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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss M James

**Respondents:** 1. Capital Care Service  
2. Mr C Ledbury

**Heard at:** East London Hearing Centre

**On:** 6 July 2018

**Before:** Employment Judge Brown

**Members:** Mr T Burrows  
Mrs S A Taylor

## Representation

**Claimant:** In person

**Respondent:** Mr N Cholerton (Counsel)

## JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) The Respondent shall pay the Claimant a total of £8,147.67 for injury to feelings, comprised of £7,500 for injury to feelings plus £647.67 interest.
- (2) The Tribunal does not make a separate award for personal injury or aggravated damages.
- (3) The Tribunal does not make an award for loss of earnings.
- (4) By consent, the Tribunal makes a recommendation that the Respondent provide an agreed reference for the Claimant.

## **REASONS**

1 The Claimant succeeded in her claim for victimisation against the First Respondent in relation to a single incident when, on 7 June 2017 Mr Ali, the First Respondent's employee, suggested to the Claimant's counsellor in a telephone conversation that she might be faking her symptoms to receive a substantial pay out.

2 The Claimant claims an award for injury to feelings, personal injury and aggravated damages arising from Mr Ali's telephone call with the Claimant's counsellor. She also claims loss of earnings.

3 The Claimant sought a recommendation - and the parties agreed - that the Respondent will provide the Claimant with a reference for future employers in the following terms:

“Melanie James worked for Capital Care Services from October 2016 to (date).

Previously she had been employed by another Group Company, Positive Mental Health Limited, from January 2016.

She was employed as an experienced Credit Controller and managed collections from a number of clients within the NHS and private sector, with debtor ledgers ranging from £30,000 to £400,000.

Melanie was particularly effective with perpetual non-paying clients, and handling bad and doubtful debts. She consistently met or exceeded her cash collection targets and her tenacity at her job was such that company debt write-offs were minimised.”

4 The Respondent also agreed that it would complete any forms requesting references in the terms which were consistent with the agreed reference.

5 The Tribunal heard evidence from the Claimant and Mr Moody, her counsellor, who were both cross-examined by Mr Cholerton, Counsel for the Respondent.

6 The Claimant produced medical reports from her GP and written statements from a number of people who did not attend the Tribunal. These statements were not directed to the particular effect that Mr Ali's telephone call had on the Claimant and therefore were not directly relevant to the issues in this remedy hearing.

### ***Findings of Fact***

7 The Claimant went off work, sick, in March 2017 and was diagnosed with symptoms of anxiety and depression by her GP around that time. She has continued to be diagnosed with those conditions since then.

8 Also in March 2017 the Claimant started seeing Mr Moody, a clinical counsellor, to assist her in managing her symptoms of depression and anxiety which included panic attacks. The Claimant's symptoms at that time were that she had begun to withdraw from friends and family, was tearful and found even simple tasks to be

difficult.

9 The Claimant has not returned to work since March 2017, but now feels able to do so. Happily, she has now been offered a job and is keen to move on from the matters which have been the subject of these proceedings.

10 Since childhood, the Claimant has had very traumatic life events which have had an impact on her emotional wellbeing. However, she told the Tribunal, and the Tribunal accepted, that she had begun in April and May 2017, with Mr Moody's help, to deal with issues in her life.

11 The Claimant had given the Respondents permission to speak to Mr Moody in the context of a grievance against the First Respondent. The Claimant told the First Respondent that the events she had complained about in her grievance had required her to attend a councillor. Mr Ali spoke to Mr Moody and Mr Ali's words gave rise to the successful claim of victimisation.

12 The Claimant told the Tribunal, and the Tribunal accepted, that when Mr Moody told the Claimant about Mr Ali's words to Mr Moody, the Claimant had a sustained and debilitating panic attack. She experienced chest pains and felt unable to breathe for 30 to 40 minutes. She needed Mr Moody to assist her with breathing exercises, to make her feel safe, after which she cried uncontrollably. This had the effect of provoking another panic attack, during which again she felt unable to breathe for 5 to 10 minutes.

13 The Claimant told the Tribunal, and the Tribunal accepted, that the Claimant was still suffering from depression, anxiety, panic attacks, night terrors and suicidal thoughts. The Claimant told the Tribunal that she felt that Mr Ali's comments had aggravated her condition and that she became unable to leave her home thereafter.

14 Mr Moody told the Tribunal that Mr Ali's conversation with him triggered a sustained panic attack in the Claimant, but also triggered underlying feelings of betrayal in the Claimant, which the Claimant needed a number of sessions with Mr Moody to address and to come to terms with. He confirmed that, when he telephoned the Claimant at her home after Mr Ali's telephone call, on a number of occasions, the Claimant was in her bedroom and not elsewhere in the house.

15 The Tribunal therefore accepted that the Claimant became even more withdrawn and depressed, to the point that she spent most of her time in her bedroom for a period after Mr Ali's comments, and that she needed several counselling sessions with Mr Moody to address the acute feelings of betrayal which they caused.

16 The Claimant told the Tribunal that she felt deeply insulted by Mr Ali's suggestion that she was a liar. The Tribunal accepted that the Claimant continues to feel distressed and indignant when she thinks about Mr Ali's comments. She was visibly distressed in the Employment Tribunal when she recalled them.

17 The Claimant has had to come to the Tribunal to obtain redress in respect of those comments, which has, in itself, been a painful process for her. The Claimant did have underlying symptoms, but these were exacerbated very acutely for a number of weeks and were still exacerbated, to some extent, at the date of the Tribunal.

