# EMPLOYMENT TRIBUNALS

**Claimant** **Respondent**

**Mr J Ocran** **v** **Coco Cola European Partners Great Britain Limited**

**Heard at**: Watford **On**: 27 October 2017

**Before:** Employment Judge Bedeau
**Members:** Mr D Palmer
Mrs C Baggs

**Appearances**

**For the Claimant:** Ms E Godwins, Employment Consultant
**For the Respondent:** Ms G Hicks, Counsel

## JUDGMENT

1. The claimant is awarded the sum of £4,500 in respect of his injury to feelings claim, plus a 10% uplift of £450 with interest on the total sum of £467.17. The respondent is ordered to pay the total sum of £5,417.61 to the claimant in respect of his injured feelings.

2. The claimant's application for compensation in respect of his personal injury claim is dismissed.

3. The claimant's application for costs is dismissed.

4. The respondent's application for costs thrown away on the first day of the hearing, is granted and the claimant is ordered to pay the respondent the sum of £1,500.

## REASONS

5. In our reserved judgment promulgated to the parties on 11 October 2017, we concluded that the claimant's direct discrimination claim was not well-founded and was dismissed but his harassment related to race claim was well-founded. The case was listed for a remedy hearing today.

6. As the case was listed for one day and with a number of matters to hear and determine, with the parties' agreement, we gave judgment with reasons to follow upon request. We then gave judgment on remedy and addressed each party's application for costs. At the end of the hearing, Ms Godwins, on behalf of the claimant, applied for written reasons.

## The evidence

7. The claimant prepared a witness statement which the tribunal ruled was admissible in evidence as the evidence was relevant to the issues. He gave oral evidence. No oral evidence was given on behalf of the respondent.

8. The claimant produced a supplemental bundle comprising of 57 pages. References will be made to the documents as numbered with the prefix "SB".

## Findings of fact

9. The claimant told us and we find as fact that he went home immediately after the meeting with Mr Karl Probert on 10 June 2016 as he felt low but not medically depressed. He did not go on sick leave at that time.

10. On 21 June 2016, he was prescribed Fluoxetine, 20 mg a day. This is an antidepressant drug and he remained on this medication until either June or July 2017. There was an issue about his sick pay but it did not cause him stress. He was upset because during the grievance process Mr Probert was trying to contact him but he was reluctant to communicate with him because of his treatment on 24 June 2016. He had no issue with Mr Pursley who did not refer to his, that is, the claimant's race.

11. In his grievance letter dated 28 July 2016, the claimant wrote,

> "…So to all of a [I] sudden have my skills and experiences undermined because some were gained in Ghana, was a major knock to my self-esteem and my feelings have been injured by those comments to the extent that I have been depressed and still on medication to treat depression." (342)

12. The claimant went on sick leave from 4 July 2016, during which time he had 4 weeks of counselling.

13. The first fit note dated 4 July 2016, states that he was suffering from depression. Subsequent fit notes dated 15 July, 5 August, and 1 September 2016, states depression/stress at work. The fit note dated 3 October 2016, states "depression interim review" and the final fit note dated 1 December 2016, states depression. (RB 52-57)

14. In the occupational health report dated 15 December 2016, it states that he was on anti-depressant medication and was reporting on-going anxiety and stress, sleeplessness, day time fatigue, reduced motivation and concentration. He was unfit to undertake his substantive work role for a

further 8 weeks. He was experiencing symptoms associated with anxiety and stress but was fit to attend management meeting with adjustments. RB 36-39)

15. In Dr Adrian Massey, consultant occupational physician's report dated 1 February 2017, he made reference to the claimant's work dispute as having impacted upon the claimant's "psychological health and well-being" and recommended a phased return to work. (RB 40-44)

16. To complete our account of the medical evidence, in a report by the claimant's general practitioner, Dr N J Hughes, dated 27 October 2017, the doctor was asked by the claimant's legal advisers to prepare a medical report on the claimant's depression. The doctor set out the history of the claimant's treatment and opined:

> "In summary, I think there is a strong suggestion that his depression was related to his employment problems and, indeed, did not really seem to start to resolve until he had left his job. He was signed off work in total, from 4 July 2016 until 28 February 2017.
>
> Of note, looking at his medical records in our possession, there is no past medical history of depressive illness. As far as know, he has not been treated for depression before."

17. There is no medical report establishing or suggesting a causal connection between the events on 24 June 2016 and any psychiatric, psychological or personal injury suffered by the claimant.

18. On 20 February 2017, the claimant was offered a different position in manufacturing but under Mr Probert's line management to which he refused as he did no longer wanted to be managed by Mr Probert. On the same day, his employment was terminated.

