Case Number: 2303025/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE ELLIOTT**
MEMBERS:	**MS B LEVERTON**
	MR N SHANKS

BETWEEN:

Mr P Elworthy

Claimant

AND

Your-Move.Co.UK Ltd

Respondent

ON: **1 September 2017**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr E Duffield, solicitor**

JUDGMENT ON REMEDY AND COSTS

The unanimous Judgment of the Tribunal is that the respondent shall pay to the claimant the sum of **£2,850.96.**
The claimant's application for costs is refused.

REASONS

1. This judgment was delivered orally on 1 September 2017. The claimant asked for written reasons.

2. By a liability judgment sent to the parties on 22 May 2017 the claimant Mr Paul Elworthy succeeded on his claim for direct sex discrimination. His other claims failed and were dismissed.

The issues for this hearing

3. The issue for this hearing is the amount of the award for injury to feelings for the act of direct sex discrimination upon which the claimant succeeded and the claimant's costs application.

4. At the end of our Reserved Judgment on liability we gave the following guidance. We said that this is not a loss of earnings case. What

remained for us to consider was the claimant's award for injury to feelings. We made detailed findings at liability stage upon the effect of Ms Thompson's comment upon the claimant and we confirmed that we remained open to hearing submissions on the level of the award. We considered that it would be helpful to the parties if we indicated at that stage, our provisional view, on what was currently before us, that this was a lower band ***Vento*** case.

Relevant findings at liability stage

5. We found that on 20 December 2013 the claimant attended a senior consultant's reward lunch at which a manager Ms Thompson (who was not at the time his direct line manager) said that if he achieved a target of £180,000 banked income she would give him a blow job. It was said in a group of about four of five people including the claimant himself, Ms Thompson, the claimant's colleague Mr Giles Barrett and two male colleagues who were not identified. The comment was followed by laughter from those present in that group.

6. The claimant's evidence, which we accepted, was that the comment left him feeling "not great" and he thought it was not an appropriate comment for a senior manager to make.

7. The claimant did not complain about this issue until nearly two years later at his disciplinary hearing on 16 September 2015, after he had handed over his resignation letter. There was no evidence that the claimant had complained to anyone at the time, either at work or outside the workplace with friends or family. The claimant did not complain to his former colleague Mr Barrett about it until he asked him to prepare a statement in connection with these proceedings

8. The claimant was asked whether he saw it as a joke and said that he saw it as inappropriate and ignored it. He thought that someone in Ms Thompson's position should not make such a comment. The claimant's evidence at the liability hearing was that the comment left him "*not feeling great"* and it left him feeling "*a bit uncomfortable*".

9. We found that the comment did not meet the bar for harassment set out in section 26 of the Equality Act 2010 but we found that the effect on the claimant was nevertheless a detriment. It was a highly sexualised comment and we had no hesitation in finding that the comment was made because of the claimant's gender. We found that it amounted to direct sex discrimination.

10. We also found that the effect of the comment upon the claimant was mild. Had it been more serious, our finding was that he would have had absolutely no hesitation in complaining about it at the time. He was not reluctant to challenge anything that he considered was "not right" at work and upon which he considered himself justified. Had the comment had a more significant impact on him, we found that he would have complained

at the time.

The claimant's costs application

11. By email dated 22 August 2017 the claimant made an application for costs against the respondent. He said he believed that the respondent wasted a large amount of his time when a witness (Mr Barrett) had confirmed that Ms Thompson made the comment relied upon. He said it had left him "financially disadvantaged to the sum of £2,000.00".

12. The claimant is a litigant in person and therefore we explained he could only claim a Preparation Time Order under Rule 75(2) of the Employment Tribunal Rules of Procedure 2013.

Submissions on remedy

13. We heard submissions from both parties. By consent the respondent's submission was made first, followed by the claimant's submission.

14. We had a written submission from the respondent to which Mr Duffield spoke. The submissions and any authorities referred to have been fully considered, even if not expressly referred to below.

15. The respondent said that based on our findings of fact any award for injury to feelings should be at the lower end of the lower band (£660-£6,600 including the ***Simmons v Castle*** uplift). It was submitted that it should be no more than £1,000. The respondent said that the claimant waited until after he resigned before raising the matter, in support of the reason for his resignation. The respondent nevertheless investigated it and has taken it seriously. The claimant did not object to Ms Thompson becoming his line manager after the comment had been made in December 2013. The respondent pointed to the fact that there was no medical evidence.

16. The claimant refuted the respondent's submission that they had investigated it thoroughly and they should have asked him further questions about the incident. The claimant referred to the emotional damage that had resulted. He said Ms Thompson had lied to the tribunal but we pointed out that we had not made a finding that Ms Thompson had lied. The claimant said that the respondent tried to cover up the matter at every opportunity. The claimant said he has been left feeling stressed and uncomfortable as a result of press coverage of the case. He said it affected his employability.

17. The claimant sought aggravated damages. He said that the respondent had made him go through three hearings. He asked us to take account of that in making our award. The claimant said we should award him £3,750.

