JB1

EMPLOYMENT TRIBUNALS

Claimant: Mr S Ali

Respondent: C6 Intelligence Information Systems Ltd

Heard at: London Central **On:** 4 October 2017 (and 24 October in Chambers)

Employment Judge: Ms A Stewart

Members: Mrs C Seddon
Mr I McLaughlin

Representation

Claimant: In Person
Respondent: Mr S Purnell of Counsel

REMEDY JUDGMENT

1 It is ordered, pursuant to section 124 of the Equality Act 2010, that the Respondent pay to the Claimant, in compensation for injury to his feelings, the sum of £5,250 plus interest in the sum of £446.20.

2 It is ordered, pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, that the Claimant pay to the Respondent £1,000 towards its costs.

Employment Judge Stewart on 31 December 2017

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REASONS

1 This Remedy Hearing is consequent upon the Tribunal's Judgment on the merits, promulgated on 18 September 2017, which upheld one of the Claimant's six original complaints. He withdrew a seventh on the first day of the Full Merits Hearing. The purpose of this Remedy Hearing is therefore to determine the appropriate award for injury to the Claimant's feelings resulting from his well-founded complaint that he was subjected to harassment on the grounds of his religion by virtue of a comment made by his line manager, Miss Mills, at a meeting on 13 September 2016.

2 The Respondent makes an application for costs on the grounds of unreasonable conduct of part of the proceedings **(Rule 76(1)(a))** and/or that the unsuccessful claims had no reasonable prospect of success **(Rule 76(1)(b) of the Tribunal Regulations 2013).** The Respondent gave an undertaking not to enforce any costs order which the Tribunal may make, pending the conclusion of any appeal process, should one be instigated by the Claimant.

3 The Tribunal heard evidence from the Claimant and had before it documentary evidence from the Respondent of a series of seven Settlement Offers, without prejudice save as to costs, made to the Claimant between 5 May 2017 and 29 September 2017, one week after Promulgation of the Full Merits Judgment. These varied between £2,500 and £15,000. All were rejected.

Issues

4 The Tribunal therefore had to determine two issues:
(i) The appropriate compensatory award for injury to the Claimant's feelings caused by Ms Mills' comment. No question of loss of earnings arose as a consequence of this complaint.
(ii) Whether or not to make a costs order in the Respondent's favour and, if so, in what amount?

The Law

5 As to the law, the Tribunal directed itself as follows:

(i) **Section 124 of the Equality Act 2010** provides that (1) if the Tribunal finds a contravention of **the Act,** (2) it may order the Respondent to pay compensation to the Claimant, … (6) the amount of which shall correspond to the amount which could be awarded by the County Court.

(ii) The case of **Vento v Chief Constable of West Yorkshire (no 2) 2003 ICR 318, CA,** set out guideline compensation bands appropriate to awards of injury to feelings, which (as amended and updated) at the date of the harassment suffered by the Claimant were: lower band, appropriate to less serious cases, £600 to £6,600; middle band, for serious cases which do not merit an award in the highest band, £6,600 to £19,800; top band, applicable only to the most serious cases, £19,800 to £33,000.

(iii) The Respondent provided 4 Employment Tribunal Judgments making awards for injury to feelings, as exemplars which it contended were akin to, and not akin to, the current case. These were illustrative only, since other Employment Tribunal cases are not binding upon this Tribunal.

(iv) **The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996** provides for interest to be paid on awards.

(v) **Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, so far as material, provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that a party has; (a) acted … unreasonably in either bringing the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim had no reasonable prospect of success.

(vi) **Rule 78(1)(a)** provides that a costs order may order the paying party to pay a specified amount not exceeding £20,000.

(vii) **Rule 84** provides that in deciding whether to make a costs order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

Injury to feelings

6 The Claimant today seeks an award of £33,000, at the top of the top Vento band, although his original Schedule of Loss sought £12,000 plus interest, that is, in the middle of the middle Vento band. The Claimant said that the Schedule had been on his previous lawyer's advice, which he had followed, but had not agreed with.