19. On 20 March 2017, he secured employment with another company as an engineering team manager where he manages a team and would like to spend at least two years in this position to build up his experience and confidence. He told us that presently he is content in his work and family life and want to put his treatment by the respondent behind him.

20. When he was giving his account of his feelings during and after the meeting on the 24 June 2016, he became visibly upset and the hearing was adjourned for a short while.

**Submissions**

21. We heard submissions from Ms Godwin's on behalf of the claimant, and from Ms Hicks on behalf of the respondent. We do not intend to repeat the submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have taken their submissions into account as well as the authorities they have referred us to.

**The law**

22. An Employment Tribunal may order a respondent to pay compensation to a claimant under section 124(2)(b) Equality Act 2010.

23. In relation to injury to feelings, section 119(4) of the Act states,

> "An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis.)"

24. We have considered the general principles to be applied when awarding compensation for injury to feelings as set out in the race discrimination case of Prison Service and Others v Johnson [1997] ICR 275, a judgment of the EAT. We have also taken into account the three bands of injury to feelings award in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, a judgment of the Court of Appeal, updated to take into account the effect of inflation since 2003 in the case of Da'Bell v NSPCC [2020] IRLR 19. The EAT held in that case that the lower band should be £600-£6,000; the middle band, £6,000-£18,000; and the top band, £18,000-£30,000, applying a 20% increase to each of the bands.

25. Following the cases of Simons v Castle [2013] I All ER 334 and Beckford v London Borough of Southwark [2016] IRLR 178, and De Souza v Vinci Construction (UK) Ltd 2017 EWCA Civ 879, the 10% uplift applies to Employment Tribunal awards for injury to feelings and psychiatric injury.

26. The Joint Presidential Guidance on Employment Tribunal award for injury to feelings and psychiatric injury, dated 5 September 2017, following De Souza, sets out the applicable bands in respect of claims presented on or after 11 September 2017. They are:

    22.1 lower band - £800 to £8,400;

    22.2 middle band - £8.400 to £25,200; and

    22.3 upper band - £25,200 to £42,000.

27. In the case of Durrant v Chief Constable of Avon & Somerset Constabulary 2017 EWCA Civ 1808, the Court of Appeal held that the Joint Presidential Guidance could apply to claims presented prior to 11 September 2017.

28. In relation to personal injury claims, we have considered the case of Sheriff v Klyne Tugs (Lowestoft) Ltd 1999 ICR 1170, another judgment of the Court of Appeal. The Court held that a claimant can claim for personal injury arising from the statutory tort of discrimination. The test is not reasonable

foreseeability but causation, namely did either the physical, psychological or psychiatric injury arose naturally and directly from the discriminatory act?

29. The tribunal must be careful to avoid awarding double recovery as injury to feeling and personal injury awards are distinct, HM Prison Service v Salmon 2001 IRLR 425, a judgment of the Employment Appeal Tribunal.

## Conclusion

Injury to feelings

30. In relation to the claim for injury to feelings, we find that the comments made by Mr Probert on 24 June 2016, did have a negative effect on the claimant's state of mind and we set our findings out in our judgment liability in paragraphs 103-105. We also found that that was not Mr Probert's purpose but the effect. We further found that there were other factors praying on the claimant's mind during his employment, particularly in 2016. These were being placed on a Personal Improvement Plan; being demoted to Team Leader, and his relationship with Mr Probert whom he said had bullied him. There was also an issue about sick pay in late 2016. Those matters prevailed on the claimant's mind at the time. We do, however, take into account the repeated statements made by Mr Probert on 24 June 2016, as having an effect on the claimant which lasted for at least a year. When he gave evidence before us and recounted his experience on that day, he was clearly upset and the tribunal adjourned for a short while to enable him to compose himself.

31. He worked for McVitie as Advanced Team Leader. This was followed by a period of employment at Diageo as a Packaging Manager and he also worked at Amazon as Area Manager. The statements made by Mr Probert completely ignore the claimant's management experience, skills and abilities gained with these companies. Although they were made on the one occasion, 24 June 2016, they did have continuing consequences. It was not until the summer of this year, was the claimant taken off medication. His personal life, work life and family life are on an even keel and he is anxious to put his unpleasant experience behind him.

32. There is no dispute between the parties that an award for injury to feelings falls in the lower updated band of Vento. The dispute is in relation to the amount.

33. Taking the above into account, we have concluded that the claimant should be awarded the sum of £4,500. We apply the 10% uplift of £450. He is entitled to interest on the £4,950 at 8% from 24 June 2016 to this hearing which is £467.17, making the total sum to be awarded to the claimant in respect of injury to feelings, £5,417.61.

