mf

EMPLOYMENT TRIBUNALS

Claimant: **Miss E Korshunova**

Respondent: **Eiger Securities LLP**

Heard at: **East London Hearing Centre** **On: 22 March 2018**

Before: **Employment Judge Foxwell**

Members: **Ms L Conwell-Tillotson**
Mr D Ross

Representation

Claimant: In person

Respondent: Miss C Palmer (Counsel)

JUDGMENT ON REMEDY

The unanimous judgment of the Employment Tribunal is that the Respondent shall pay to the Claimant compensation for injury to feelings of £5,000 plus statutory interest of £1,498.08, a total of £6,498.08.

REASONS

Introduction

1 This is the remedy hearing arising from the Tribunal's judgment sent to the parties on 7 February 2018. Contrary to the terms of that judgment this hearing has taken place on 22 March 2018; the date of 23 March was inserted in the liability judgment by me in error and I have apologised to the parties for that. We nevertheless all turned up on the right day.

2 At the last hearing the Tribunal found that the Claimant had been subjected to a detriment because of a protected disclosure but by a majority dismissed her claim of automatic unfair dismissal brought on the same basis. The Tribunal thought that the protected disclosure was a factor in the Claimant's dismissal but the majority did not

find that it was the sole or principal reason for dismissal. As explained in that judgment, the tests of causation for detriment and automatic unfair dismissal claims are different.

3 The parties agree that, in light of our judgment, the remedy which the Claimant is entitled to is limited to compensation for injury to feelings. It is, of course, well-established that public interest ("protected") disclosure claims are a form of discrimination and fall to be compensated in the same way (see *Virgo Fidelis Senior School v Boyle [2004] IRLR 268*). In *Virgo Fidelis* the EAT said that detriment suffered by whistle-blowers should normally be regarded by Tribunals as a very serious breach of discrimination legislation. We have borne that guidance in mind but it does not take protected disclosure cases outside the scheme of compensation for injury to feelings established in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318*, as more recently up-rated in *De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844* and as reflected in Presidential Guidance issued on 5 September 2017.

4 In these reasons we shall refer to the *Vento* bands as the lower, middle and upper. The parties agree that the Claimant's case does not fall in the upper band so we need not consider it further. The Respondent argues that the claim sits at the bottom of the lowest band in the suggested range £800 to £1,200, although there is an open offer of £1,500 referred to in Miss Palmer's skeleton argument. In contrast, the Claimant argues that compensation for injury to feelings falls in the middle of the mid-band and she puts her claim at £16,800. The lower band presently stands between £800 and £8,400 and the middle band between £8,400 and £25,200. The lower band is generally appropriate for single unlawful acts although occasionally a particularly serious act may merit an award in the middle band.

5 The Tribunal has power to award additional compensation where there are aggravating features such as high-handed or oppressive conduct. This can relate to the unlawful act itself or to the Respondent's conduct after the act was done. Exceptionally, aggravated damages can be awarded where the Respondent's conduct of the Tribunal proceedings has been high-handed or oppressive (see *Zaiwalla v Walia [2002] IRLR 697*) but, as in the case of compensation for injury to feelings, aggravated damages remain compensatory and are not intended to be punitive.

The hearing

6 We read the Claimant's witness statement prepared for this hearing and one she submitted for the Remedy Hearing before the Jones Tribunal. The Claimant was cross-examined on her evidence relating to remedy by Miss Palmer. The Respondent did not call any evidence. Additionally, we read a small bundle prepared by the Respondent for this hearing. The Claimant did not produce any other documents but referred us to ones in this bundle.

7 We considered written submissions prepared by the Claimant and Miss Palmer respectively. Each made further oral submissions which we considered too. We are grateful to them both for the thorough and careful approach they took to the issues raised by the claim and the questions asked by the Tribunal during the course of the hearing.

The Claimant's case

8 The Claimant characterised the detriment, the withdrawal of three banks from her group of Euro/Dollar clients on 4 July 2014, as being more than a single act. She said that she dealt with multiple brokers at each client, she estimated at least three from each, so that there were nine or more individuals who were removed from her.

9 The Claimant's evidence was that she felt humiliated and distressed by Mr Ashton's decision to do this and that this feeling continued for the remaining days of her employment. The way she put it was like this: she had had to work for three years to be asked to handle these clients, which did not happen until April 2014, so not long before the events which led to dismissal. On 4 July 2014 she was asked to hand these clients over to junior brokers, ones she described as "inexperienced" and "untrained", although she acknowledged that she was asked to supervise them. The essence of her evidence is that she knew and they knew that this was a humiliation of her. She said that she felt that this step showed that her career was stalling (that is our paraphrase of the thrust of her evidence). She also suggested that the removal reduced her sphere of contacts in a business based on personal relationships and reputation. She said that the fact that she had not been able to explain or discuss the change with her clients before it was implemented also had an impact on her reputation. She told us that, had her clients not been removed, her opportunities for finding other work would have been greater because of the importance of personal relationships.

