



EMPLOYMENT TRIBUNALS

Claimant: Dr Vivienne Jean Lyfar-Cisse

First Respondent: Brighton & Sussex University Hospitals NHS Trust
Second Respondent Mr Graham White

Heard at: Southampton Hearing Centre

On: 5 February 2018

Before: **Employment Judge Craft**

Members: **Mr N Knight**
Mrs R Rose

Representation

Claimant: Ms A Brown, Counsel

Respondent: Mr T Kibling, QC

UNANIMOUS RESERVED JUDGMENT ON REMEDY

1. The Claimant is awarded compensation for injury to feelings in the sum of £7,363.
2. The Claimant's claim for aggravated damages is dismissed.

REASONS

Background

1. This remedy hearing follows the promulgation of the Employment Tribunal's unanimous reserved judgment on 23 January 2018 following the remitted hearing held in October 2017 in which the Employment Tribunal upheld the Complainant's complaint of race discrimination in the form of victimisation contrary to s.27(1) Equality Act 2010 for which a provisional remedy hearing (dependent upon the Reserved Judgment) had been fixed at the end of the remitted hearing.
2. The Employment Tribunal received evidence from the Claimant who provided her evidence in chief by way of a witness statement (Exhibit A4) dated 1 February 2018. In addition to the documents previously referred to it at the remitted hearing the Employment Tribunal was also provided with the Claimant's schedule of loss (Exhibit A5). Mr Kibling provided written submissions (Exhibit R4). The Employment

Tribunal was also referred to the following authorities:

Vento v Chief Constable of West Yorkshire Police (Vento No. 2) [2003] IRLR 102

De Souza v Vinci Construction (UK) Ltd EWCA Civ 879

Esporta Health Clubs v Roget UK EAT / 0591 / 12, [2013] EQLR 877

HM Prison Service v Salmon [2001] IRLR 435

Commissioner of Police v Shaw EAT [2012] ICR 464

Durrant v Chief Constable of Avon & Somerset Constabulary [2017] EWCA Civ 1808

The Remedy Claim

3. The Claimant's schedule of loss sets out three heads of claim. These are for injury to feelings in the sum of £15,000; aggravated damages in the sum of £10,000 and Claimant's travel expenses incurred in the course of the proceedings of £1,200. The schedule also summarises the Claimant's basis for each claim and also sets out what it describes as principles and precedents to establish an entitlement or meritorious basis for the claim for aggravated damages.
4. The Claimant accepts that she has pursued 23 claims of discrimination initially against four Respondents during the course of these proceedings. She also accepts that she has been successful in respect of only two of those claims with the findings of victimisation made against the second Respondent, Mr White, the first Respondent's former head of HR. The Claimant informed the Employment Tribunal that she still considers the other unsuccessful claims demonstrated discriminatory behaviour by the Respondents and that she was upset, disappointed and devastated when the first Judgment was promulgated on 1 August 2013 which dismissed all her claims.
5. The Claimant further asserts that the Respondents have not acted in good faith in their conduct of these proceedings. She alleges the Respondents consciously conjured up their explanation of "restorative justice" as a defence. She also makes a further allegation that Mr White's intervention was not only influenced by the fact that she had done a protected act but also by the fact that the Claimant was chair of the BME Network and the fact that she had a reputation for robustly defending her BME colleagues upon which the Employment Tribunal has made no finding. The Claimant also relied on previous proceedings which she has pursued against the first Respondent, as well as alleging that the Respondents conducted these proceedings in an inappropriate manner stating that the outcome of her grievance in respect of Mr White's conduct was a recommendation that he should face disciplinary action which was not taken forward.
6. She also asserted that the Respondents were content to spend a considerable amount of money from the public purse by defending the indefensible and showing no interest in settlement. The Claimant then alleged that she had been subject to persistent and continuing racial discrimination and victimisation by the first Respondent and in doing so referred to other internal procedures and other Employment Tribunal proceedings unrelated to this case. After intervention by the Judge Ms Brown accepted that these matters could not be relevant to the remedy pursued before this Tribunal.

7. The Claimant also confirmed that she had not been prepared to accept the written apology which was provided to her by Mr Bradley and Mr Wardle even before she was aware that Mr White had intervened in the grievance procedure and recommended that course of action to them. She explained that she had not accepted their apology because they had never admitted to doing anything wrong in raising their concerns as to potential difficulties about the availability of Down's Syndrome test results within the normal target period for them. She remains of the view which was not upheld by the first Tribunal that they were making false allegations against her. The Claimant then described to the Tribunal that the whole experience of these proceedings had caused her distress, anxiety, embarrassment, pain, sleepless nights and other disruptions.

