Case Number: 3200907/2016

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Miss N Lomana Otshudi**

Respondent: **Base Childrenswear Limited**

Heard at: **East London Hearing Centre**

On: **21 March 2018**

Before: **Employment Judge C Hyde**
Members: **Mr P Quinn**
Mr T Brown

Representation

Claimant: Mr C Khan, Counsel
Respondent: Mr D Matovu, Counsel

REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The application for a recommendation was refused.

2. The Respondent was ordered to pay compensation for race discrimination in respect of the Claimant's dismissal as follows:

   a. **£3505.24** in respect of lost earnings.

   b. Interest on that sum from August 2016 to the date of calculation of remedy at half of the annual interest rate of 8% = **£117**.

   c. The total of the awards for lost earnings and the interest on that (£3622.24) was increased by 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and Schedule 2A. 25% of £3622.24 = **£905.56**.

d. Compensation for injury to feelings in the sum of **£16,000.**

e. Aggravated damages in the sum of **£5000.**

f. Compensation for personal injury in the sum of **£3000.**

g. Interest on the total sum of £24,000 (injury to feelings, aggravated damages and personal injury awards) sum from 16 May 2016 to 21 March 2018 at the rate of 8% per annum = **£3520**.

h. The total of the awards for injury to feelings, personal injury, aggravated damages and the interest on them (£27520) was increased by 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and Schedule 2A. 25% of £27520 = **£6880**.

3. The Respondent was ordered to pay to the Claimant the sum of **£300** in respect of her costs incurred (preparation time order).

REASONS

1 This was a hearing to determine remedy following the reserved judgement in this case which was sent to the parties on 21 December 2017. The complaint of direct race harassment in respect of her dismissal was well founded.

2 Reasons for our Judgment having been delivered orally on 21 March 2018, written reasons are provided as they were requested by the Respondent at the conclusion of the remedy hearing. They are set out here only to the extent that it is proportionate to do so, and only to the extent that it is necessary to do so in order for the parties to understand why the Tribunal has made the determinations set out in the Remedy Judgment above. Further, where matters were agreed, or set out in writing by the parties, for the most part, the Tribunal has not repeated them in these reasons on grounds of proportionality.

3 The Claimant sought various remedies as set out both in her Schedule of Loss and as refined by her counsel in a skeleton which was prepared for the Remedy Hearing which the Tribunal marked REMC2. The Tribunal heard evidence from the Claimant in accordance with a witness statement which we marked REMC1. We also considered the bundle of documents which had been prepared for the liability hearing which contained a section relating to remedy. Within that section, we were taken to a psychiatric report which was prepared prior to the liability hearing by Dr Turner, which was relied on in support of the personal injury claim.

4 Our determinations on the various aspects of remedy are set out in turn below.

5 First, we considered the application for a recommendation. The Respondent indicated through their counsel that they are taking steps to improve their internal policies. We considered that in those circumstances, they would probably have no objection to the

recommendation requested by the Claimant. However, case law on the subject either precludes or discourages us from making recommendations in cases where a successful complainant is no longer in the employment of the Respondent. We considered that we were bound by that law, which has also been reinforced by recent changes to the relevant legislation. Whilst the Tribunal welcomed the indications through counsel about the Respondent's intentions, albeit they had not actually been evidenced, we did not consider that it was appropriate for us to make the recommendation sought given the state of the law.

6 The second element that we considered was the loss of earnings claim. This figure had been agreed between the parties at £3505.24. In those circumstances we awarded that sum to the Claimant in respect of her loss of earnings.

7 It appeared to us also that interest was properly to be awarded on that sum but we thought the appropriate period for which interest should run would be from August 2016 at half of the annual interest rate which is 8%. Although Counsel for the Respondent initially craved the Tribunal's indulgence to consider the issue of the calculation of the award of interest on the loss of earnings figure, by the end of the hearing, Mr Matovu confirmed that he had no representations to make on this. Interest had not featured in the schedule of loss and was raised by the Tribunal.

8 £3505.24 x 4% x 1.83 years = £117. As the Respondent had not made its representations about the Tribunal's calculation of this figure, the sum of £117 was inadvertently omitted from the subsequent calculations and the 25% uplift was not applied to either the loss of earnings figure or the interest in the sums announced to the parties. The Tribunal considers it proportionate to cure that oversight in these reasons.

