Case Number: 3302554/2015

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms M Eslahi	**v**	**D & D Corporation Limited** **Mr M Sharma**

Heard at: Watford **On**: 31 May and 1 June 2017

Before: Employment Judge R Lewis
Members: Ms P Breslin
Mrs I Sood

Appearances
For the Claimant: Ms C Bell, Counsel through FRU
For the Respondents: Ms S Berry, Counsel

REMEDY JUDGMENT

1. The first respondent is ordered to pay to the claimant the sums awarded at paragraphs 3, 4, 5, 6 and 11 below, and £4,007.19 of the sum awarded at paragraph 9, a total of £21,247.47.

2. The first and second respondents are further jointly and severally ordered to pay to the claimant the sums awarded at paragraphs 7 and 8 below and £6,000.00 of the sum awarded at paragraph 9, a total of £30,000.00

3. The basic award for unfair dismissal is the agreed sum of £950.00.

4. The compensatory award for unfair dismissal is £13,155.66 and loss of statutory rights in the agreed sum of £961.54, a total accordingly of £14,117.20.

5. There is an award for failure to issue compliant particulars of employment in writing in the agreed sum of £961.54.

6. There is an award for failure to issue written reasons for dismissal in the agreed sum of £961.54.

7. There is an award for injury to feelings of £19,000.00, including aggravated damages of £2,000.00.

8. There is an award for personal injury of £5,000.00.

9. There is an award of uplift on all the above items (with the exception only of the s.38 award, paragraph 5 above) in the agreed percentage of 25%, a total sum of £10,007.19.

10. There is an award of interest to be calculated in accordance with the Interest on Awards Regulations 1996, calculated for the period 31 January 2014 to 1 June 2017.

11. There is an award of reimbursement of tribunal fees of £250.00.

12. No separate or further award is made on the claim for breach of contract (notice pay).

ORDER

1. There will be a one day hearing on a date to be fixed.

2. The tribunal will then determine: (1) the amount to be awarded under paragraph 10 above; (2) against which respondent(s) such sum is to be awarded; (3) any issue relating to recoupment; and (4) any sum to be awarded in addition to those awarded above by way of grossing up.

3. In the event of costs application(s), the listing will be extended to two days.

4. A party who wishes to apply for costs must inform the tribunal and other party of its intention to do so by **31 July 2017.**

5. No later than **4 September 2017**:

    5.1 The parties are to exchange skeleton arguments on the points set out at paragraph 2 above;

    5.2 A party applying for costs is to send to the other its skeleton argument and costs schedule, which must set out at least the sums claimed and the basis of calculation.

6. The claimant is to prepare and send to the respondents by **2nd October 2017** and bring to the tribunal at least three copies of a bundle containing the Orders and Judgments of the tribunal in these proceedings and the items exchanged in accordance with paragraph 5 above. The bundle is to

be indexed and paginated. If a party wishes to refer to authority, a copy should not be included in the bundle. The party should bring one hard copy to the hearing.

7. The claimant is to bring to the hearing copy documentation from the DWP which verifies her JSA payments.

8. It is anticipated that each party will be permitted a maximum of 30 minutes for submissions on remedy points and a maximum of a further 30 minutes for submissions on costs, and representatives should prepare accordingly.

9. The parties may not extend any of the above deadlines, or otherwise amend or depart from the terms of this order without the prior leave of the tribunal.

REASONS

1. These reasons were requested by Ms Berry on behalf of the respondents.

2. Judgment on liability was sent out on 22 March. We were told, at the start of this hearing, that the claimant had been late in serving her supplemental statement on remedy, and while the respondents served no witness evidence, they provided a counter schedule, in reply to which the claimant had, very shortly before this hearing, served a second supplemental statement and given further disclosure. At the start of the hearing, Ms Berry asked us to exclude material which she stated had been made available by the claimant at 5pm the previous day. While both parties appeared to have taken a cavalier view of the orders of the tribunal, we thought it in the interests of justice to admit both the claimant's supplemental statements, but in principle not to permit her to rely upon documents which had been disclosed for the first time the previous day. In the event both counsel took a pragmatic approach, enabling the tribunal to work with the material before it.

