EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms G **v London General Transport Services & Others**

Heard at: Watford **On**: 12 March 2018
13 March 2018 (in Chambers)

Before: Employment Judge R Lewis
Members: Mrs S Boot, Mr R Clifton

Appearances

For the Claimant: Mr D Stephenson, Counsel
For the Respondent: Ms N Owen, Counsel

REMEDY JUDGMENT

1. The first respondent is ordered to pay to the claimant the total sum of £55,167.20. The sum is calculated as follows:-

   1.1 The basic award for unfair dismissal is agreed to be £1,437.00.

   1.2 The compensatory award for unfair dismissal is £23,612.89. The recoupment regulations do not apply.

   1.3 The financial award of damages for sex discrimination is £23,612.89, which, for avoidance of doubt, is fully coterminous with the sum stated above.

   1.4 The award of interest on the sum stated in the previous paragraph is £1,626.90 , calculated at 8% on £23,262.89 @ £5.10 per day x 319 days

   1.5 The award for injury to feelings for sex discrimination is £17,000.00.

   1.6 The award for aggravated damages for sex discrimination is £3,000.00.

1.7 The award for personal injury is £5,000.00.

1.8 The award for interest on the last three items above is £3,490.41, calculated at 8% on £25,000.00 @ £5.48 per day x 637 days.

REASONS

1. Where in these reasons we refer to our Reserved Judgment on liability, sent to the parties on 4 December 2017, we refer to RJ and then the number of the paragraph.

2. This hearing was listed at the conclusion of the public hearing in October 2017. There was a statement on remedy from the claimant, and on behalf of the respondent, a statement from Ms Angela Ryder, General Manager, dealing with pay and employment opportunities. Each gave evidence and was briefly cross-examined.

3. There was a useful working bundle for the purposes of this hearing, and we were referred to a modest number of authorities, notably Commissioner of Police v Shaw 2012 IRLR 291, Durrant v Chief Constable of Avon and Somerset 2018 IRLR 263, and Essa v Laing Ltd 2004 IRLR 313. We were also referred to the JSB guidelines.

4. A notable feature of this hearing was that at the start and in the course of the day, both Counsel co-operated in an entirely professional manner so as to maximise the area of agreement between them. We record our appreciation to both for their approach.

5. The tribunal made the following findings of fact, as to which there was little controversy.

Medical matters

6. Our bundle contained a report from the claimant's GP, Dr Bhagat, as well as reports from therapists whom the claimant has consulted. We had an extract from the claimant's medical and other health records. We find as follows:-

   6.1 The claimant has been registered with her present GP practice since about 1998;

   6.2 As indicated in RJ 87, she consulted her GP on 17 June 2016 and she was then signed off sick.

   6.3 Slightly ambiguously, Dr Bhagat wrote that the claimant "first presented" on that day and "This was the first presentation we had with regards to this issue." We understand the issue there to refer to a mental health issue, and the advice to be that there was no previous record of mental health consultations.

6.4 The bundle indicated that the claimant had an unbroken series of Med 3 certificates stretching to 3 April 2017, on which date it was said that she "may" be fit to work (50). The diagnoses were for anxiety, anxiety states, stress and, on 28 October 2016 and repeated on 27 February 2017, for depression.

6.5 The claimant was prescribed various forms of anti-depressant medication, beginning on 17 June 2016 and concluding on 21 July 2017, when she told the GP that she had not taken the medication for two months (50) from which we infer that, as she said in oral evidence, she stopped taking sertraline in about mid-May 2017.

6.6 On the day of the first GP consultation, the claimant was referred to IAPT for therapy (68). Following telephone assessment, she was seen three times in July and August (44-46) and then referred to a specialist service.

6.7 The specialist service was provided through Ms Oppey, a CBT therapist, who saw the claimant ten times between 29 November 2016 and 10 April 2017 (48-49).

6.8 The report of the initial therapy stated that the claimant had in July 2016 indicated "levels of anxiety and depression in the severe range" (46) and the discharge letter of April 2017 reported a reduction in symptoms and "levels of anxiety and depression reduced to the mild range". (48)

The claimant's work

7. The claimant was signed off unfit to work from 17 June 2016 until 3 April 2017.

8. Early in 2017, and in order to support her daughter, she became a director and shareholder in a new small business. Her GP consultation on 27 February 2017 (51) records that she had "been told to do some work" which in context is likely to be a reference to guidance given to the claimant at a CBT session.

9. On 5 April 2017 the claimant joined two job agencies (147-148) and made a single application (148) through CV library. We were shown that she made four or five applications on 2 May and about 8 applications in the last days of June and beginning of July. She signed an agency assignment on 30 June (153) after which she took up employment which extinguished her financial losses.

Discussion

10. The professional co-operation between the representatives reduced significantly the scope of our decision making about purely financial loss. Mr Stevenson asserted that the claimant had mitigated her loss and conducted herself reasonably, and that she should be entitled to compensation for all financial loss in the period up to 4 July 2017, it being accepted that all

financial loss had been extinguished thereafter. Ms Owen submitted that the appropriate date was 16 May 2017, 6 weeks after the claimant's last Med 3 had expired.