10 The Claimant also said that the Respondent's unlawful treatment of her affected her health. We looked at her GP records which showed that she was treated for anxiety in April 2014, that is before her protected disclosure, and had further treatment in May and July 2014.

The Respondent's case

11 The Respondent argues that the unlawful act was a small part only of a much wider picture and, whilst causation of some injury to feelings is acknowledged, it argues that this can have been minor only. Miss Palmer pointed to the witness statement prepared by the Claimant for the first remedy hearing before the Jones Tribunal. That statement concentrates on the consequences of dismissal (which had been found to be unlawful) and the Claimant's position after dismissal. Miss Palmer argued that, whatever injury to feelings the Claimant may have suffered because of Mr Ashton's unlawful act, it became subsumed and overtaken by the impact of dismissal itself, which has now been found not to have been unlawful, as described in that first remedy hearing statement. This is the context in which she places the quantification of compensation at the very bottom of the *Vento* bands. She emphasised that the unlawful act took place on 4 July 2014 and the Claimant was dismissed on 25 July 2014 so there was only a matter of a few days between each event.

12 As far as the medical consequences are concerned, Miss Palmer relied on the fact that the Claimant did not consult her GP on or immediately after 4 July 2014 when the clients were removed. Rather she did so later in the sequence of events on being suspended prior to dismissal.

13 Miss Palmer referred us to some comparator cases reported in *Harvey* at paragraphs 931 to 955 and 995 to 1024; the first tranche relate to sex discrimination claims and the second to race discrimination claims.

14 The Tribunal questioned Miss Palmer closely on the issue of a potential award of aggravated damages, referring to findings about Mr Ashton's credibility and consistency, the quality of disclosure by the Respondent and the timing and merits of an application for costs rejected at the last hearing. Miss Palmer told us that this was a case which had engendered strong emotion on both sides and had been hard-fought over a number of years but that this was not to be confused with oppression or highhanded behaviour.

Conclusions

15 While we acknowledge that the unlawful act had continuing consequences, we nevertheless find that it was a single act. We judge that it is one falling in the lowest *Vento* band. We have had regard to the previously decided cases presented as comparators by the Respondent but, while they are of some assistance, none are protected disclosure cases which are to be regarded as a particularly serious category (see *Virgo Fidelis*) above. We have also had the benefit of the findings of fact of the Jones Tribunal and of having heard evidence directly from the Claimant.

16 We are satisfied by the Claimant's evidence that she felt humiliated in front of others by the unlawful treatment. It was suggested to her in cross-examination that she was not being truthful about this but we do not find that to be the case.

17 We note that the Claimant's immigration status made her vulnerable to any steps which threatened the security of her employment: she is of Russian origin but has lived in the UK since the age of 15 and hopes to obtain indefinite leave to remain. The impact on her of the unlawful act must be assessed in that context. Of course, the Claimant was already feeling anxious because of a pre-existing deterioration in her relationship with Mr Ashton. We are sure on the evidence that this treatment added to this.

18 It would be easy to assume that all of this effect was subsumed in dismissal as Miss Palmer suggests, but we have had regard to our unanimous finding that the Claimant's protected disclosure was a factor in her dismissal. In this context in our judgment dismissal reinforced and exacerbated the Claimant's feelings of distress and anxiety consequent upon the unlawful treatment and did not simply extinguish it. Put another way, her upset because of the earlier unlawful treatment was not simply rubbed out by the greater upset caused by the later treatment, dismissal, which was not unlawful when judged by the higher test of causation relevant to it.

19 We have considered carefully whether subsequent conduct, particularly the conduct of this litigation, is a reason for an award of aggravated damages. Our enquiry arose from a strong impression that this was bitter litigation. We have decided that it would be wrong to make such an award as our impression could itself be wrong or misjudged, based as it is on very limited knowledge of the behind-the-scenes intricacies of this litigation, much of which will be privileged. So, having raised and explored that matter, we have decided that there is no evidential basis for making an

award of aggravated damages.

20 We turn then to our assessment of compensation for injury to feelings itself. We find that this treatment caused humiliation and distress for the Claimant and that it falls in the lower Vento band. Nevertheless, we judge it wrong to characterise the treatment as falling right at the bottom of the lower band. Rather, we find that it falls slightly above the mid point in that band. We assess compensation for injury to feelings at £5,000.

21 In addition to that we award interest pursuant to statute. The calculation is based on 1,367 days having elapsed since the unlawful act which at 8% pa comes to £1,498.08, so the total award is £6,498.08. We suggested rounding this to £6,500, but the Respondent was not happy with that. Accordingly, we enter judgment for the Claimant for **£6,498.08** including statutory interest.

Employment Judge Foxwell

23 March 2018