



# EMPLOYMENT TRIBUNALS

**Claimant:** C  
**Respondents:** 1. A Ltd  
2. A

**HELD AT:** Manchester **ON:** 21 September 2018  
**BEFORE:** Employment Judge Slater  
Mr D Wilson  
Ms B Hillon

## REPRESENTATION:

**Claimant:** Mr A Barnes, consultant  
**Respondent:** Mr R Quickfall, counsel

# JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that the respondents are ordered to pay, jointly and severally, compensation to the claimant for harassment and direct sex discrimination of £21,273 plus interest of £1059.

# REASONS

## Facts

1. These reasons should be read in conjunction with the findings of fact in our decision on liability.

### Facts relevant to financial loss

2. We found in our decision on liability that the claimant was paid £750 for a week when she worked nights and £650 for a week when she was working days. She was paid £500 for a week when she did no driving but was developing a website for the respondent. The claimant was not a member of a pension scheme in the short period

she was employed by the first respondent. However, by no later than February 2018, the first respondent would have been required, by law, to enrol the claimant into a pension scheme and the claimant and the first respondent would have been required to make minimum contributions to the scheme.

3. Following the termination of her employment, the claimant signed up with a number of employment agencies. She obtained what she described as “drips and drabs” of work. The claimant brought copies of her bank statements to the remedy hearing. We accept that the entries show the net earnings she received for work after the termination of her employment and before beginning permanent employment in May 2018. The sum of net earnings prior to starting her permanent employment is £3445.47.

4. The claimant did not do much paid work in March 2018 because her father died that month.

5. The claimant began permanent employment on 15 May 2018. The claimant provided us with copies of payslips for the weeks with the following processing dates: 31 August 2018, 7 September 2018, 14 September 2018 and 21 September 2018. The net pay for these weeks was as follows: £405.20, £670.67, £394.74 and £609.07. The pay varies according to the amount of work done and when the work is done. The net payments include an expense allowance for each night that the claimant has to stay away from home. This is not taxable and we accept that this covers expenses actually incurred. The claimant did not have to stay away from home when working for the respondents.

6. The claimant is a member of a pension scheme with her new employer; she makes contributions and the employer make contributions to this scheme.

7. The claimant anticipates staying with her current employer.

8. We find that the claimant incurred expenses in job hunting, driving to see agencies. She was required to attend in person so that the agencies could examine her licences. We accept the figure of £376 as being the claimant’s calculation of mileage costs, calculated by her using an online calculator.

9. We find that the claimant incurred further mileage costs when undergoing training for her current job; she used £90 of petrol on those journeys.

10. The claimant did not claim job seekers’ allowance.

#### Facts relevant to injury to feelings

11. We accept the claimant’s evidence as to how the conduct in relation to the proven allegations made her feel.

12. In relation to the conduct referred to in allegation 3 (trying to persuade the claimant to try out the bunk in the van and to kiss the claimant on two occasions), we find that the claimant was very upset and disgusted. The claimant, in evidence, said she does not get upset easily but she felt ground down by being pestered by the second respondent.

13. In relation to the conduct referred to in allegation 5 (trying to kiss the claimant whilst visiting her at her home), we find that the claimant was shocked by the second respondent's conduct and she felt really sick.

14. In relation to allegation 7 (the second respondent putting his hand on her knee several times when they were in a car together), we find that the claimant was very hurt and upset. We find she felt ground down by the conduct of the second respondent.

15. In relation to allegation 8 (the second respondent making comments on the phone about trying out the bunk) we find that the claimant felt sick and disgusted by the conduct of the second respondent, continuing his conduct after she had told him no. We find that the claimant felt her blood was boiling.

16. In relation to allegation 10 (the second respondent making sexual overtures to the claimant, including attempts to touch her, consistent with his previous conduct towards her) we find that the claimant was angry and upset. We find that she felt "at boiling point" and had had enough. We find that the claimant cried all the way home. She felt she was being put in an impossible position.

17. We concluded the claimant's dismissal was direct sex discrimination; the respondents did not satisfy us (the burden of proof having passed to them) that the dismissal was in no way related to the claimant's sex or the claimant rebuffing the second respondent's advances. We find that the claimant felt hurt and upset that the respondents would dismiss her because she would not sleep with the second respondent. She felt it was very unfair. We find she felt sick and lost. The claimant suffered serious financial difficulties over Christmas 2017 as a result of not having a wage. She took out payday loans. We find that this must have caused the claimant considerable anxiety.

### **Submissions**

18. Mr Barnes, for the claimant, submitted that compensation for injury to feelings should be in the top band of Vento because there were so many acts of harassment and discrimination. He submitted that the claimant had expected to earn £750 gross per week with the first respondent (£573 after deductions). He submitted that the claimant was unlikely to get back to her previous earnings for at least another two years. The claimant made no claim for pension loss.

