mf

EMPLOYMENT TRIBUNALS

Claimant: **Miss G Dowokpor**

Respondent: **London Borough of Waltham Forest**

Heard at: **East London Hearing Centre**

On: **7-9 & 13 November 2018**

Before: **Employment Judge Ross**
Members: **Mr T Burrows**
Mrs B K Saund

Representation

Claimant: Ms S. Robertson (Counsel)

Respondent: Mr. S. Keen (Counsel)

JUDGMENT ON REMEDY

1. The Respondent do pay the Claimant compensation of £22,344.25 (including interest), assessed follows:

1.1. Pecuniary loss (including interest): £8,816.86;

1.2. Damages for injury to feelings: £12,500;

1.3. Interest on the injury to feeling award: £1,027.39.

REASONS

Additional Evidence

1. On the issue of remedy, the Claimant relied on the following evidence in particular:

1.1. relevant parts of her witness statement (paragraphs 41-45, 58-60);

1.2. a supplemental witness statement with some further documentary evidence attached;

1.3. the GP report at p.272 Bundle.

2. The Respondent did not object to the Claimant adducing her supplemental statement nor the further documentary evidence, even though it had been produced today.

3. Mr. Keen indicated that the Respondent's case was that the Claimant could not, in effect, give expert medical opinion evidence of causation; and that, whilst the Respondent did not admit that the unfavourable treatment caused any personal injury, there was no point subjecting the Claimant to cross-examination.

4. Ms. Robertson explained that the Claimant did not contend that she had suffered any personal injury. Her case was, however, that the medical evidence we had before us was sufficient for solidifying injury to feelings to the top part of the *Vento* middle bracket.

The issues on remedy

5. Ms. Robertson had produced a helpful, short, revised Schedule of Loss.

6. The parties agreed the following figures:

6.1. Loss of agency fees: £11,900, plus interest of £452.32;

6.2. Loss of balance of parking permit: £15;

7. The Claimant agreed that the figures for JSA and Income Support to be off-set from these figures was £3,550.46.

8. The only issue that the parties were not agreed upon was the level of the injury to feeling award. Ms. Robertson contended that the award should be at the top end of the middle *Vento* bracket, claiming £20,000. Mr. Keen argued that the award should be at the top of the lower bracket or the bottom of the middle bracket of the *Vento* brackets.

Relevant Law

9. Ms. Robertson set out the principles of law to be applied by the Tribunal when assessing injury to feelings by directing us to *Armitage v Johnson* [1997] IRLR 162, paragraph 27. We took into account those principles.

10. Further, we took into account the Presidential Guidance on Employment Tribunal awards for injury to feeling and psychiatric injury, and the First Addendum to them. We reminded ourselves that:

> "*In respect of claims presented on or after 6 April 2018, the Vento bands shall be as follows: a **lower band of £900 to £8,600** (less serious cases); a **middle band of £8,600 to £25,700** (cases that do not merit an award in the upper band); and an **upper band of £25,700 to £42,900** (the most serious cases), with the most **exceptional cases capable of exceeding £42,900***."

11. Ms. Robertson sought to rely on *Hampshire County Council v Wyatt* EAT/0013/16 for the proposition that it was not always necessary for a Tribunal to have expert medical evidence to decide that injury had been suffered. No copy of this case was supplied, so, having reserved judgment, the Tribunal considered a copy of this authority.

12. *Wyatt* was an appeal against an award in a disability discrimination case. The Employment Tribunal had found that the Claimant's suspension was not an unlawful act but was the most proximate cause of her depression and triggered that depression; and the Respondent appealed against an award for personal injury on the basis that the Employment Tribunal was wrong to make such an award in the absence of expert medical evidence, which was necessary to establish both causation and quantum of this claim which are difficult issues to disentangle. The Respondent argued that in a low-value case, cost and proportionality issues may drive parties and tribunals to deal with such issues without medical evidence but in all other cases medical evidence must be obtained before such an award can be made. The EAT held (Simler J. presiding), with our emphasis added:

> *"28. Medical evidence in particular, is likely to assist in identifying whether (i) all the injury or harm suffered by a claimant can be attributed to the unlawful conduct and (ii) that injury or harm is divisible. It may assist in determining the extent to which any treatment a claimant has undergone has been successful. It may also assist in dealing with questions of prognosis. In those circumstances, we do not agree with the Tribunal's statement that all a further medical report can do is say that the Claimant made certain claims and express a view as to whether the maker of the report believes them or not. <u>We consider that in cases where there are issues as to the cause or divisibility of psychiatric or psychological harm suffered by a claimant, it is advisable for medical evidence to be obtained. Moreover, there is a real risk that failure to produce such medical evidence might lead to a lower award or to no award being made</u>.*
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> *29. However, we do not accept the Respondent's argument that medical evidence is an absolute requirement or that an award cannot be made in the absence of expert medical evidence in every such case bar those of low-value without error of law. We would be concerned to see such a principle established, bearing in mind in particular the financial cost involved in obtaining expert medical evidence. We also consider that there are potential practical difficulties that may arise…. In this case, by way of example, we understand from Ms Moss that the Remedy Hearing*

> *was listed at the end of the Liability Hearing in March 2015 for a date some three months in the future. However, the Tribunal's Liability Judgment was not promulgated until a month before the Remedy Hearing. At that point, the Claimant took steps to obtain independent medical evidence, but the report was only forthcoming on the day before the hearing. The Claimant was therefore unable to disclose the report to the Respondent in good time before the Remedy Hearing, and an adjournment was regarded as necessary if she wished to rely on that evidence. Faced with the prospect of an adjournment, she felt unable to cope with further delay and chose to proceed without it. We understand that position and do not criticise her for her approach. It identifies the sort of practical difficulties that might arise were the Respondent to be correct in its submission that as a matter of law in every case medical evidence is required.*
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> *30. In any event, we anticipate that in a case where concurrent causes for injury or harm in respect of which compensation is sought or relied on by the respondent to a claim, or established by the evidence, it will be in the respondent's interests as much as the claimant's to obtain expert medical evidence. We would expect parties to co-operate in those circumstances and to endeavour where possible to instruct a medical expert on a joint basis."*

