss can have a very significant impact. The assessment will depend on the findings made by the ET as to the particular injury suffered by the particular Claimant in any given case.

31. The Respondent has also observed that the Claimant has not participated in this appeal and sought to draw an inference from that. There may, however, be a number of reasons why the Claimant is not participating in the appeal. It is not for me to speculate, and I draw no inference either way.

Conclusions

32. The ET in this case put the award for compensation for injury to feelings in the middle of the middle **Vento** band at £12,000. On the findings it had made, that does seem high; particularly where the Claimant herself (I am told, with the assistance of her solicitor) put it at the higher end of the lower bracket. If the ET had got the **Vento** band right, then I might question whether it was right for the EAT to interfere: the trial Judge or Tribunal is plainly best placed to form a view of the injury to feelings in any particular case, and it would be quite wrong for an appellate court - even a specialist court such as the EAT - to tinker with the award

made. Here, however, experience of such awards in other cases does put the spotlight on this level of award, and the question arises as to what was the basis for it.

33. The ET certainly refers to the continuing effects of the Respondent's conduct on the Claimant:

> **"It is likely to affect her career, her self-esteem and her standing within what is a small industry",**

albeit that might seem to be a less a finding as to how the Claimant's feelings had been injured as a projection forward as to what the ET thought was likely to be the case in the future. The ET's further findings seem to relate to the likely impact of the Respondent's behaviour in the proceedings. That behaviour might well have justified an award for aggravated damages, and it might be that this is what the ET really had in mind; aggravated damages, after all, are simply an element of injury to feelings, it is the aggravation of the injury that is being compensated. That said, the ET does not specifically state that this is what it is doing. Although it would have been entitled to see an award of aggravated damages as part of the injury to feelings award, it would have needed to have said what it was doing; how it had arrived at the award.

34. Allowing that I must take the ET's Judgment in its entirety, I am ultimately unable to understand the reasons for the award being made in the mid-**Vento** band, in a case in which the Claimant had put it in the lower bracket. Apart from what I have set out above, there is no fuller explanation of the matters that persuaded the ET to make the award it did. I do not find that the Reasons disclose an attempt to punish the Respondent, but I can see that the ET might have had in mind factors that went to the aggravation of the injury rather than the simple injury to feelings. That said, it is not for me to second-guess the ET in this regard. It did not say that that was what it was doing, and it did not explain its reasons for making an award at this level.

35. That being so, it seems to me that it would not be safe to allow this award to stand. The question then arose as to how I should dispose of this appeal, and that is a matter that I have canvassed with Mr Gilchrist. Given that there is more than one outcome possible from any reconsideration of this question, the Court of Appeal's guidance in the case of **Jafri v Lincoln College** [2014] EWCA Civ 449 would suggest that I must remit it back to the ET for fresh consideration. In this case, were I to do that, it would seem appropriate to remit it to the same ET, which has knowledge of the case and determined the question of liability as well as remedy.

36. In this case, however, Mr Gilchrist has indicated that the Respondent would be in agreement with this court substituting its own view for that of the ET. That would bring the matter to a close and provide certainty for the parties at this stage. That is a course which the Court of Appeal in **Jafri** allowed was still open to the EAT, and it seems to me to be appropriate in this case.

37. With the Respondent's agreement, therefore, I have considered the question as to the appropriate level of award in this case. On the basis of the ET's indication that it had seen this as not a trivial or insignificant injury to the Claimant's feelings, it would, I consider, be wrong for me not to respect that view. On the other hand, I have not been provided with material in the ET's Reasons which would justify, in my judgment, an award falling in the middle bracket of **Vento**, nor has the ET expressly stated that this is a case where an award should be made for aggravated damages.

38. In those circumstances, and given that I am told that the Claimant's schedule put the award towards the higher end of the lower **Vento** bracket, I award the sum of £6,000 for injury

to feelings in this case. That respects the view apparently taken by the ET as to the seriousness of this matter for the Claimant, but at the same time puts it into what seems to be the appropriate band. That being so, I allow the appeal and substitute my award of £6,000 for that of the ET.