19. Mr Quickfall, for the respondents, submitted that compensation for injury to feelings should be assessed towards the upper end of the lower Vento band. He submitted that this was more than banter, but not a lot more and that the claimant was robust in dealing with what was happening to her; she was more angry than upset. Mr Quickfall submitted that the claimant's pay with the respondent should be not more than £650 gross (£505 net) per week. He submitted she should not be awarded two years' future loss of earnings.

## The Law

20. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded for a breach of the Equality Act in relation to work is “the amount which could be awarded by a county court...under section 119”. Section 119 provides that the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort and section 119(4) provides: “an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)”. The aim of damages in tort is to put the claimant in the position they would have been in, had the act of discrimination not occurred. Compensation (with the possible exception of exemplary damages which may be relevant in rare cases) is to compensate for loss caused by the act of discrimination. There is no limit on compensation for discrimination.

21. In relation to compensation for injury to feeling, we have regard to the guidelines in *Vento v Chief Constable of West Yorkshire Police (no.2)* [2003] IRLR 102. We note in particular the guidance that awards are compensatory and not punitive. *Vento* sets out the bands that we must consider. These were amended by the case of *Da’Bell v NSPCC* [2010] IRLR 19. The Court of Appeal in *Da Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879, held that the 10% uplift provided for in *Simmons v Castle* [2012] EWCA Civ 1039, should also apply to employment tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales. The Court of Appeal invited the President of the Employment Tribunals to issue guidance adjusting the *Vento* figures for inflation and incorporating the *Simmons v Castle* uplift. The Presidents of the Employment Tribunals in England and Wales and Scotland issued joint guidance. The guidance provides that, in relation to cases presented after 11 September 2017 and before 6 April 2018, the *Vento* bands are as follows: lower band £800- £8,400 (less serious cases); middle band £8400 - £25,200 (cases that do not merit an award in the upper band); and upper band £25,200 - £42,000 (the most serious cases). In the most exceptional cases, the award can exceed £42,000.

22. In accordance with the authority of *London Borough of Hackney v Sivanandan* [2013] IRLR 408 CA, awards of compensation for discrimination must be made on a joint and several basis against the employer and employee respondents in cases of “indivisible” damage i.e. those where it is not possible to identify distinct elements of loss caused by individual tortfeasors.

23. Interest may be awarded on awards made in discrimination cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The interest rate for claims presented on or after 29 July 2013 is 8%.

## Conclusions

### Compensation for discrimination

24. We consider financial loss and injury to feelings suffered as a result of dismissal, which we concluded was an act of direct sex discrimination. We also consider injury to feelings suffered because of the acts of harassment which we found to be well founded.

Financial loss

25. We conclude that, for the purposes of assessing loss of earnings, we should take an average gross wage of £700 as being what the claimant would have earned, had discrimination not occurred and she remained with the first respondent. The claimant earned £750 gross when working nights and £650 gross when working days. The claimant has not satisfied us that there was an agreement that she would always work nights and, therefore, earn the higher wage. Using an online tax calculator, the weekly net pay, based on a gross wage of £700 per week, for the tax year 2017/2018, would have been £539 (disregarding the pence).

26. In the period from dismissal until starting her permanent job on 15 May 2018, the claimant earned a net total of £3445.47 from agency work.

27. In calculating the net earnings from the claimant's new permanent employer, we conclude that we should not take into account the expenses allowance for each night out since this is in respect of expenses estimated to be incurred rather than pay. We, therefore, deduct the allowance from the net pay for each of the weeks for which we have payslips, which gives us the following net pay figures for the weeks with process dates of 31 August, 7 September, 14 September and 21 September respectively: £379.20, £642.67, £394.74 and £590.57. Since we do not have all the payslips for the period 15 May 2018 to the calculation date (21 September 2018) we have to estimate the pay for this period. We do so by using an average net weekly figure based on the four payslips we have seen (subject to the adjustment for the expenses allowance). This gives an average net weekly pay of £502.

28. We conclude that the claimant has an ongoing loss of earnings of the difference between her net weekly earnings with the respondent (£539) and that with her new employer (£502) i.e. £37 per week.

29. The claimant makes no claim for pension loss. We consider it correct to make no award for pension loss. By May 2018, the first respondent would have been required to enrol the claimant in a pension scheme and make contributions to that scheme. The claimant is in a scheme with her new employer. We consider it likely that each employer would have made similar pension contributions, so do not consider it necessary to make any award for pension loss or adjustment because of the claimant being in a pension scheme with her new employer.

30. We have found that the claimant incurred job hunting expenses and mileage costs for undergoing training in her new employment of £376 and £90 respectively so include these sums in our calculations.

31. The claimant has provided us with no evidence about bank charges which she says were incurred because of her dismissal, so conclude no amount should be awarded in respect of such charges.