3. We adjourned to read the claimant's two supplemental statements, and additional documents to which we were referred. While do not wish to make disproportionate reference to bundling, we comment that by the end of this remedy hearing, the arrangement of our documents was exceptionally unhelpful.

4. Timing prevented us from completing the task of calculation at the end of the second day of hearing. We adjourned with the unresolved issues of calculation of interest, grossing up and recoupment. We invited counsel to deal with those issues and to report to the tribunal in writing by 16 June, in the hope that those matters could be agreed as pure calculations in light of our judgment.

5. In the event, the area of disagreement in correspondence was such that it could not properly be resolved without a further hearing. That being so, we record that at the end of the hearing Ms Berry raised a possible costs application. We therefore made the above order, with a view to achieving finality.

6. The parties are reminded that it remains open to them to resolve their outstanding differences without need of another hearing.

7. We now set out our findings on remedy, starting with the lesser items.

Tribunal fees

8. The claimant applied for tribunal fees to be reimbursed, having incurred the issue fee and then received remission. The respondents submitted that as the claimant had not succeeded on many of her claims, no fee should be payable. We disagree and award the fee, as it seems to us that payment of the full fee was a gateway requirement of achieving any form of adjudication.

Penalty payment

9. Ms Bell's written submission included an application that the tribunal order a penalty payment in accordance with s.12A Employment Tribunals Act 1996 in respect of aggravating features of breaches of the claimant's rights. She did not deal with this in closing submission, and did not pursue the point with great enthusiasm. It did not seem to us, as a matter of discretion, and taking this matter as a whole, that such an order was in the interests of justice. It seems to us that our judgments mark the gravity of the case.

Expenses

10. The claimant's schedule of loss included claims for expenses, which in fact broke down in to a number of headings, including medical and prescription charges; travel costs to job centre appointments; and travel costs to the tribunal. She also claimed postage costs. We consider that costs related to the tribunal proceedings should be dealt with under the costs jurisdiction, and decline to make any such order. We had no evidence which documented the medical costs, of which a large element appeared to include the travel costs, incurred at the claimant's choice, from London to Slough to visit the GP of her choice. We did not consider those costs proven to be attributable to the matters before us. We did not consider it in the interests of justice to make the award sought in respect of travel costs to the job centre appointments.

Contribution

11. Ms Berry submitted that the compensatory award should be reduced by contributory fault. In her submission, she identified a number of passages in our earlier judgment which could fairly be designated as critical of the claimant. She submitted that they constituted conduct which met the test in

s.123(6) Employment Rights Act, which required reduction for contribution. We disagree. We have re-read with care our findings about the sequence of events between 4 and 10 June. We do not wish to repeat or paraphrase what is stated there. We do not accept that we have found that the matters relied upon by Ms Berry meet the test of blameworthy conduct which caused or contributed to the actual dismissal which we have found. At the very highest, they were part of the factual matrix giving rise to Mr Sharma's irate and volatile state of mind on 10 June 2015.

Interest

12. In calculating interest in relation to the discrimination award, we must, in accordance with the 1996 regulations, set a date of contravention. We disagree with Ms Berry that the earliest date was in June 2015. We found that the claimant was discriminated against through text messages which began in January 2014, and we have therefore taken the date of discrimination as 31 January 2014, and the date of calculation as the second day of this hearing, 1 June 2017.

Uplift

13. The parties had agreed that any uplift in accordance with s.207A of the 1992 Act for failure to follow the Acas Code, should be at the rate of 25%. We accept Ms Bell's submission that the uplift should attach to the entire award, (with the exception only of the s.38 award for failure to issue written particulars), and therefore to those portions of the award made under a jurisdiction for which there was no applicable Code. It seems right that the award of uplift is made against the party liable to pay the primary sum to which the uplift attaches.

Compensatory award

14. The main matters before us were the period in respect of which the compensatory award should be made, and injury to feelings.