9 We next considered injury to feelings and alongside this we considered the claim for aggravated damages and for an uplift for non-compliance with the relevant ACAS codes. We used the figures and the ***Vento*** brackets which relate to pre-September 2017 cases. The applicable figures were agreed. Given that the dismissal in this case which was what we found to be discriminatory occurred in May 2016, we thought that was the proper approach. We reminded ourselves that the discriminatory harassment that we found related to the dismissal.

10 In these reasons, we highlighted some of the main features which we thought had led to the Claimant's injured feelings. The dismissal on 19 May 2016 came out of the blue. The Claimant at the time of dismissal was given a patently false reason – that she was being made redundant – the veracity of which she challenged at the time. The Respondent's response at the time was to call into the meeting what we loosely refer to as 'Management reinforcement' against her. It was clear that the Claimant was very aware that she was the victim of wrongdoing, and that she was being put under pressure not to question it. She had to deal with the sudden loss of her job in a career which she had chosen and invested time and study in developing.

11 We also took into account that she promptly submitted a letter of grievance and appeal against the dismissal on the 24 May 2016 by email and that there was no reply from the Respondent to this. It was not in dispute that the Respondent had received the email. We also considered that it was relevant in terms of considering the impact of this on the Claimant that she then pursued the conciliation process under ACAS and then

presented a claim form to the Tribunal alleging race discrimination and pursued this to hearing. She sought assistance from Mr O'Keefe of the Cleaning and Allied Independent Workers Union. In their grounds of resistance, only presented in December 2016, the Respondent repeated the reason for dismissal as redundancy and strongly disputed the allegations of race discrimination, including in relation to the dismissal. Then, within the Tribunal process, the Claimant through her representative quite properly attempted to obtain evidence from the Respondent to substantiate the reason for dismissal which had been given to the Claimant namely redundancy. None was forthcoming. Indeed, there was very little disclosure provided by the Respondent.

12 Then very belatedly in August 2017, shortly before the relisted full merits hearing, a postponement which was requested by the Respondent having been granted earlier in 2017, the Claimant was in receipt of a substantially altered defence. There was an application at the beginning of the liability hearing for the Tribunal to refuse to allow the Respondent to amend their defence to pursue this very different case. The application was refused. All these matters indicated to us that the Claimant was very upset about the treatment she complained of.

13 In relation to the injury to feelings award, the Respondent argued that this was a one-off isolated incident. We acknowledged that this is partly how band 1 awards are characterised under the ***Vento*** principles. However, we considered that it would be absurd to conclude that if the Tribunal found a single incident of discrimination it was bound to conclude that compensation fell within band 1, without taking into account all the relevant circumstances. We considered that we should have regard to the overall circumstances. Whilst it was correct that there was one incident of discrimination found, we considered that we had to take into account the effect on the Claimant.

14 The Respondent conceded that it was a serious incident. We attempted to put it into perspective. Clearly where an employee has worked for a Respondent for a number of years and is then subjected to a discriminatory dismissal, the employee is likely to be more severely affected than someone who had not long been in employment, such as the Claimant. However, we found that the Claimant was good at her job and that she expected to remain in this employment for the foreseeable future. She had discussed the prospect of a pay rise with the managing director. We also expressly reminded ourselves that we did not find that the other six or seven allegations of race discrimination amounted to such. We also noted that the Claimant was aware of those incidents at the time that they occurred, and we had regard to the contemporaneous texts which were produced for us during the hearing, to measure the Claimant's reactions to those incidents. She did not suffer from depression or any disorders we were aware of during the employment.

15 Thus, separating the personal injury element, we considered that in relation to the injury to feelings this was indeed a case which fell within the middle band and we considered that the middle of the middle band was an appropriate assessment of where it fell. We considered that the appropriate award for injury to feelings was the sum of £16,000.

16 We then looked at the application for aggravated damages. It is unnecessary to repeat the background circumstances. The application was about post-dismissal conduct by the Respondent, not the circumstances of the day of the termination which we included in our assessment of the injury to feelings award. The focus here was on the failure to

deal with the Claimant's appeal/grievance letter against the dismissal at all. We also took into account the initial provision of a false and probably unsustainable defence. This was evidenced by for example the failure to respond to requests for disclosure from the Claimant's representative.

17 We also took into account the belated change of case alleging attempted theft by the Claimant as the reason for the dismissal. This in turn led to the cross examination of the Claimant and the case being put in a public hearing on the basis that the Claimant had attempted to steal items from her former employer. We finally had regard to the fact that as of the date of the remedy hearing, there was no evidence of any apology from the Respondent.