32. The claimant sought continuing loss of earnings for a further two years from the calculation date. We consider two years for future loss is too long. The claimant is under a continuing duty to take reasonable steps to mitigate her loss. We conclude that, if she takes such steps, she should be able to fully mitigate her loss in a shorter

period. We conclude that a period of 6 months future loss is appropriate. The difference in pay is relatively small and the claimant may be able to increase her earnings by that amount, either with her current employer or by seeking better paid work.

33. The calculation of financial loss is set out in the Schedule to these reasons.

34. We conclude that it is appropriate to award interest on financial loss from a midpoint between the date of dismissal (5 November 2017) and the calculation date (21 September 2018) at the rate of 8% per annum in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The calculation of interest is set out in the Schedule.

### Injury to feelings

35. We conclude that the claimant has suffered injury to feelings as a result of the allegations of harassment which we found to be well founded and the dismissal, which we found to be an act of direct sex discrimination. We found that the claimant suffered injury in the way described in our findings of fact. Rather than make separate awards for each act of discrimination, we have concluded that it is appropriate to make a global award of compensation for injury to feelings, taking into account the injury suffered because of all the discriminatory acts. Both parties approached the awarding of compensation for injury to feelings on this basis.

36. We conclude that this was a serious case. There were a number of incidents, over a period from September to November 2017, culminating in the discriminatory dismissal. The claimant, on the basis of her own evidence, does not get upset easily and, as we found in our decision on liability, was used to dealing with suggestive comments from other lorry drivers with a standard riposte of “not in your dreams”. However, we conclude that the claimant was upset by the first respondent’s comments in a way that she was not upset by comments from other lorry drivers. This is understandable and credible; the situations in which comments were made by other lorry drivers and by the second respondent were very different. The claimant was on an equal footing with other drivers encountered, for example, at service areas, and was not travelling with them. The second respondent was in a position of power over the claimant which he ultimately exercised to the claimant’s disadvantage by dismissing her. Some of the acts of harassment occurred when the second respondent and the claimant were alone together, sometimes in a confined space: the second respondent’s car, the claimant’s home and the yard at night. We reject the suggestion that, since the claimant was able to deal robustly with comments from other lorry drivers without this upsetting her, she was immune to injury to feelings suffered because of harassment by the second respondent occurring in a very different context.

37. We conclude that the discriminatory act of dismissal caused the most serious injury to feelings. The claimant cried all the way home. She felt a sense of injustice that she had lost her job, despite being recognised as being a good driver, believing the reason for her dismissal to be that she had rebuffed the second respondent’s sexual advances. She suffered serious financial difficulties because of the loss of a regular income, causing her to take out payday loans around the Christmas period.

38. Some of the incidents, had they been the only incident with which we had been concerned, would, as an individual, isolated act of discrimination, have attracted an award in the lower Vento band. However, the cumulative effect of the acts of harassment, which ground the claimant down, taken together with the dismissal which had the most serious impact on the claimant, lead us to conclude that the middle Vento band is appropriate. Whilst not seeking to minimise the effect of the discrimination on the claimant, this is clearly not a case which is so serious as to properly fall within the upper Vento band. We conclude that an award towards the lower end of the middle Vento band is appropriate, given the findings we have made as to the impact on the claimant, who suffered less injury than some other people may have done as a result of the same discrimination, because of her robust nature. We remind ourselves that we are compensating the claimant for the injury suffered by her, rather than punishing the respondents. We conclude that the appropriate award for injury to feelings for all the incidents taken together is £8,500. We consider it appropriate to award interest on this award at 8% per annum starting from an approximate midpoint in the acts of discrimination, which we take to be 11 October 2017.

### Breach of contract

39. We do not make any separate award of damages for breach of contract since we have compensated the claimant for loss of earnings in the notice period as part of the compensation for loss of earnings in the discrimination award.

## Schedule – Calculations

### Financial loss EDT to calculation date (5 November 2017 to 21 September 2018)

46 weeks

46 x £539 (net earnings with respondent) = £24,794

Less earnings in that period:

Agency work 3445

Earnings in new permanent job  
(15 May to 21 September 2018)

19 weeks x £502 9538

£12983

Total financial loss to date £11,811

### Future financial loss

26 weeks at (£539 - £502)

26 x £37 = £962

**Total financial loss £12,773**

Injury to feelings

Compensation for injury to feelings **£8,500**

**Total compensation for discrimination £21,273**

Interest

*Interest for 23 weeks on financial loss to date*

$23/52 \times 8/100 \times £11,811 = \mathbf{£418}$

*Interest on injury to feelings  
(49 weeks)*

$49/52 \times 8/100 \times £8500 = \mathbf{£641}$

**Total interest £1059**

---

Employment Judge Slater

Date: 1 October 2018

RESERVED JUDGMENT & REASONS  
SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.