Submissions

8. In his helpful written submissions Mr Kibling referred the Tribunal to the judgment of **Mummery LJ in Vento 2** stressing the importance that any award for injury to feelings must be fair and reasonable to both parties and not punitive and derive from the unlawful conduct in question. Furthermore the onus is on the Claimant to establish the nature of the injury occasioned by the unlawful act and awards for injuries to feelings should serve to compensate for that injury and should not be used as a means of punishing a respondent. He also accepted that much would depend upon the particular facts of each case which in turn must depend on the findings of fact made by the Employment Tribunal from the evidence tendered to it and the injury found to have been suffered by the particular individual by the unlawful act. He also accepts that discriminators must take their victims as they find them. Therefore, once liability has been established, compensation should not be reduced because, for example, the victim was particularly sensitive. Moreover, Mr Kibling reminded the Tribunal that the issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct.
9. In respect of aggravated damages Mr Kibling submits that it is only in exceptional and appropriate cases that aggravated damages will be awarded. He referred the Tribunal to the case of **Commission of Police v Shaw** where three categories of case were identified by the President of the EAT. Further, he explained that, the starting point is that aggravated damages is a compensatory award which should not be awarded in order to punish a Respondent for its conduct, however heinous: that is the province (only in a very limited class of case) of exemplary damages, which are not claimed in this case.
10. Mr Kibling also asked the Tribunal to note that the Claimant had pursued nine allegations against Mr White and that all of these allegations had been dismissed by the first Tribunal in its unanimous judgment in August 2013. It was not until October 2014 that the matter came before the EAT and by that time Mr White had left the Respondent's employment. Mr Kibling suggested it was therefore extraordinary for the Claimant to have suggested the Respondent should have taken disciplinary proceedings against Mr White, and such a consideration could not be relevant to the remedy sought by the Claimant.
11. Mr Kibling also submitted that the Claimant had not provided any supporting documents in respect of her claims and no medical records to support her allegations of regular migraine attacks, severe stress and anxiety and ability to sleep. He also asked the Tribunal to note that the Claimant has made clear that she still feels that notwithstanding the judgment given in August 2013 that her other discrimination claims remain valid. Her sense of distress and frustration as to outcome cannot inform the Employment Tribunal's assessment of an injury to feelings award to her.

12. Finally he submitted that the facts in the case of **HM Prison Service v Salmon** on which the Claimant relies in pursuing her claims for aggravated damages are far removed from the Claimant's case and also serve as good guidance as to when such an award is to be made. He concluded by submitting that the award for injury to feelings in this case falls within the Vento 2 lower band being an isolated or one off occurrence making the appropriate range of award between £600 to £6,000 and that the appropriate award should be at the lower end of this range. He also submitted that it would be inappropriate to make an award for aggravated damages and that the recovery of travel expenses was a misplaced application and that such a claim could not be recoverable without a successful costs application being made by the Claimant.
13. Ms Brown submitted the Employment Tribunal should not be concerned with the claims that had failed. It should concentrate on the claims which had succeeded. The failure of other claims cannot be relevant to this award. The fact that the first Tribunal had made findings that Mr White's motives were laudable and benign, which it had, should have no impact on how this Tribunal assessed the injury to feelings suffered by the Claimant by his actions. Furthermore the Claimant could rely on the fact that such an argument had revived her sense of injustice in the Respondent defending the indefensible within these proceedings.
14. Ms Brown also referred the Tribunal to the **Durrant** case in which it had taken some years for the claimant to achieve justice and this was a factor which was taken into account in upholding an appeal and increasing an award of injury to feelings to the claimant.
15. Ms Brown asked the Employment Tribunal to note that the Respondent employs approximately 6,500 people of whom 14% are from ethnic minorities. Mr White had a staff of over 100 and considerable experience in his field. He was the gatekeeper for the Respondent's policies and procedures and the action he took was malicious high-handed and oppressive and was about an abuse of power. Furthermore he could have reviewed his own actions but he chose to defend his position notwithstanding that he had gone behind the Claimant's back and the findings made against him in the Respondent's own grievance procedure. It should not have needed the Employment Tribunal to tell the Respondents that this was wrong and that it was irresponsible to argue the legal point. This was not an isolated incident it was a determined and deliberate course of conduct for which an award of aggravated damages was appropriate. Finally, the mid-range Vento figure which the Claimant sought was not excessive in the circumstances of this case when she had achieved final vindication within the proceedings in January 2018 by the judgment in the second remitted hearing.