18 Having regard to all the relevant circumstances in the case, we considered that an award of £5000 was appropriate for aggravated damages.

19 We then considered the personal injury claim. We adopted the summary of the findings of Dr Turner in Mr Khan's Skeleton, there was no evidence to contradict this before us and no challenge to his findings. Thus, we had cogent and reliable evidence from a suitably qualified doctor that the Claimant was medically depressed for a period conservatively estimated as 3 months after the termination of her employment.

20 There was no evidence that during the albeit short employment i.e. just prior to the discriminatory incident that the Claimant was suffering from depression. There had been a prior episode of depression in 2015 but the evidence that we had before us was that she had recovered from this, so to the extent that this made the Claimant more vulnerable to recurrence of depression, we did not consider that the law allowed the Respondent to escape those consequences.

21 The bracket for an award under the Judicial Studies Board guidelines was agreed between counsel as the less severe bracket. We considered that the submission that the award should be in the middle of that bracket was valid. We concluded that the Claimant should be awarded £3000 in respect of the medically treated condition which we found last conservatively for 3 months.

22 The total awarded for injury to feelings, aggravated damages and personal injury came to a figure of £24,000. We stood back and considered whether that figure overall was an appropriate level of compensation i.e. not a windfall to the Claimant and fairly reflected the compensation for the discrimination that we had found. We cross referred to the Claimant's annual gross income which was £19,000 and we were satisfied that indeed it was an appropriate figure.

23 To that sum we added interest from the date of the discrimination which was 16 May 2016 to the date of calculation of remedy at the full rate of 8% per annum for 1 year and 10 months. For the first year this came to £1920, and for the subsequent period of 10 months to 21 March 2018 came to £1600. The combined total was £3520.

24 We then considered the issue of the ACAS uplift and we reviewed the wording of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and Schedule 2A which permits us to make an award in these circumstances. The Claimant

relies on the breaches of the codes of practice on disciplinary and grievance procedures. There was some discussion between counsel and the Tribunal as to the exact effect of those provisions. Mr Matovu's position was that it mattered not whether the Tribunal made the award in respect of breaches of the grievance or disciplinary procedure although his view was that the grievance procedure was the applicable code of practice here. What was clear was that there was no procedure whatsoever followed in relation to the dismissal save for the oral communication of the decision to dismiss. However as was noted above, and not disputed by the Respondent, a false reason was given to the Claimant and insisted upon further in the dismissal meeting, and there was no response to the Claimant's prompt letter of grievance and appeal against the dismissal. We did not attach much weight to the grievance aspect given that the discrimination finding was in relation to the dismissal. However, the Claimant clearly had concerns about whether she had been the subject of race discrimination and the grievances raised those allegations, and the failure to address any of it meant that the Respondent declined the opportunity to address these concerns and issues promptly. Subsequently in December 2016 in their response the Respondent did address some of the discrimination allegations, but that was not compliant with the Code as there had been a considerable delay.

25 The failure to comply with any proper process was against the background of the different reason being put forward 15 months after the termination. We considered that in the circumstances, the failures to comply with the ACAS Code constituted unreasonable failures.

26 We reminded ourselves that the starting point of an uplift is 10% but that we can award up to 25% if we considered it just and equitable to do so. We considered that to all intents and purposes this Respondent had failed to follow the code on disciplinary and grievance procedures and it was just and equitable therefore to increase the award to 25%.

27 In summary, the total of the injury to feelings and personal injury awards and the aggravated damages with interest was £27520. 25% of that figure was £6880.

Costs

28 The Tribunal then considered the Claimant's application for costs. She had submitted a document in which she set out her position and attached to it a schedule in relation to costs or preparation time. It was accepted by the Claimant that the Tribunal could not order both and in the event Mr Khan asked the Tribunal to make an award in respect of preparation time.

29 The Tribunal treated this as an application that costs should be awarded because the Respondent had acted otherwise unreasonably. The Respondent's counsel Mr Matovu conceded that the provision of a false ET3 constituted unreasonable conduct of the proceedings by the Respondent. However, he argued that costs should be limited to the consequences of that and that the preparation time order application was not sufficiently tied to that course of events.

30 Mr Matovu then argued strenuously in favour of his clients against the suggestion that there were grounds for a costs order on the basis that the Respondent had conducted the proceedings unreasonably by putting forward and relying on the second defence, the

defence that Mr Matovu characterised as 'the true defence'.