11. We resolve that issue in favour of the claimant and we make an award of full loss up to 4 July. We find that her mitigation of loss up to that date was reasonable. In so finding, we note that while she had worked as a bus driver for the last three years, and enjoyed the work, and was plainly competent, she was reluctant to apply for vacancies in a similar environment. We consider it reasonable mitigation that she should seek to avoid a male dominated transport depot for fear of recurrence, or for fear of a former colleague or TUPE transfer bringing her back into contact with a previous negative event. We accept that after an illness and absence from work of at least ten months, she needed time to regain her self-confidence, and that she was also concerned about the effects of medication, which she said left her drowsy, and wished to be quite sure that she was fit to work to her own standard. She could not be expected to start looking for work until she felt fit and safe to do so, which we accept was not at the beginning of April, but closer to the first half of May, when, she said she stopped taking medication so as to come off the drowsy after effect.

12. The representatives had agreed the loss of income figure in the period which we have found as £20,881.89, and had agreed a figure of £220.00 for pension loss and £350.00 for loss of statutory rights.

13. They agreed on figures, but not liability on two further matters. The claimant had the benefit of free TfL travel for herself and one family nominated member. The parties agreed the value of the benefit was £1,882.00 per person. We accept with Mr Stevenson that the claimant is entitled to be compensated for the loss of that benefit, even though it was not contractual and was not part of her terms and conditions with the respondent. It seems to us a loss which flows from dismissal and discrimination. We do not find that the same can be said of the benefit in favour of the claimant's daughter (aged 22 at date of this hearing) and do not accept Mr Stevenson's submission that we should make an award for further £1,882.00 for her loss. We award one such sum.

14. The claimant said that she had a gym membership with Fitness First. An email from Fitness First of 12 January 2018 confirmed this (103). As Ms Owen pointed out, there was no evidence of the claimant having availed herself of a system for direct payment from salary which the respondent operated; and the claimant denied having paid for her membership on direct debits. We nevertheless accept the email at 103 as evidence that the claimant enjoyed a discount benefit by virtue of her employment, which she lost as a result of dismissal and discrimination and we aware the agreed sum of £279.00 for that loss. We decline Mr Stevenson's application to award a second sum of £279.00 in respect of the claimant's daughter's loss and for the same reason.

Interest on the above

15. The above figures represent both the compensatory award under the Employment Rights Act and compensation for pecuniary losses under the Equality Act. We find that there is a complete overlap of the award and components. In other words, and for complete avoidance of doubt, the above sums would have been awarded if the claimant had less than two years' service.

16. We come to consider interest in accordance with the Employment Tribunal's (interest on awards in discrimination cases) Regulations 1996, we find that regulation 6(1)(a) engages £21,101.89 of the above. We consider that that is the element of the above which engages past financial loss, including the loss of the travel and gym membership, but excluding loss of statutory rights.

Injury to feelings

17. In considering the award for injury to feelings, we note and rely in particular on the relevant history, summarised in RJ 58; the findings at RJ 76-83, and RJ109-112. In so far as the discriminatory constructive dismissal claim is part of the injury to feelings award, we note RJ 149-152; all references inclusive. We set out below the considerations in the award, not set out exhaustively or in order of priority:

    17.1 We accept that the incidents with Mr F and Mr E took place in the presence of others, and therefore involved a demeaning element of public humiliation;

    17.2 We find that the incidents compounded the claimant's sense of difference of treatment and isolation, which were factors already present in a heavily single gender workplace;

    17.3 We find that the claimant's sense of humiliation and isolation was compounded by the words and actions of Mr Affaine, and by the failure of Mr Field to deal with them robustly. We deal with this element at greater length when we deal with aggravated damages;

    17.4 We find that the respondent's grievance process failed the claimant in part because others who were interviewed were untruthful and in part because of a broad failure to understand the nature and meaning of sexual harassment;

    17.5 We note that the matters which we have upheld were events which were spread over a period of about three months; but that they were set in a relevant background which went back over two years;

    17.6 In that setting, we note that the respondent missed opportunities to address the claimant's concerns;

17.7 The claimant had about 55 weeks absence from the workplace and the world of work in consequence, with a severely detrimental effect on her self confidence;

17.8 The claimant was on medication for about ten months, although it is evident that the period of ten months was one which she unilaterally abridged without medical advice, and that certainly the medical advice was to continue medication at least until 21 July (when she was seen), which would have meant a period of about 57 weeks on medication;

17.9 The claimant had 13 CBT sessions, spread over a period of nine months;

17.10 The claimant was diagnosed medically with anxiety, stress and depression, and was assessed for CBT originally as scoring on the severe depression range;

17.11 We accept that in her witness statement the claimant truthfully spoke of feelings of fear and humiliation; that she suffered periods of sleeplessness and tearfulness and exhaustion; that she experienced flashbacks. We accept that there was a damaging effect on her self-confidence and a loss of resilience, leading to a sense of apprehension in returning to the male dominated work environment of bus driving.