15. We thank counsel for helping us focus our task. It was agreed that the claimant was still unemployed at date of this hearing, 23 months after her dismissal. It was agreed that the weekly loss of earnings to hearing was 118 weeks @ £386.33, and that for the first 100 weeks, the claimant had been in receipt of Job Seekers Allowance of £73.10 per week. The calculation is 42 x (£386.33-£73.10). The issue before us was as to reasonable mitigation, and therefore as to the period in respect of which we should make an award. Our finding was that we make an award for 42 weeks at the stated figure, during all of which the claimant received JSA. The 42 weeks includes the contractual notice period, and therefore no separate award is made for the failure to give notice.

16. The claimant's evidence on mitigation was troubling. As at the February hearing, she was at times an unconvincing narrator. She agreed that shortly after her dismissal she relocated to London, and that she therefore had

access to the London job market. Her evidence was that she began applying for jobs immediately after her dismissal, and certainly in June 2015; but that she had no records whatsoever of that, because her then solicitors had not advised her of the necessity of retaining any form of record. It was only when she instructed her present solicitors, in February 2016, that she was so advised and began to keep records. She agreed that the records which she had produced, although voluminous, were incomplete; there were periods for which there were no records; she had had at least two journeys to Iran for medical treatment of one month each; and there was no record or verification of her having applied for posts through the Job Centre Portal. She gave no evidence to suggest that her job hunting was affected by the concurrent evidence which we received about her ill-health (details below) which indicated that from 30 June 2015 until 23 September 2016, she was certificated unfit to work.

17. The respondents put forward, by way of counter schedule, but not by oral evidence, the following points. Before joining the first respondent, the claimant had about six years service in two well-known retailers, Matalan and Marks and Spencer. They produced very recent screen shots from employment agencies showing considerable numbers of vacancies in retail in London, and an exchange of emails with the agency, Office Angels, who advised on the basis of a redacted version of the claimant's cv that she would not be difficult to place in employment, in particular in retail, and in particular starting part-time.

18. We were given several hundred pages of records of unsuccessful job applications made by the claimant. Ms Berry skilfully identified a selection of posts applied for which were posts in specialisms which the claimant plainly did not have, or at levels of remuneration twice or more above what she had been paid by the first respondent; we agree with Ms Berry that these indicated some lack of realism. Ms Bell in reply identified a smaller number of applications which were more modestly paid, and more likely to be focussed in areas where the claimant did have experience.

19. The claimant's evidence was that she applied through agencies, online, through the Job Centre portal, through visiting employers, and had met with no success whatsoever. We were shown a cv which she had produced in support of job applications, which we found troubling. While we accept that a job hunter's CV may present a selection of helpful facts, we were concerned that the claimant's CV begged questions in a competitive job market. The claimant stated that she had not applied for employment at Matalan or Marks and Spencer; in particular, she was concerned that her ex-husband might still work for Marks and Spencer in London and she wanted to avoid any risk of coming in to contact with him.

20. The claimant gave evidence that she experienced a difficulty in how to address the issue of her employment with the first respondent when applying for jobs. She was afraid to name them as the most recent employer, given the nature of the relationship and its conclusion in this litigation, and was concerned about the absence of a recent employer as

referee from her CV. She was also concerned by the increasing impact upon her of a prolonged period of unemployment.

21. We agree with Ms Bell that we should not apply an over rigorous standard to the claimant; that we should apply a broad brush approach; and that it is for the respondents to show a failure of reasonable mitigation, a matter first addressed by the respondents in the few days before this hearing, and evidenced by the screen shots and email referred to above.

22. This was diffuse evidence. We recognise the difficulties faced by both counsel in trying to draw themes and a shape from it. Our conclusions are as follows:

    22.1 The claimant applied for jobs from July 2015 onwards, irrespective of health advice that she was unfit to work;

    22.2 We accept that in her job applications, and as a generalisation, the claimant applied for posts which were beyond her previous skills, salary level and expectations. We also accept that she applied for some posts which were within her previous skills, salary and expectations.

    22.3 We accept that she was reasonably flexible about travelling within the London area for work;

    22.4 We accept that she complied with the requirements imposed upon her by the Job Centre as a condition of receipt of benefit.

    22.5 We were greatly assisted by the summary provided by Ms Bell of Savage v Saxena [1998] ICR 357. We therefore go on to identify what steps she should have taken to mitigate her loss, and how long we think it would have taken her to produce an alternative income. We find as follows:

        22.5.1 The claimant gave evidence of what she described as increasing desperation in her job hunt. We accept her use of that word. It indicates that her priority increasingly became to get back to any form of work.