Personal injury

34. In relation to the personal injury claim, based on the claimant's experience in respect of the harassment, we could find no causal connection between the comments on 24 June 2016 and his depression. It was clear to us that by 21 June 2016, there were other matters which affected him which led to him being prescribed Fluoxetine by his doctor for depression. It was not clear whether his depression was mild, moderate or severe. The diagnosis was three days before the comments were made by Mr Probert. We have concluded that at the time he was prescribed Fluoxetine he was concerned about being placed on a PIP, being demoted to Team Leader and the alleged bullying by Mr Probert. In the Occupational Health Reports and in the other medical reports, there is no reference to the statements made by Mr Probert on 24 June 2016 as having caused the claimant's depression. We, therefore, are not satisfied that the claimant has established a causal connection between the harassment on 24 June 2016 and his depression. The claim in respect of personal injury is dismissed.

The parties' costs applications

35. After giving judgment on injury to feelings, Ms Godwins applied for an order that the respondent pay the claimant's costs. She referred to a "Without Prejudice letter save as to costs and subject to contract" sent by her firm to the respondent dated 8 February 2017. In it reference is made to the claimant having a strong harassment claim based on the comments by Mr Probert concerning Ghanaian management style. Various quotes were referred to in relation to the claimant's discussions with Mr Probert, one of which being "They are too soft and often do as they are told." The letter invited the respondent to consider settling the case and a figure between £40,000 to £60,000 was suggested but the claimant's representatives believed that £40,000 would be fair compensation to avoid a hearing as it included a clean break, that is the termination of the claimant's employment. The letter advised the respondent of the costs implications should the case proceed to a tribunal hearing. Ms Godwins submitted that it was unreasonable conduct by the respondent in not engaging in discussions with her firm with a view to settling the claims. She submitted that the claimant's costs came up to £24,030. (RB47-51)

36. The application was opposed by Ms Hicks, counsel on behalf of the respondent who submitted that the letter did not accurately reflect the allegations made by the claimant and referred to the alleged statement made by Mr Probert, "They are too soft and often do as they are told" which had always been challenged by the respondent and to which the tribunal did not make such a finding of fact. It was open to the respondent to prepare for a hearing as a number of named individuals were cited as part of the claimant's case and they refuted the allegation of discriminatory treatment. Out of the many acts relied upon by the claimant, only one was well-founded. In the circumstances, the outcome justified the respondent's decision to proceed to a hearing. The figure of £40,000 was wholly

disproportionate to the value of the claim as found by the tribunal and there is no legal requirement for a party should engage in settlement discussions.

37. Ms Hicks made an application for costs on behalf of the respondent based on the fact that a day's hearing was lost as the claimant, on the first day of the liability hearing, produced a bundle of documents comprising 85 pages. The respondent challenged the admission of those documents and time was spent by the tribunal, in considering the application. The tribunal ordered that the case be adjourned to commence at 11.30 the following morning but gave the respondent the option to decide whether, following the late disclosure, it should apply for an adjournment. The respondent did not apply for an adjournment and the hearing commenced at 12.10 pm. As a result, the case could not be concluded within the time allocated and had to be adjourned for one day for the remedy hearing. The application was limited to counsel's brief fee of £1,500.

38. Ms Godwins submitted that the hearing would have been adjourned in any event on the last day as the tribunal wanted to listen to the claimant's recording of the meetings.

39. We pointed out to Ms Godwins that we only suggested listening to the recordings because the case was going to be adjourned and wanted to make good use of the time. Listening to the recordings was not the reason for the adjournment.

**The law**

40. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

41. The power to make a costs order is contained in rule 76. Rule 76(1) provides,

> "A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
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> (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) any claim or response had no reasonable prospect of success."

42. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

43. E.T Marler v Robertson [1997] ICR 72, a judgment of the National Industrial Relations Court, and

44. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

45. In Oni v Unison UKEAT/0370/14/LA, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.

46. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."

> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

**Conclusion on costs**

47. We have come to the conclusion that the claimant had not established that the respondent's conduct of proceedings was unreasonable. For the reasons given by Ms Hicks, the respondent was entitled to challenge the case put against it and against named individuals. Only one of the acts relied upon was well-founded.

48. The tribunal on the final day of the liability hearing, were unable to give judgment due to insufficient time left and had to adjourn for one day chambers discussion. This then necessitated a one day remedy hearing. The cost to the respondent counsel's fees is £1,500.

49. We are satisfied that all matters would have been concluded on the final day of the liability hearing had the claimant made his disclosure well before the hearing or had the additional documents been included in the joint bundles.

50. Having taken in to account his means, we order that he should pay the respondent's costs in the sum of £1,500 as he refused to set-off this figure from the award of compensation.

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Employment Judge Bedeau

Date: 30 November 2017

Sent to the parties on: 30/11/2017

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For the Tribunal Office