17.12 Our overarching finding is that the claimant experienced a prolonged sense of powerlessness, and the consequences of the misuse of power by others around her.

17.13 The documentation referred to matters arising in the claimant's past, (noted also at RJ6). In a very brief legal submission Ms Owen invited the tribunal to find that the claimant's vulnerability was not attributable to the action of any respondent, and accordingly nor was the full extent of her reaction to these events. Mr Stephenson briefly replied to state that we must take the victim as we find her, without interpolating any assessment of her vulnerability to sexual harassment. We agree with Mr Stephenson's approach.

17.14 It seems to us, taking these matters together, that an award in the lower Vento band, as Ms Owen suggested, is insufficient to compensate the claimant for all of the above. We agree with Mr Stephenson that it is a middle band case, but do not agree with him that we go to the top of the middle band, and making appropriate allowances in accordance with counter submissions on the application of the Presidential Guidance and uplift, we make an award for injury to feelings of £17,000.00.

Aggravated damages

18. Mr Stephenson relied heavily on Commissioner of Police v Shaw and submitted that this was an appropriate case for aggravated damages. He rightly cautioned us against double recovery and reminded us that the purpose of the award is compensatory. In his written submission, he referred to: the nature of the initial sexualised language; the events involving Mr Affaine and Mr Field on 8 July; the response of witnesses, both in the grievance process and in evidence to us, attacking the claimant and accusing her of lying and worse.

19. We note also that an an award of aggravated damages is to be made exceptionally, and must fall into one of the categories identified by the EAT in Shaw. We rely on the head note: "The basic concept here is that the distress caused by an act of discrimination may be made worse by being done in an exceptionally upsetting way….. An award can be made in the case of any exceptional… conduct which has the effect of seriously increasing the claimant's distress."

20. We do not agree with Mr Stephenson that the usages of sexualised language, or the denials and counter attacks of witnesses met the test of exceptionality. We rather refer to our findings at RJ109-112, and we consider that in the light of those findings, an award of aggravated damages should be made in the sum of £3000.00. We attach this award very largely to Mr Affaine's conduct and also to some extent to Mr Field's failure to restrain it. Mr Affaine discriminated against the claimant at a time when he was present in the meeting to represent her interests. We accept that he showed every sign of empathy and support for those against whom she brought the grievance, made gratuitous voluntary attempts to explain away their discriminatory conduct, said or did little or nothing to give the claimant the support to which she was entitled as a colleague presenting a grievance of harassment and discrimination. His actions exacerbated her sense of isolation and powerlessness, and compounded her distress. It disappointed her expectation that the representative of the largest Union in the country would in some way help redress the imbalance of power which she perceived at the time. We have found that Mr Field failed to rise adequately to the challenge of the events.

21. We add that while this Judgment, likes its predecessor, is unanimous, this is a point on which the non legal members, drawing on their substantial experience of grievance hearings, express particular concern.

Personal injury

22. We agree first with Mr Stephenson's submission that the claimant experienced a period during which she was diagnosed with depression. It was assessed as severe, and we accept the claimant's account in evidence (summarised above) of the effects on her.

23. Following Essa v Laing, we go on to find that the experience of discrimination which we have found was causative of the period of diagnosed depression, which had the duration and effects described above. We rely on our above

findings of fact about the claimant's absence from the workplace and the world of work; the requirements of medication and therapy, and their duration; and the claimant's account of her wider perception.

24. Drawing the above together, we agree in principle that an award should be made for personal injury. It did not seem to us to do justice to this aspect by dealing with it as a matter (such as travel anxiety) under chapter 13 of the JSB Guidelines. We accept Mr Stephenson's submission that we should consider the claimant's case as falling in the moderate category in chapter 4. We have not found it easy where in that range to place the claimant. We are alert to the risk of double recovery, and we place the award close to the bottom of the category, and award £5,000.00 for personal injury.

Interest on the above

25. The interest award is 8% of £25,000 for 619 days, which we calculate at £5.48 per day, a total therefore of £3,490.41.

ACAS uplift

26. We heard submissions on whether we should uplift the award for failure to follow the ACAS Code on grievances. Mr Stephenson made the compelling point that where the tribunal has found that the very conduct of a grievance meeting has been discriminatory, it stands to reason that the Code has not been followed. While we can see clearly the force of that argument, we decline to make an award for two main reasons. First, the provisions of the Code present to us as mechanical, not qualitative, and we are not convinced that there has been a failure to comply with the mechanical requirements. Secondly, we would be concerned by the risk of double recovery. We have found that the conduct of the meeting attracts an award for injury to feelings, and it has been the only factual matter which attracts aggravated damages. In exercise of the discretion allowed us by section 207A(2) TULRCA , it does not seem to us just and equitable to make a further award in respect of events at the same meeting.

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Employment Judge R Lewis

Date: 29 March 2018

Sent to the parties on: .....

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For the Tribunal Office