13. In this case, neither party proposed that expert evidence be obtained.

14. Mr. Keen produced examples of injury to feelings awards, taken from the "Practical Law UK Checklist". He accepted that these were not authorities (most described awards at first instance by Employment Tribunals) but he contended that they were a tool to demonstrate how tribunals applied the guidance in *Johnson*, particularly the value in everyday life of the sums awarded.

15. Counsel accepted that discrimination cases are fact-sensitive; and that each of the cases cited to us was a case decided on its facts. This is demonstrated well by *Johnson*, which concerned a campaign of discriminatory acts over time; it was the worst such case that that tribunal had seen.

16. We took all the submissions and the above points of law into account. It would not be proportionate to list each submission.

Findings as to injury to feelings

17. We accepted the Claimant's evidence of the effect of the termination of her assignment set out in her supplemental statement.

18. In respect of the "Impact on pregnancy" section of her first witness statement, we agreed with Mr. Keen that the Claimant could not give medical opinion evidence.

19. Insofar as we understood Ms. Robertson's argument, she was contending that there was a causative link between the Claimant's physical symptoms and the treatment suffered, which "solidified" her claim for injury to feelings.

20. We have considered *Wyatt*; but the facts in this case are very different. Here, all the medical and factual evidence points to the Claimant having a difficult pregnancy. There are a number of potential causes for the borderline or high blood pressure and migraines, including the pregnancy itself and the anxiety that was likely to be present given her history of miscarriage. On the evidence before us, on a balance of probabilities, we did not find that the treatment suffered led to the symptoms experienced.

21. However, we found that the treatment of the Claimant added to her anxiety in a very particular way, which did exacerbate her injury to feelings.

22. Each pregnancy is special to the expectant mother. Further, the law seeks to protect the health and safety of the mother and the unborn child, because society recognises that they are vulnerable during the protected period.

23. The Claimant's pregnancy, however, was a very special pregnancy. The Claimant had a history of miscarriage. She had an ectopic pregnancy and the medical consequences of this are described in her witness statement. The Claimant was "devastated" by the first miscarriage and the events of August 2016. The Claimant's surprise and joy surrounding her third pregnancy must be viewed with the greater illumination that the context to it provides.

24. Moreover, the importance of this pregnancy to the Claimant was magnified by the risks posed by the history of miscarriage and the borderline or high blood pressure. Termination of the assignment for a pregnancy related reason was bound to add to the Claimant's stress; we need no medical evidence for that finding.

25. Set in that context, the manner in which the Claimant's assignment was terminated increased her injury to feelings. We find that this would have arisen for at least the following reasons:

    25.1. The lack of prior warning would have increased the impact on her feelings at the time and would have been likely to have increased her stress.

    25.2. There was a degree of concealment by the Respondent, as we have explained in our findings of fact on liability. Moreover, the Claimant was misled about the nature of meeting on 3 November 2017. Although it was not the intention, the effect was to increase the hurt to the Claimant.

26. Furthermore, the letter to the DWP at p.204 can fairly be read as being critical of the Claimant's performance – because the Claimant was in the role that was alleged to be not meeting service requirements. The Tribunal could not understand why, as this letter was going to the DWP, it did not state that the

termination was due to budgetary restraints. Had it done so, the Claimant's performance would not have been put in issue at all. We found that this letter was likely to have added to the Claimant's injury to feelings.

27. We found the Claimant to an impressive witness, who was likely to be more resilient than others who had experienced such treatment. But we agreed with Ms. Robertson that for such a person to be upset, albeit briefly towards the end of her evidence, demonstrates the degree of hurt that she felt from the treatment.

28. It was common ground that the Claimant was paid £238 per day at the time of the termination. This equates to £1,190 for a 5 day week. Ms. Robertson argued that this was one feature which distinguished this case from the examples relied upon by the Respondent, because the Claimant's earning capacity was higher than in those cases.

Conclusions

29. We find that the facts set out at paragraphs 24-25 above carry particular weight in this case. They distinguish this case from any of those referred to by Mr. Keen.

30. Taking the facts at paragraphs 24-25, whether on their own or when combined with the other findings above, we are satisfied that the award in this case should be in the middle band of the guidelines in *Vento*.

31. We have reminded ourselves of the factors in *Johnson*.

32. The award in this case must not punish the Respondent. There was, after all, a one-off act of discrimination.

33. Further, given our findings, the award must not be too low as to diminish respect for the policy of the legislation in this area. Society has condemned discrimination. This was a very special pregnancy, and we have been critical of the manner of dismissal.

34. We have reminded ourselves of the value of money in everyday life. We have done this by reference to earning capacity. Whereas the Claimant was on a daily rate of £238 per day, it was likely that her contract would not be renewed at the end of March 2018. Her earning capacity as an agency worker in that role, to the end of the year, was in the region of £12,000. We have decided to uplift this slightly to £12,500 given the degree of hurt in this case.

35. Standing back, we consider that the public would respect an award at this level. They would want the Claimant to be properly compensated for the hurt that she had suffered as a result of the treatment found.

36. The interest on this award is assessed as £1,027.39 on the basis of 375 days, at 8% interest.

Employment Judge Ross

18 January 2019