        22.5.2 Recognising that priority, the claimant should have lowered her horizons, and focussed her energies on what was within her realistic expectations, even if that meant taking up a job which she felt represented temporary retrogression in career terms;

        22.5.3 She gave evidence, which we accept, that she had done well at both Matalan and Marks and Spencer, and we find that she should have applied to either or both. She had given evidence in particular of several successful years with the

latter, and of the goodwill which she had earned with the company as a result;

22.5.4 Given the size and scale of Marks and Spencer, and the scale of its operation in London, we consider that in making such an application, she should have explained to Marks and Spencer the necessity of avoiding working contact with her former husband, so far as possible. We are confident that a company of its scale has experience of addressing such requests.

22.5.5 The claimant should have sought objective help in preparing her cv, and been prepared to submit a modest, limited document, commensurate with more modest expectations.

22.5.6 While we understand her concern about naming the first respondent on her CV, and the problems with a reference, it seems to us that that was not an insuperable problem. It would have been reasonable for example, to explain to a new employer that the transition from Marks and Spencer to a small family company had not been successful for her, and that a reference would not be forthcoming from that company.

22.5.7 As suggested by Office Angels, the current market offers opportunities for temporary work, which may be a stepping stone to permanent work. There was no evidence that the claimant had ever considered this. (We accept that if she had done so, there might have been a consequence on her benefits entitlement).

23. In our judgment, the above reasonable steps, operating cumulatively, would have led the claimant to match the £25,000 per annum which she was paid when dismissed by 1 April 2016, and our compensatory award therefore is for loss of income in the 42 weeks between 10 June 2015 and that date.

Injury to feelings and personal injury awards

24. Ms Bell approached this area with care. Her over-arching submission was that the tribunal should make a single award in the middle Vento band, including an element of aggravated damages; and a further award for personal injury.

25. In dealing with injury to feeling, the claimant gave evidence of her feelings in particular at the time of the events where we have upheld her claims. We do not criticise her in saying that the language she used was sometimes overwrought. We were also referred to the claimant's GP printout, and to two letters about treatment in Iran. There was no independent medical advice given by a non-treating physician to assist the tribunal.

26. The claimant remained a poor narrator, and we faced the difficulty, not an unusual one in dealing with medical evidence, that we had before us at second or third hand, a doctor's interpretation and summary (which we could not test as to accuracy) of what he or she thought had been reported by the claimant. The report from the claimant at the time may not have been accurate or complete, and we accept that her inaccuracy may in turn reflect reticence or embarrassment, and we do not intend to imply that the claimant misled any of her advisers. Some of the letters which we saw from medical advisers were clearly geared towards advocacy, and we noted a number of letters from the GP which were addressed "To whom it may concern" and which clearly related to the claimant's applications to be housed.

27. We note the following:

    27.1 From mid 2013 onwards the claimant reported to her GP that she suffered stress as a result of domestic issues unrelated to work, (1139).

    27.2 The claimant was a frequent attender at her GP surgery, with a variety of complaints unrelated to the matters before us. She clearly felt able to seek medical guidance when needed, and able to communicate with her GP.

    27.3 In December 2014 she told the GP about an escalation in domestic violence (1136);

    27.4 The claimant was briefly signed off with stress on two occasions on 25 and 27 February 2015 (179 and 180); However, the appointments which generated those sick notes were not recorded in the computer print out.

    27.5 In the course of spring 2015, and running to September 2015, the claimant was concerned in stressful legal proceedings against her then husband, including obtaining a restraining order, and criminal proceedings;

    27.6 The medical records (1134 and 1135) indicate crisis points at the end of June 2015 and again on 17 July 2015, when the first long-term stress sick note was issued (181). This was the period immediately after the claimant's dismissal, when she was in correspondence with the respondents' then solicitor. We note in particular that the claimant was prescribed Citalopram and the dose was doubled after two weeks; and that the GP's record for 17 July contains the only express reference in the medical records to a single event which was in the factual matrix before us (1134). The note refers specifically to the threat of legal action to recover alleged loans, where other references to employment in the medical records use generalised language, such as referring to difficulties or harassment.

