

**Reserved judgment**



**Between:**

**Claimant: Ms I El Ali**

**Respondent: Interserve FS (UK) Limited**

**Heard at London South Employment Tribunal on 3 August 2018**

**Before Employment Judge Baron**

**Lay Members: Ms J Forecast & Ms P O'Toole**

**Representation:**

**Claimant: Edward Walker – Lambeth Law Centre**

**Respondent: Safia Tharoo - Counsel**

**JUDGMENT**

It is the judgment of the Tribunal as follows:

- 1 That the Respondent do pay compensation to the Claimant in the sum of £46,520 calculated as set out in the reasons below;
- 2 That the Respondent do pay interest of £6,058 on such sum calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

**REASONS**

- 1 I must again apologise for the delay in providing the parties with this document caused simply by the continuing shortage of judicial resources.
- 2 This was a hearing to consider remedies for the Claimant as a consequence of the judgment of the Tribunal made following a hearing in July 2017. We do not propose to rehearse the whole history of the claim, the allegations nor our findings on them.
- 3 We read a witness statement from the Claimant and she was cross-examined by Miss Tharoo. We were provided with a separate bundle prepared by each of the parties for the purposes of this hearing. Mr Walker provided written submissions. We find the further facts as set out below.

- 4 To put the chronology into context we simply record that the events of which the Claimant complained occurred between 26 August and 9 September 2016. The Claimant had suffered from mild depression for several years before then and had been prescribed Fluoxetine (20mg) on alternate days. The report of Dr Isaac mentioned below records that the Claimant had taken the death of her mother in about 2006 very hard.
- 5 The Claimant went off work sick on 30 November 2016 and did not return to work thereafter. The exact details of how company sick pay was calculated are not clear, but what is clear from the information supplied by Mr Walker (and not contested by the Respondent) is that the last payment of sick pay was made in June 2017.
- 6 The Claimant's Fluoxetine medication was increased to 30mg daily from November 2017. She started to have panic attacks, approximately once a week. The first was on 30 November 2017. Those attacks had reduced somewhat in frequency and intensity by the date of this hearing.
- 7 The Claimant told us, and we accept, that she wished to return to work but the NHS had not been able to provide sufficient support for her to recover from her mental health issues. She had eventually had six counselling sessions but was rationed to those six.
- 8 We were provided with a report by Michael Isaac, Consultant Psychiatrist, dated 15 June 2018 prepared following an interview with the Claimant on 13 April 2018. Dr Isaac had been instructed by Lambeth Law Centre on behalf of the Claimant. The report is 12 pages in length. Dr Isaac recorded that he only had the Claimant's medical records from April 2015 onwards, and that the earliest record referred to 'recurrent depression'. Dr Isaac's conclusions based on the information provided to him and in reply to questions prepared by the Claimant's representatives were as follows:
  - 8.1 In answer to a question as to the Claimant's mental health before September 2016 Dr Isaac said that the Claimant had 'displayed moderate major depressive disorder, recurrent, without psychotic features prior to (and since) September 2016.' He added that the Claimant was then in remission. The phrase 'major depressive disorder' simply meant 'clinical depression' which Dr Isaac assessed as 'mild, sometimes moderate'.
  - 8.2 At the time of the examination the Claimant was not clinically depressed, although she was anxious. Dr Isaac said that it is the nature of such disorder for the mood to fluctuate.
  - 8.3 The chief difference in the Claimant's condition before and after September 2016 was that the Claimant had begun to suffer from panic attacks after September 2016.
  - 8.4 In answer to a question as to the Claimant's mental health issues had been influenced by what were referred to as 'additional factors' after September 2016 Dr Isaac stated as follows:

3.3 It is in the nature of a recurrent disorder to recur, and I do not think that the natural history of [the Claimant's] disorder has been affected by the index events. The index events might have influence the timing of a relapse and perhaps increased its magnitude, so that her depression would have been moderate, rather than mild/moderate following the index events. However, this was not a long term matter and depressed mood can fluctuate in this fashion anyway.

3.4 As far as additional factors are concerned, it strikes me that the principal concerns have been [the Claimant's] relationship and her financial worries at not working. She would say – and there is no psychiatric evidence pre-index to refute this, or confirm it – that it is the index events that have caused these additional factors to come into play.