18. The respondent responded on the issue of aggravated damages. It was submitted that this was not appropriate and the conduct of a party during the proceedings should not be relied upon and submits that the

respondent is entitled to defend the claims which were not confined to sex discrimination. There was no basis on the respondent's submission for aggravated damages and the respondent had not acted in a high-handed manner. In relation to press coverage, the respondent submits that press coverage was not a matter under the respondent's control and this was not a factor for the injury to feelings award.

19. The claimant said he gave his original witness statement to the press because of a misunderstanding as to what was required of him.

Submissions on costs

20. We explained to the claimant that costs are not the norm in the employment tribunal and informed him of the threshold test under Rule 76. He said that the respondent had tried to "cover up the truth" in the proceedings and this led him to go through a number of hearings.

21. The respondent raised Rule 77 on timing and we confirmed that the proceedings were not determined until the decision on remedy so the claimant was within time for his costs application.

22. At the first case management hearing the respondent raised the jurisdictional point on time and this resulted in the Preliminary Hearing in April 2016. It was said it was reasonable to raise the jurisdictional issue and the respondent did not waive the point. The respondent said that the respondent had not acted vexatiously, abusively, disruptively or otherwise unreasonably.

23. So far as the witness evidence was concerned, the tribunal did not find Ms Thompson to be dishonest or a liar but the tribunal preferred the evidence of the claimant and his witness. The respondent was entitled to defend the proceedings. This was not just a claim for sex discrimination, there were other claims and they failed.

The law

Remedy

24. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunal's must remind themselves of the value in everyday life of the award by reference purchasing power or earnings.

25. There are three bands for award for injury to feelings following ***Vento Chief Constable of West Yorkshire Police 2003 IRLR 102 CA*** and uprated in ***Da'Bell v NSPCC 2010 IRLR 19 EAT*.** The lower band is £500-£6000, the middle band is £6000-£18,000 and the upper band is £18,000-£30,000. There has been a recent consultation exercise on the ***Vento*** bands but they remain at the date of this hearing as stated here.

26. The Court of Appeal recently confirmed in the case of ***De Souza v Vinci Construction UK Ltd 2017 EWCA Civ 879,*** having reviewed the EAT authorities, that the proper level of general damages should be increased by 10% following ***Simmons v Castle 2012 EWCA Civ 1288.***

27. We are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the ***Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803*** (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated.

Costs

28. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Mummery LJ in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

29. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) the response…had no reasonable prospect of success*

30. The Court of Appeal held in ***Yerrakalva*** (above) that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

Conclusions

Remedy

31. We are aware from the claimant's submissions that he has been upset by the effect of the tribunal proceedings and press coverage. However, it is the effect upon him of the comment made by Ms Thompson in respect of which we make the award and not the effect of the proceedings.

32. This is not case in which we award aggravated damages. This was not high-handed or oppressive conduct on the part of the respondent. The incident took place in a social party setting when everyone had had a lot

to drink. It did not meet the test for harassment and consequently we find it does not meet the test for aggravated damages.

33. The respondent submits we should award no more than £1,000 and the claimant submits we should award £3,750.

34. We have made detailed findings of the effect of the comment upon him, and we consider having heard submissions, that this is a lower end of the lower Vento band case. The effect of the comment upon the claimant was mild.

35. We award £2,200 inclusive of the ***Simmons v Castle*** uplift.

36. Interest is awarded at 8% from 20 December 2013, the date of the act of discrimination. The judgment rate of interest is 8% and on £2,200 is £176 per annum. From 20 December 2013 to 19 December 2016 is three years, making £528. We calculate 255 days from 20 December 2016 to today, making interest of £122.96.

37. The total award with interest is **£2,850.96.**

Costs

38. The claim is in respect of a hearing on 19 January 2016 before Employment Judge Hall-Smith. This was a routine telephone case management hearing at which the claimant had union representation and we see no basis for making a costs award in relation to preparation time for this hearing.

39. The claimant also claimed in respect of a hearing on 28 June 2016. He confirmed that he meant the preliminary hearing which gave rise to the judgment of Employment Judge Morton on 28 April 2016. This was a hearing at which his time was extended for pursuing his claim for sex discrimination. It is not possible to say that this preliminary hearing had no reasonable prospect of success or that the respondent acted unreasonably in defending the preliminary hearing.

40. The claimant claims in respect of a hearing on 7 December 2016 in the Employment Appeal Tribunal (UKEAT/0195/16) against the judgment of Employment Judge Morton at the Preliminary Hearing on 28 April 2016. It was the respondent's appeal and it was not successful. We cannot award costs in relation to the EAT and informed the claimant that this application should be made to the EAT.

41. On costs we find that the claimant has not met the threshold test. The proceedings were not such that the respondent had no reasonable prospect of success. The respondent was entitled to defend the proceedings and was successful on constructive unfair dismissal and sexual harassment. The press coverage is not a matter under the respondent's control when proceedings are in public. The respondent has

not acted unreasonably or otherwise as set out in Rule 76.

42. The fact that the claimant has had to attend a number of hearings is a fact of the proceedings and was not occasioned by any unreasonable conduct on the part of the respondent.

Employment Judge Elliott
Date: 1 September 2017