The Law

16. The Employment Tribunal considered that Mr Kibling had provided a succinct and accurate summary of the key principles for the Tribunal in addressing the claims for awards for injury to feelings and aggravated damages. His summary had not been challenged by Ms Brown, and the Tribunal's understanding was assisted by reading the Approved Judgment in the case of **Durrant v Chief Constable of Avon & Somerset Constabulary** to which Ms Brown had referred.
17. The Employment Tribunal has also been assisted by reading the judgment in the case of **Commissioner of Police v Shaw** which gives guidance as to the nature of aggravated damages and principles governing their award. These can be summarised as follows:

- (a) The manner in which the wrong was committed. The basic concept is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. The phrase "high-handed, malicious, insulting or oppressive" is often referred to in such circumstances. It was stated to give a good general idea of the territory involved but not to be treated as an exhaustive definition.
 - (b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity which is spiteful or vindictive or intended to wound is, as a matter of commonsense and common experience, likely to cause more distress than the same act would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. The point was made, however, this can only be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate injury. There is also in practice a considerable overlap with (a) above.
 - (c) Subsequent conduct. The practice of awarding aggravated damages for conduct subsequent to the actual act complained of to cover cases where the defence is conducted in an unnecessarily offensive manner.
18. The Employment Tribunal does not consider it necessary to summarise the Vento cases which are well known but confirms that it has taken account of them and the Presidential Guidance as to Employment Tribunal awards for injury to feelings which followed the **De Souza** case.

Conclusions

19. The Employment Tribunal now summarises its conclusions having carefully considered all the evidence, the oral and written representations made to it and the cases to which it was referred by the parties. It is agreed that the burden is on the Claimant to establish non-pecuniary loss arising from the conduct of Mr White which the Tribunal has found to have been unlawful. The parties are also agreed that any award must be fair and reasonable to both parties and must not be punitive. It must also derive from the unlawful conduct found against the Respondents not from the other unsuccessful claims or the Claimant's disappointment as to the overall outcome of the proceedings in which 21 of her 23 claims were dismissed.
20. However, the Tribunal does have to consider all the relevant circumstances and, by reference to the findings of fact made by the first Tribunal, the context in which the unlawful conduct occurred and the reasons Mr White took the action that he did, as found by the first Tribunal. This is particularly so in this case where the Claimant asserts against the Respondent capricious conduct of these proceedings, multiple acts or links of victimisation and malicious or premeditated implementation of internal procedures. It was a matter of concern for the Tribunal that in her evidence in support of her claim for an award for injury to feelings and aggravated damages the Claimant asked the Tribunal to take into account previous proceedings which she had pursued against the first Respondent and matters arising after the commencement of these proceedings and the further proceedings which the Claimant now pursues against the first Respondent. Ms Brown had to concede, and her own submissions to the Tribunal made clear, that these were matters which although it was clear had caused the Claimant substantial upset and distress, could not be relevant to the Tribunal's consideration of remedy. However, it was relevant to the Tribunal's deliberations because it demonstrated a continuing sense of grievance which was causing upset and frustration to the Claimant arising from the overall outcome of these proceedings,

and matters that have occurred since the event which this Tribunal have not had to consider and are not relevant to the remedy sought.