31 The Claimant argued that the consideration of a costs order goes further than the first defence and that it was also unreasonable for the Respondent to have raised the second defence and this constituted unreasonable conduct in that it was misconceived/had no reasonable prospect of success. The Respondent conceded that the first admittedly false reason put forward by them meant that the Respondent was put 'on the back foot'. A considerable amount of time was spent addressing this second limb of the costs application.

32 The Tribunal reviewed our findings about the second reason, especially in the light of Mr Matovu's submission that the Tribunal had not made a finding that the second reason was false. Mr Matovu accepted that the Tribunal did not need to make positive findings about the truth or otherwise of the second reason in order to have disposed of the Claimant's complaint. However, he relied on the fact that we did not in fact make such findings and argued that this should be taken into account and indeed should limit our ability to make a finding at this stage that the Respondent had acted unreasonably so that the threshold could not be established.

33 We considered that we made some findings about the second reason which were damming albeit expressed in judicial language. In particular we referred to paragraphs 139 and 144 – 147 of the reasons on liability, although there were other sections of the judgement in which we expressed some scepticism about the witnesses and the evidence that had been adduced to substantiate the second reason. We referred to paragraph 147 and the Respondent expressly linking the first, untrue, reason with Mr Granditer's spirited defence to the race allegations, and his failure to put forward what he asserted at the trial was the true reason at a time which would have assisted him when he was clearly embroiled in serious litigation about this case. We also referred to paragraph 161 in which we made some further comments about the quality of the evidence which the Respondent relied on in support of the second reason. We referred to the Respondent's failure to muster a shred of documentary evidence to show that the items which had been described as the subject of the alleged attempted theft even existed, or had been in the ownership of the Respondent at a material time.

34 Being on the back foot for the Respondent meant that they should have realised once they accepted that they could not continue to put forward the first totally false reason of redundancy, not least because there was no redundancy process ongoing at the time of the Claimant's dismissal, and they had no evidence to prove otherwise, that background was likely to make it even more difficult for the Tribunal to find that the burden of proof had not shifted, and that the second reason was a sufficiently cogent answer to the Claimant's allegation. Both reasons were on any view flimsy, and the first put the Respondent in some evidential difficulty in relation to the second, in an area of law where the evidence is weighed up on the balance of probabilities.

35 The Respondent also faced difficulties in relation to the substantive race harassment allegation because of Mr Granditer's somewhat intimidatory reaction to the Claimant in the meeting when she questioned the dismissal for redundancy, then his failure to respond at all to the letter of grievance and appeal, containing multiple allegations of race discrimination.

36 The Tribunal understood throughout its consideration of this case that there was no duty on the Respondent to prove that the Claimant had attempted to steal the items in question. The questions were whether a suspicion on the Respondent's part that she had done so was really their reason for dismissal, and if so, whether their suspicion, devoid of almost any investigation as it was on the Respondent's case, was caused by her race.

37 Even if the position was, as the Respondent effectively argued, that as an act of kindness the decision was taken to say that the dismissal was for redundancy rather than for suspected attempted theft, in all the circumstances and given that Mr Granditer became aware even during the meeting on 19 May that the dismissal for redundancy was not seen as a kind act and had generated suspicion on the Claimant's part, and that she followed this promptly with a detailed letter of grievance about race discrimination, the Respondent should have realised that putting forward the second reason when they did, was unlikely to have been a successful defence and had no reasonable prospects of success.

38 In short, we considered that in the face of consistent challenge by the Claimant through to the hearing, reliance by the Respondent on totally uncorroborated oral evidence to support a new defence following late withdrawal of an admittedly untrue case, and having elaborated upon the untrue case in the ET3, amounted to unreasonable conduct of the defence. Thus, the threshold was met under both Rules 76(1)(a) and (b).

39 We looked at calculations of the time spent in preparing for this case and we thought that these were perfectly reasonable estimates of time. We very much had in mind throughout our consideration of this case and in relation to the application for costs that there were seven allegations altogether brought by the Claimant including the dismissal and that it was only the dismissal which succeeded. Thus, we considered that the appropriate course to follow was to order the Respondent to pay to the Claimant one - seventh of her costs incurred. The total claimed for the preparation time was £2105.30. We divided that by 7 and made an award of a preparation time order in the Claimant's favour of £300.

40 The Respondent requested written reasons for the Tribunal's judgment.

Employment Judge Hyde

25 May 2018