### **Relevant Law**

18 The Tribunal is guided by principles set out in *Prison Service v Johnson* [1997] IRLR 162 in relation to assessing injury to feeling awards. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable. Awards that are too low would diminish respect for the policy underlying anti discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong.

19 Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power. It is helpful to consider the band into which the injury falls, see *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. The EAT increased the *Vento* bands for injury to feelings to allow for inflation in *Da'Bell v NSPCC* [2010] IRLR 19. *Da'Bell* was heard at the end of 2009. From then the lower band is £500 to £6,000 the middle band is £6,000 to £18,000 and the upper band is £18,000 to £30,000. In *Vento* the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race or sex. The middle band should be use for serious cases which do not merit an award in the highest band the lower band is appropriate for less serious cases such as where the act of discrimination is an isolated or one off occurrence.

20 Joint Presidential Guidance on Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury following *Da Vinci Construction (UK) Limited* [2017] EWCA Civ 879 was issued on 4 September 2017. It reviewed the effect of recent case law and inflation on the *Vento* Bands and said that, when awards are made by Tribunals, the *Vento* bands should have the appropriate inflation index applied to them, followed by a 10% uplift on account of *Simmons v Castle* [2012] EWCA Civ 1039 *Simmons v Castle* [2012] EWCA Civ 1288.

21 The Joint Presidential Guidance concluded as follows, "...as at 4 September 2017, that produces a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,000 (cases that did not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000. ... the Employment Tribunal retains its discretion as to which band applies and where in the band the appropriate award should fall."

22 In *Kemeh v Ministry of Defence* [2014] EWCA Civ 91, [2014] IRLR 377, the Court of Appeal approved the EAT's reduction of an Employment Tribunal's award for injury to feelings of £12,000 in respect of a one-off racial slur. The Tribunal had seen the case as one falling within the middle band of *Vento*, but the EAT reduced the award to £6,000. The Court of Appeal considered that a one-off slur such as this, with no lasting employment consequences, would normally only qualify for the lower *Vento*

band.

23 Aggravated damages are available for an act of discrimination (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275, EAT). The award must still be compensatory and not punitive in nature, *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, EAT. In that case, a whistleblowing case, compensation was assessed on the same basis as awards in discrimination cases). The EAT said that the circumstances attracting an award of aggravated damages fall into three categories: (a) *The manner in which the wrong was committed*. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase “high-handed, malicious, insulting or oppressive” is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress. (b) *Motive*. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a). (c) *Subsequent conduct*. This can cover cases including where: the defendant conducted his case at trial in an unnecessarily offensive manner; the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously; the employer fails to apologise; and the circumstances are such as those in *Bungay v Saini*.

24 In *HM Land Registry v McGlue* UKEAT/0435/11, [2013] EqLR 701, EAT. The EAT said that aggravated damages 'have a proper place and role to fill', but that a tribunal should also 'be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”’. Such damages are not intended to be punitive in nature

### ***Discussion and Decision***

25 Applying the law to the facts, the Tribunal decided that it was not possible, in this case, to separate the Claimant's claim for personal injury from her claim for injury to feelings. It made an award reflecting the hurt, distress and exacerbation of symptoms experienced by the Claimant as a global award.

26 With regard to aggravated damages, on the evidence, the Tribunal did not find that Mr Ali intended to be insulting to the Claimant, or had the conversation in a deliberate malicious way, rather than being ignorant or insensitive. The Tribunal found that Mr Ali's comments, although hurtful and insulting, were not exceptional or contumelious.

27 Nevertheless, the Tribunal did find that Mr Ali's words had a profoundly exacerbating effect on the Claimant's feelings of depression and anxiety. The Claimant was a vulnerable person and the words were particularly wounding and detrimental to her.

28 The Tribunal decided that the Claimant was still visibly, deeply distressed in the Tribunal when recalling Mr Ali's comments.

29 The Tribunal took into account the circumstances in which Mr Ali's comments were made. They were made pursuant to a grievance process in which the Claimant had been hoping to secure redress, but, in fact, experienced the opposite when she became aware of Mr Ali's reaction to her grievance.

30 The Tribunal found that this was a single act of victimisation and therefore fell within the lower band of Vento. Nonetheless, it did have severe consequences on the Claimant's mental state. She suffered a severe panic attack and needed several weeks of psychotherapy to come to terms with it. She became so withdrawn and ill that she was confined to her bedroom for some weeks afterwards. The Claimant has ongoing exacerbations of her depression, continuing today, over one year later, albeit at a lower level. The Claimant's injury to feelings, suffered as a result of this single act, was particularly serious.

31 We therefore awarded the Claimant a figure at the top of the lower band of Vento. We assessed the appropriate figure to be £7,500. We awarded interest at 8% from the day of the injury in question, that is, for 394 days. The calculation is  $394 \div 365 \times 0.08 \times £7,500 = £647.67$ .

32 In total the Tribunal therefore awarded the Claimant £8,147.67 for injury to feelings.

33 The Tribunal did not make an award to the Claimant for loss of earnings. The Claimant had already been unable to work before Mr Ali made his comments and neither she nor Mr Moody suggested that she would have been able to return to work but for Mr Ali's comments. The loss of earnings experienced by the Claimant therefore was not caused by Mr Ali.

Employment Judge Brown

25 July 2018