21. The distress and devastation which the Claimant said she endured when the first judgment was promulgated was also irrelevant to consideration of remedy except that again the Claimant's evidence made it clear that she still feels her unsuccessful discrimination claims remain valid and endured substantial frustration at the fact that 21 of her 23 claims were unsuccessful. Such upset and distress on which she relied cannot inform the Tribunal's decision as to remedy in this case.
22. Furthermore the Employment Tribunal are satisfied that the first Tribunal's findings of fact and its dismissal of 21 of the Claimant's claims make the Claimant's claims of malicious or premeditated implementation of internal procedures, multiple acts of victimisation and capricious conduct unsustainable. The overall outcome of the proceedings also confirms that the Claimant's allegation that the Respondent has been defending the indefensible is an incorrect criticism of its involvement in this litigation in which it was entitled to defend the Claimant's claims and was substantially successful in doing so.
23. The Employment Tribunal also note that the victimisation found against Mr White was not the catalyst for these proceedings. This was an exchange of emails in November 2011 involving Mr Bradley and Mr Wardle which the first Tribunal found to be innocuous but resulted in a grievance from the Claimant against Mr Bradley and Mr Wardle. Mr White then intervened in that grievance without informing the Claimant of his involvement or discussing it with her but his intervention did result in Mr Wardle and Mr Bradley sending written apologies to the Claimant as to the queries they had raised and the distress this had caused to the Claimant, who accepts, that she was not prepared to accept those apologies (even when she was unaware of Mr White's involvement) and pursued proceedings alleging discrimination against Messrs Bradley and Wardle who were at one time named Respondents in these proceedings.
24. There has been no finding that Mr Bradley and Mr Wardle acted in bad faith towards the Claimant and the findings of fact do not undermine the overall integrity of the Respondent's internal procedures. Indeed it was the grievance procedure referred to above that disclosed the actions of Mr White which led to the Claimant's second grievance in respect of his actions. The outcome of the second grievance was the finding that Mr White had acted outside the first Respondent's relevant internal procedures and a recommendation that disciplinary action should be considered not, as the Claimant alleges that disciplinary action should be taken; and consideration was given to such a course of action. The findings of fact of the first Tribunal do not support the Claimant's allegation that the Respondents conjured up an explanation of restorative justice or that Mr White acted in bad faith. The fact that his intentions were found not to be malign or malicious did not prevent the finding of victimisation and that finding did not depend on a finding that he had acted in the way the Claimant has alleged.
25. The Employment Tribunal has already stated that an award for injury to feelings is compensatory and must not be punitive. The burden of proof is on the Claimant to explain the nature and extent of the injury to feelings and to establish a case for an award of aggravated damages. It is a further burden on the Claimant to establish that the non-pecuniary loss she seeks arises from the two findings of discrimination that had been made against the Respondents. The Employment Tribunal has given careful consideration to the Claimant's evidence as to the impact of that unlawful conduct on her. It accepts that she was upset and distressed when she found out

about the steps Mr White had taken. The grievance she pursued in respect of it was properly considered by the Respondent and in the course of its deliberations and its promulgation of two judgments the first Tribunal did not find that Mr White had been deliberately untruthful or disingenuous as to what he had done or the reasons for it although he cannot avoid the consequences of not having engaged with the Claimant and the victimisation arising from that.

26. However the Claimant has presented evidence which relies on a number of irrelevant factors which have caused her distress and has made unjustified allegations against the Respondents to pursue an additional claim of aggravated damages which the Employment Tribunal, applying the guidance given in the case of **Shaw** find to be unsustainable. The Employment Tribunal has to consider the impact on the Claimant of the relevant acts undertaken by Mr White. This is a matter that does not concern the overall conduct of the Respondent whether within these proceedings or outside these proceedings. After stripping away the other matters on which the Claimant seeks to rely the Employment Tribunal is left to assess the undoubted impact of disappointment and stress which this had on the Claimant when she discovered what he had done taking into account that the potentially serious consequences which this Tribunal identified that could have arisen, that is, the Claimant's resignation, which did not occur. The Claimant was able to continue in her employment with the Respondent while pursuing matters internally and then externally which the Tribunal has also taken into account in its extensive analysis.
27. The Tribunal concludes that in these circumstances an award of injury to feelings at the upper end of the lower Vento bracket is appropriate. It also finds, for the reasons set out above that it is not appropriate to make an award for aggravated damages in respect of this case. It also agrees that with Mr Kibling that the pecuniary claim for travel expenses is a matter that must be considered within the Claimant's claim for costs which has recently been submitted by the Claimant and which could not be considered at this hearing and will be subject to separate consideration in due course.
28. The claim was issued in June 2012, at which time the Office for National Statistics provides the RPI All Items Index was 241.8. Accordingly, the upper boundary or the lower band is $\text{£}5,000 / 178.5 \times 241.8 = \text{£}6,773.10$.
29. The Employment Tribunal considers that a sum of £5,000 is appropriate to compensate the Claimant for her injury to feelings.
30. The Claimant is entitled to interest upon her award at the rate of 8% per annum the relevant period is from 15 June 2012 to 11 May 2018. This is 2,156 days. The calculation of interest is as follows: $2156 / 365 \times 8\% \times \text{£}5,000 = \text{£}2,362.73$. Therefore the Claimant is entitled to compensation for injury to feelings of £7,363. The Claimant's claim of aggravated damages is dismissed. The claim for pecuniary loss for travel expenses will be considered within the Claimant's costs application.

Employment Judge Craft
11 May 2018

JUDGMENT SENT TO THE PARTIES ON
16 May 2018