- 8.5 Dr Isaac stated that as at the date of the interview the Claimant was psychiatrically able to return to work, and that she had probably been able to do so 'throughout much of 2017.' However the Claimant would not be able to return to work for the Respondent in the same section.
- 9 Mr Walker was not prepared to accept that report, saying that it did not place 'sufficient weight on the significant amount of medical evidence that shows that [the Claimant] has consistently identified the acts of the Respondent as the precipitating events, right from the time she went off sick.' In the absence of further questions having been put to Dr Isaac, or any other evidence, we fail to see how we can properly go behind the report of someone instructed as an expert simply because a representative has sought to diminish its value.
- 10 The Claimant drew our attention to documents from her GP's surgery dated 6 April 2017, and 13 and 25 July 2018. We do not consider that they add anything material to the report of Dr Isaac. Her oral evidence was that she was still not fit to return to work and that she needed more time and treatment.
- 11 There was in the Claimant's bundle a report from King's College Hospital dated 10 August 2017 referring to a visit by the Claimant to A&E on the preceding day after having felt dizzy and had a panic attack. That report refers to 'ongoing stress with a court case'. We can properly take judicial notice that however informal and friendly the Tribunal may attempt to be, litigation is adversarial and inevitably causes stress for those involved.
- 12 Following receipt of Mr Isaac's report Mr Boucher, the HR Business Partner of the Respondent, wrote to the Claimant on 12 July 2018 notifying her of two vacancies for a Security Operative. He said that the Respondent was keen to get the Claimant back to work. We comment that we are aware that in general it is in the interests of both an employer and an employee for the employee to be away from work for as short a time

as reasonably possible. The Claimant had not pursued either vacancy as she did not consider herself able to return to work.<sup>1</sup>

- 13 There was some evidence concerning the Claimant having back pain. Mr Walker confirmed that no remedy was being sought in that respect, and so we do not mention it further.
- 14 Mr Ogunlaga remained in his position as Logistics Manager on site. He was not disciplined. The Claimant accepted in cross-examination that when enquiries had been made by the Respondent the witnesses to the alleged incidents had not supported her version of events. The Respondent has not apologised to the Claimant. No grievance procedure was instituted.
- 15 The Claimant claimed damages or compensation under several different headings as set out in the schedule of loss in the bundle prepared for this hearing. The first category is what was labelled 'Special Damages' being net loss of earnings and loss of annual leave. The next category was labelled 'General Damages' which was sub-divided into two further categories. The first of those comprised injury to feelings, aggravated damages, and stigma damages. The second comprised damages for anxiety / panic disorder, and for moderate depressive illness, and also damages for actual bodily harm being bruising to the Claimant's arm. The Claimant sought a '25% ACAS uplift' in respect of all those matters, and a final award of £5,000 to cover the costs of ongoing medical treatment.
- 16 We will also deal with the matter can be dealt with under separate categories.

#### Loss of earnings

- 17 Mr Walker had calculated loss of earnings on a net basis up to the date of the hearing, and gave credit for contractual sick pay, statutory sick pay, and also benefits received by the Claimant. Miss Tharoo did not dispute a liability for loss of earnings, but referred the Tribunal to the letter of 12 July 2018.
- 18 Our conclusion is that the Claimant is to be awarded loss of earnings to the end of September 2018. We have made that decision on the basis that the advice of Dr Isaac is that the Claimant was fit for work in June 2018, that posts were offered in the letter of 12 July 2018, and that the letter referred to Occupational Health working with the Claimant to reintegrate her into the workplace. Thus there would have been some delay before the Claimant would have returned to work.
- 19 Our calculation is based on that set out in the schedule of loss.<sup>2</sup> The total pay the Claimant would have received to the end of September 2018 would have been £34,739. Offset against that figure is £2,463 of

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<sup>1</sup> We were not referred to any relevant forms Med3.

<sup>2</sup> We are ignoring pence.

contractual sick pay, and benefits of £6,356. The net award is therefore £25,920.

- 20 The other matter under this heading is leave pay. Mr Walker simply said that the sum claimed (of £3,811) covered leave which the Claimant had missed 'based on a multiplier of 0.1207 of the net sum.' That calculation is correct on the basis of the net lost earnings claimed, before crediting sick pay and benefits, being £31,576. Miss Tharoo submitted that it was not appropriate to make any award because the Claimant remains employed.
- 21 We agree with Miss Tharoo. It is not up to the Tribunal to advise the Claimant as to the relationship between her absence due to illness and her entitlement to annual leave and leave pay, whether contractual or under the Working Time Regulations 1998. What we can say is that an employee who is absent due to illness cannot simply seek payment in lieu of leave not taken.