7 The Tribunal was mindful that its principal task is to determine the effects of the act of harassment, which took place on 13 September 2016, upon the Claimant and his life. It accepted that the Claimant, as a Muslim, overhearing the phrase 'the missing terrorist' used of a Muslim colleague by his line manager at a full team staff meeting including a new member of staff, felt shocked, offended and very embarrassed. He could hardly believe that it had been said and soon began to feel angry. The Tribunal found that the phrase, in the particular wider

social context of an ongoing wave of Islamic terrorist attacks across Europe, was particularly shocking and offensive, even when used in a 'light-hearted' manner.

8 The Tribunal accepted that this was a one-off occasion, that Ms Mills had no intention of causing offence and immediately recognised that she had gone too far and went to report the incident to her own line manager. Neither she, nor her line manager, however, went to apologise either to the Claimant or Mr Ayub, to clear the air or to explain and try to set matters straight. There has still been no apology to the Claimant.

9 The Tribunal accepted the Claimant's evidence that the incident added to and exacerbated his stress levels caused by his struggles with his narcolepsy and other health conditions and their effects on his attendance at work. He was dismissed, during his probation period, for poor performance, not all of it related to his disability, on 19 September 2016, just 6 days after the harassment incident. Ms Mills' comment led the Claimant to feel, in hindsight, that his dismissal might also be discriminatory. The Tribunal also accepted that the incident to some extent undermined the Claimant's confidence in the workplace and his self-esteem.

10 The Tribunal was mindful that a Respondent must take a Claimant as it find's him, with his inherent vulnerabilities, for example arising from his rather precarious health condition (the thin skull rule). However, the Tribunal found no evidence that the harassment incident adversely affected the Claimant's existing health condition or his ability to work or the kind of work for which he applied after his dismissal. The main upsetting event for the Claimant was his dismissal and the Tribunal found that to have been non-discriminatory. The Claimant had already registered his own company in April 2016, prior to his employment with the Respondent, and he launched his own business online on 2 October 2016, some 2 weeks after he was dismissed. The Tribunal therefore found that the effects on his confidence and self-esteem were not long-lasting in any severity. He has since commenced full-time employment as from 27 June 2017. The Tribunal also noted that the Claimant had spoken effusively and with gratitude throughout his employment with the Respondent of the strongly supportive environment he had experienced at work, particularly from Mrs Jackson.

11 The Tribunal did not accept the Respondent's contention that this incident properly fell within the range £1,250 to £2,500 in the lower Vento band, because of the seriousness of the comment itself in the wider social context of Islamic terrorist outrages and the effect that this must necessarily have upon any Muslim, and did have on the Claimant. In all the circumstances, the Tribunal unanimously concluded that the proper award for injury to the Claimant's feelings was in the upper quartile of the lower Vento band; **£5,250 plus interest**.

Interest:

12 The Tribunal calculated interest as follows:

> £5,250 divided by 365 days x 8% gives a daily rate of £1.15.
> 388 days between the act of discrimination and today's hearing date x £1.15 = **£446.20 pence.**

Costs Application:

13 The Respondent seeks a costs order on the grounds that 6 of the 7 original claims failed and that this shows that they therefore had no reasonable prospect of success and/or that it was unreasonable for the Claimant to insist on pursuing all of these claims throughout the hearing, including seeking to amend to add yet others. Further, that he unreasonably refused a series of without prejudice settlement offers, as set out in paragraph 3 of these Reasons. The Tribunal found these offer letters to be reasoned and entirely properly and openly expressed in their terms, in that no improper pressure was applied.

14 The Respondent contends that the Claimant failed properly to consider whether all of his claims were likely to succeed and that if he alleges that his original legal representative was negligent in advising him, he has a potential claim against that solicitor. The Respondent presented a costs schedule, up to and including the Full Merits Hearing, amounting to £88,103 plus VAT. However, the Respondent did not seek a detailed assessment and told the Tribunal that it did not wish to 'ruin' the Claimant by seeking the full £20,000 within the Tribunal's fixed sum jurisdiction. The Respondent seeks, at the very least, a costs order of that sum which the Tribunal is minded to award by way of compensation for injury to feelings, unless the Tribunal finds that the Claimant's unreasonable conduct merits a larger costs order.

15 The Claimant contends that he was entitled to have his claims litigated in full and that, although not a lawyer himself, he believed that he had valid arguments and that his disability claim was the strongest part of his case and that he had done nothing unreasonable or extraordinary meriting a costs order against him.