27.7 We note also the particular events of 22 September 2015, when the claimant was seeking medical help and support in dealing with a housing issue (188 and 1134).

27.8 The claimant returned to Iran for medical treatment in December 2015 for about a month. She explained that this could be paid for in Iran with the support of her family, but that due to exchange control it was difficult for her family to provide support in this country. We accept the claimant's evidence, which was that she felt more at ease being treated in her home country and discussing her mental health in her mother tongue.

27.9 We note the handwritten account of that treatment at 192D. It gave us some limited assistance. We had no independent verification of its authorship, whether it was authored by a clinician, and why it was not given by the physician, Dr Abedi, who had in fact treated the claimant.

27.10 We noted the further assessment from the GP in February 2016 (1127 and 1128), that the claimant continued throughout 2016 to be signed off on forms MED3, until the end of September 2016. She continued on Citalopram. She returned to Iran for further treatment early in 2017, and we noted the reference to her having taken part in 178 talking sessions.

27.11 We accept Ms Bell's submission that taking these matters in the round it has been proved to us that the claimant suffered a depressive illness. We find certainly that it was triggered by the summer of 2015 at the latest, and we accept that it continued, although fluctuating and under control, into 2017. We accept that it has been shown, to a material degree, to be attributable to the events set out in our earlier judgment. We accept that those events were concurrent with domestic events which were not attributable to either respondent. We decline Ms Berry's invitation to apportion responsibility and therefore liability for the depressive illness between work and other events; we do not consider that we have any medical evidence upon which to do so, nor do we consider that we have the skill to do so in the absence of such evidence. Ms Bell invited us to compensate the claimant for personal injury at the lowest end of JC guidelines, deliberately limiting the scope of her submission in light of the acknowledged limitations in the evidence in support. We agree with that approach and award £5,000.00.

27.12 We have approached the claim for injury to feelings by taking the claimant's supplemental evidence with caution. As stated, the claimant's language was, viewed objectively, overwrought (no matter how sincerely felt) and repeated the binary approach which we have stated was of less assistance to us than might appear to the parties.

27.13 We accept that as a result of the events which were before us, the claimant felt distressed and anxious. We accept that her stressors were exacerbated by a sense of her own vulnerability in comparison with the power of her employer. We use the word vulnerability to encompass our broad findings that the claimant felt trapped and powerless in her work and in her dealings with her employer; that she felt isolated in a small company, without redress procedures, and at a time when she felt aware of being in a foreign country without family. We add in particular that the phraseology used by Mr Sharma which referred to 'investment', and the particular "white man" phrase conveyed to the claimant that she was taken for granted, and violated her self respect.

27.14 The events with which we were concerned were spread over a period of time, with the constant risk of arbitrary recurrence.

27.15 Taking all of these matters together, we consider that this is a case appropriate for an award well in to the middle Vento band, which we set at £17,000.00.

27.16 Ms Bell made application for aggravated damages limited to £2,500, as part of the injury to feeling award, and attributable only to the act of victimisation. She referred us to Alexander v Home Office [1988] ICR 685 and Commissioner of Police v Shaw EAT/1025/11. In the latter case, Ms Bell submitted that we should consider the third category identified by the EAT, "where subsequent conduct adds to the injury – ie rubbing salt in the wound".

27.17 We regard aggravated damages as an exceptional award, and noted that in this application, Ms Bell took care to focus very specifically on one discrete matter, readily provable, and on which the tribunal has made findings. We note our previous finding that Mr Sharma had no reasonable basis upon which to advance the employer's counter-claim. We attach no weight to the fact that it was done through solicitors, as they were acting on Mr Sharma's instructions. We note, as stated above, that the solicitor's letter was the one specific item referred to in the medical notes (1134). It seems to us that Ms Bell's thoughtful submission is well made: Mr Sharma retaliated against the claimant with a threat which had no basis whatsoever. We agree with Ms Bell that it is an appropriate event for aggravated damages and we make an award of £2,000.00.

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Employment Judge R Lewis

Date: 17 August 2017……

Sent to the parties on: . 17 August 2017

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For the Tribunal Office