#### General damages

- 22 As mentioned there is a variety of matters under this heading and we will deal with each in turn. The first is injury to feelings, which we link also to damages for psychological injury. Mr Walker submitted that this case fell into the upper *Vento* band. He cited 'excessive physical force' because of the Claimant's sex, the abuse of power by Mr Ogunlaga, the negative consequences on the Claimant, and also that the Respondent's investigation was inadequate. In the schedule of remedies provided for this hearing the Claimant was seeking £40,000. That was in addition to further claims of £15,000 in respect of aggravated damages and stigma damages, and a further £20,000 for psychiatric injury.
- 23 Miss Tharoo pointed out that in the Claimant's original schedule of remedies which covered all of her allegations, and not only those in respect of which the Tribunal found in her favour, the matter had been placed in the middle *Vento* band and a figure between £15,000 and £20,000 had been sought. Miss Tharoo noted that the top band was for the 'most serious cases' such as covering a lengthy campaign of discrimination. Further, in that schedule of loss there was no claim for damages for any psychiatric injury.
- 24 Miss Tharoo also correctly pointed out that any award ought to take into account the Presidential Guidance current at the time. She had helpfully calculated the bands as being £818 - £8,320, £8,321 - £24,020, and £24,021 - £40,903. Miss Tharoo suggested that if the Claimant had been successful in all her allegations then the matter could fall within the middle band of *Vento*, but of course the Claimant did not succeed in all her allegations. In our view this matter does fall within the middle band as it was not a single isolated incident, but neither was what occurred something very serious stretching over a long period of time.

- 25 In connection with any award for psychiatric injury Miss Tharoo referred us to the report from Dr Isaac, and we have summarised the relevant points above and set out an extract from it.
- 26 We must be careful to ensure that the remedy which we award is appropriate in all the circumstances, but at the same time avoid double recovery. Miss Tharoo urged us to make one overall award covering both any psychiatric injury which we find was caused, and also injury to feelings. We cannot adopt that approach, although it has its attractions, because of the requirement to calculate interest differently on different types of award. We have however looked at the overall picture.
- 27 We have had regard to Chapter 4 of the Judicial College Guidelines relating to psychiatric damage. We have concluded that this matter falls within the Moderate or Less Severe categories taking into account insofar as relevant the seven factors identified in that section of the Guidelines. The range of awards is therefore £1,350 - £16,720.
- 28 The Claimant had a history of depression, and also her mother's death had had a material adverse effect on her. We have sought to ascertain as best we can the marginal effect of the treatment of the Claimant by the Respondent, and so the extent to which her pre-existing condition has been exacerbated. Dr Isaac was quite clear that the incidents might have caused the Claimant's depression to be moderate rather than mild/moderate, and he also stated that that 'was not a long term matter'. He also opined that the Claimant was able to return to work. There was thus some psychiatric injury, but of a relatively short term nature.
- 29 There is no one figure which is the right figure to award in such circumstances. Our award for injury to feelings is £12,000 and for psychiatric injury £8,000 based on the *Vento* bands and the Guidance as mentioned above.
- 30 Mr Walker sought aggravated damages and stigma damages. No authorities were cited to us. Aggravated damages are usually awarded where the respondent has acted 'in a high-handed, malicious, insulting or oppressive manner'.<sup>3</sup> The application for aggravated damages in this case was made on the basis that the Respondent had been kept in post and that the Claimant was not able to return to work at the site in question. We have also noted the comments of Underhill P in the EAT in *The Commissioner of Police of the Metropolis v. Shaw* [2012] ICR 464:<sup>4</sup>

*Held*, allowing the appeal, (1) . . . that, unlike exemplary damages, aggravated damages were compensatory only and should be awarded, not to punish a respondent for his conduct, but to reflect the extent to which aggravating features had increased the impact of the discriminatory conduct on the claimant and thus the injury to his feelings; and that relevant circumstances for an award of aggravated damages were the manner in which the wrong was committed, the

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<sup>3</sup> *Alexander v. Home Office* [1988] ICR 685 CA

<sup>4</sup> Quoting from the headnote

motive behind it and any subsequent conduct by the perpetrator, the ultimate question being, not so much whether the awards for injury to feelings and aggravated damages in isolation were acceptable, but whether the overall award was proportionate to the totality of suffering caused to the claimant.

*Per curiam.* It is very doubtful whether the practice of awarding aggravated damages as a separate head of compensation is a good thing. It would have been more sensible for tribunals in England and Wales to have followed the Scottish practice and make a single award for injury to feelings, taking into account those aggravating features that are currently dealt with under the separate head of aggravated damages. However, it would be a healthy reminder of the real nature of aggravated damages if any such awards were in future formulated as a sub-heading of an award for "injury to feelings" rather than as a wholly distinct head. The most important thing is to identify the main considerations leading to the overall award for injury to feelings, specifying any aggravating or mitigating features to which the tribunal attach particular weight. What matters is whether the total award for non-pecuniary loss is fair and proportionate.