16 The Tribunal concluded as follows:

a) The fact that any given claim does not succeed does not entail, per se, that it had no reasonable prospect of success or that it was unreasonable conduct of the case to pursue it to a full merits hearing. It is overwhelmingly common for a claim to require a hearing of the evidence before it can be found to be well-founded or otherwise. Costs do not follow the event in Tribunals and it requires something more for an unsuccessful party to have a costs order made against it. The Tribunal accepted in this case that the Claimant had legal representation at certain, earlier, stages of this case but not latterly.

b) The Claimant's victimisation claim had no reasonable prospect of success and was not properly pursued nor argued by the Claimant in that no protected act was specified during the case. It was not reasonable to pursue this claim in the circumstances.

c) The Tribunal found no evidence that the Claimant's race had anything to do with his dismissal. (Paragraph 104.2.2 of the Tribunal's merits Judgment). However, it found that the 'missing terrorist' comment, 5 days before the dismissal, was a fact from which it could, in the absence of any other explanation, find the taint of religion or belief discrimination in the Respondent's decisions to dismiss the Claimant and/or to deny him a sleeping room. In the event, having heard all of the evidence on both issues, the Tribunal was satisfied by the Respondent's explanations.

d) The Respondent disputed to the end that the Claimant was disabled for the purposes of the **Equality Act 2010**, although it appeared to the Tribunal on the evidence that it must have been apparent to the Respondent, following disclosure of the Claimant's narcolepsy on 10 May 2016, that the effects on his day to day activities were more than 'minor or trivial' and he was found on the evidence to be disabled by the Tribunal. The Respondent said during final submissions at this Remedy hearing that it "was entitled to have the matter litigated". This principle applies equally to both parties where there is dispute requiring the hearing of evidence. It was clear to the Tribunal that the Claimant's reasonable adjustments claim required full hearing of the evidence in order to be determined. Whilst finding this claim not well-founded, the Tribunal's conclusions regarding the provision of a sleeping place, were sufficiently nuanced to refute the contention that it was a claim without any reasonable prospect of success which it was unreasonable to pursue (Paragraphs 117 and 118 of the Tribunal's merits Judgment).

e) The Tribunal found the Claimant's harassment claim to be well-founded – but on the basis of religion or belief discrimination, not race discrimination. Both parties fudged these two separate strands of discrimination until the case came to a merits hearing, including in the warning given by the Respondent to Ms Mills after her disciplinary process. This did not assist the Claimant in discerning the distinction between discrimination on the grounds of his race and on the grounds of his religion or belief.

17 Accordingly, the Tribunal concluded that the race discrimination and victimisation complaints were the only elements of which it could be said that there was no reasonable prospect of success from the outset and that it was therefore unreasonable to pursue them. This leaves the disability claim, the unfair dismissal claim and the religion or belief discrimination complaint, of which only the harassment element was successful. The Claimant was entitled to have these complaints litigated. The Respondent would therefore have had to have presented its case regarding the reason for dismissal and the non-provision of a sleeping place in any event. The Tribunal assessed that removing the victimisation and race claims would have saved perhaps between 10 and 15% of the hearing time and preparation. Had the Respondent conceded the disability issue prior to the merits hearing, an equivalent amount of time could have been saved, in the Tribunal's view.

18 As to the Claimant's refusal to accept the without prejudice offers; the Claimant showed a certain obduracy in that regard. However, it is difficult to conclude that this crossed the line into unreasonable conduct as envisaged by **Rule 76**. He had the benefit of legal advice until nearly 3 weeks before the full merits hearing. It is impossible to say what advice he may have received. His eventual award by this Tribunal exceeds the lowest offers by the Respondent but does not exceed the higher offers made.

19 The Tribunal heard detailed evidence of the Claimant's means. He is still on probation in his new job, although hopeful that he will be made permanent. His net income per month is £3,800 with outgoings of £2,237 on average. He has over £17,000 of debts, repayable on a monthly basis at say, £1,000 per month. The Tribunal concluded that he has disposable income of about £563 per month. Contingencies must be built into this figure to allow for his disability, the

possibility of him losing his current job before being made permanent and/or before acquiring statutory rights.

20 Having regard to all of the above factors, the Tribunal unanimously decided that a costs award should be made for the Claimant having unreasonably pursued victimisation and race discrimination, without any reasonable prospect of succeeding in those claims, but that it should be a modest award in the sum of £1,000.

Employment Judge Stewart on 31 December 2017