- 31 We were not provided with any evidence concerning any procedures adopted by the Respondent in respect of Mr Ogunlaga, save that the Claimant had accepted in evidence that her colleagues had not supported her version of events. While we accept that in appropriate circumstances a separate identified award can be made arising out of the treatment by an employer of incidents of the nature pertaining in this case, we simply do not have the information to justify any separate award.
- 32 Mr Walker also sought 'stigma damages' in the round sum of £5,000 on the basis that the judgments will be available on the internet, and that will deter potential future employers from employing her. The availability of the judgments may also affect future social acquaintances, he said. Again we were not referred to any authorities. We accept that in principle such damages are recoverable in claims of discrimination, as did Miss Tharoo.<sup>5</sup> However such damages have to be proved. The Claimant in this case remains employed by the Respondent and so it is not a case where an employee has left the employment, and the Tribunal is trying to assess the period during which she will be unemployed in order to calculate compensation. The fact of the Claimant having brought these proceedings could then be a relevant factor in assessing the period of unemployment. In the absence of evidence we are not prepared to make any award simply on the basis that it is included in the schedule of loss and that Mr Walker made submissions on the matter.
- 33 The next head of damages is for genuine personal injury and relates to the bruise suffered by the Claimant. Mr Walker sought £1,220. We have referred to the Guidelines. There was a bruise, or bruises, referred to in the report of 10 September 2014 of King's College Hospital NHS Foundation Trust as 'consistent with fingertip marks'. These were not serious. Our award is £600.

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<sup>5</sup> See *Chagger v. Abbey National plc* [2009] EWCA Civ 1202

- 34 The final head of compensation sought by Mr Walker (somewhat optimistically) was future medical expenses of £5,000. It appears that what is being sought is funding for treatment which is not available on the NHS, or for more prompt treatment. We are not prepared to make any such award.
- 35 Mr Walker also sought an uplift of 25% in respect of all elements of our overall award, save for medical expenses. The basis for the application was that paragraph 31 of 'the ACAS Guidelines' required that grievances be dealt with without unreasonable delay, and that the Claimant was not informed of the outcome of her grievance made on 13 September 2016 until 21 November 2016. Miss Tharoo correctly pointed out that the Tribunal may only award an increase for breach of the ACAS Code of Practice and not the supplementary Guide. She submitted that the Tribunal had rejected this matter already, and also that there ought to be a reduction in the award by reason of the Claimant's failure to appeal the outcome of the grievance.
- 36 The current Code of Practice is the 2015 edition, and there is a supplementary Guide. There was an extract from a document in the Claimant's bundle and that appears to be an extract from the 2011 Edition of the Code. The relevant text is slightly different. The material parts from the 2015 Code are as follows:

**Keys to handling grievances in the workplace**

**Let the employer know the nature of the grievance**

32 If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

**Hold a meeting with the employee to discuss the grievance**

33 Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

34 Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.

**Decide on appropriate action**

40 Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

**Allow the employee to take the grievance further if not resolved**

41 Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.

- 37 The Tribunal has the power under section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 to increase any award made under various statutes and regulations where it is just and equitable to do



so, in circumstances where there has been a failure by the employer to comply with the Code. There is a limit of 25%. Claims under the Equality Act 2010 are covered by section 207A. The Tribunal also has the power to reduce any award where there has been a failure by the employee.

- 38 We need to revert to our original findings of fact. The Claimant presented her grievance on 13 September 2016. Mr Zeitzen met the Claimant on 5 October 2016. He then interviewed others, and subsequently provided the outcome to the Claimant on 21 November 2016. The various grievances were not upheld. The Claimant was notified of her right to appeal. She did not do so.
- 39 The sole basis upon which Mr Walker sought an uplift which is covered by the Code is that there had been unreasonable delay by the Respondent. We agree that the Respondent could have acted more swiftly, but it is an exaggeration to call such delay as there was 'unreasonable'. Miss Tharoo applied for a reduction in the award in that the Claimant did not appeal. When asked why she did not appeal the Claimant replied that nobody in the Respondent had done much. We interpret that as meaning that the Claimant had no faith in the Respondent's procedures. Our conclusion is that it is not just and equitable either to increase the award, nor to reduce it.

**Employment Judge Baron  
Dated 05 December 2018**