EMPLOYMENT TRIBUNALS

Claimant: **Mrs. C Wells**

Respondents: **Aramark Limited (R1)**
Emcor Group (UK) Plc (R2)

Heard at: **Nottingham**

On: **Wednesday, 22nd November 2017**

Before: **Employment Judge Heap**

Members: **Mrs. J M Bonser**
Mr. P Jackson

Representation

Claimant: **Miss. K Jeram - Counsel**
First Respondent: **Mr. B Watson - Legal Consultant**
Second Respondent: **Mr. J Crozier - Counsel**

JUDGMENT having been sent to the parties on 15th December 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Background and the issues

1. This hearing followed on from a Liability Judgment in which we found in favour of the Claimant in respect of a number of her complaints, including unfair dismissal, a failure to make reasonable adjustments and also discrimination arising from disability contrary to Section 15 Equality Act 2010.

2. The purpose of today's hearing therefore was to deal with the remedy which it was appropriate to Order so as to compensate the Claimant for those particular complaints which we had determined to be well founded.

3. We should note here that the Claimant has, since the point of our Liability Judgment, been reinstated by the First Respondent and has subsequently transferred to the employ of the Second Respondent pursuant to Regulation 4 Transfer of Undertakings (Protection of Employment) Regulations. Those matters are dealt with in further detail in an earlier case management Order and therefore the content is not rehearsed again here. It was agreed by all parties, however, that the Second Respondent would be liable for the

award of compensation to be paid to the Claimant but that the First Respondent would remain a party to the proceedings.

4. The parties had, by the time of this hearing today, managed to agree a number of issues in relation to what we will refer to as the pecuniary aspects of remedy. Particularly the parties were agreed that there should be a basic award of £520.00 in relation to the unfair dismissal complaint.

5. The parties were also agreed that in respect of financial losses arising from the dismissal (which we had found both to be unfair and an act of discrimination arising from disability) there should be a sum Ordered to be paid in relation to loss of earnings of £2,735.50.

6. It was also agreed between the parties as to the manner and calculation of interest which would be applicable both to those loss of earnings and also to any award for injury to feelings.

7. Turning then to the issue of injury to feelings it was broadly agreed between the parties that an award for injury to feelings in this case should sit in the middle of the **Vento**[1] bands. The divide between the parties, however, was as to where that particular sum would fall within that middle band.

8. Following discussion and in view of the recent decision in **Durrant v Chief Constable of Avon & Somerset Constabulary [2017] EWCA Civ 1808**, it was agreed at the outset of this hearing that the joint **Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879** dated 5th September 2017 ("The Presidential Guidance") would be applicable to the award which we were to make to the Claimant. The foregoing therefore records the areas of agreement between the parties at the hearing.

9. There were, however, also areas of disagreement. The first of those was whether there should be an element of the award to specifically reflect a sum for personal injury. The Claimant's position was that there should be and this should be in the region of £5,000.00. Alternatively, the position was whether there should be a global award for injury to feelings taking account of all matters such as the effects on the Claimant, the matter of her health and any aggravating features. That latter position was the one which both Respondents urged us to adopt.

10. The second area of disagreement between the parties was whether the costs of a proposed course of Cognitive Behavioural Therapy ("CBT") and the travel costs associated with that should be Ordered to be paid. The Claimant's position was that they should and the Respondents' was that they should not, although we observe that the Respondents did both accept that the Claimant would be likely to embark on such a course of treatment and/or at least that she would not be averse to undertaking such treatment.

11. Thirdly and finally there was the question of whether there should be an award of aggravated damages in this case. The Claimant asserted that there should and relied on three distinct acts as being indicative of the fact that such an award should be made. The first of those was that a risk assessment was undertaken without consultation with the Claimant. The second was that the Claimant was told by the First Respondent that she could not carry a bucket up a single step and the third that there had been a misconstruing of medical reports.

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[1] **Vento v The Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871** as 'up-rated' by **Da'Bell v NSPCC [2010] IRLR 19 EAT.**

12. All of those matters were dealt with within the liability judgment and therefore we do not rehearse the facts of those issues here in any further detail.

THE LAW

13. The statutory provisions which are relevant to the areas of disagreement before us are as follows:

14. Section 124 Equality Act 2010 deals with the ability of the Tribunal to make Orders where a complaint or complaints of unlawful discrimination have been made out. The relevant parts of Section 124 provide as follows:

> ***124 Remedies: general***
>
> *(1)This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
>
> *(2)The tribunal may—*
>
> *(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) order the respondent to pay compensation to the complainant;*
>
> *(c) make an appropriate recommendation.*
>
> . . . .
>
> *(6)The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.*

15. It is common ground that an Order for compensation under Section 124 Equality Act 2010 can include compensation for injury to feelings. The parties are agreed that the sum for injury to feelings in this case sits within the middle of the **Vento** Bands. The Presidential Guidance is agreed to be applicable to the award and the relevant part says this:

> *"………..taking account of Simmons v Castle and De Souza v Vinci Construction (UK) Ltd, the Vento bands shall be as follows: a **lower band of £800 to £8,400** (less serious cases); a **middle band of £8,400 to £25,200** (cases that do 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**".*

16. Guidance in respect of when an award of aggravated damages should be made is given by the Employment Appeal Tribunal in **Commissioner of the Police of the Metropolis v Shaw [2012] IRLR 291**, the relevant extracts of which are as follows:

> *"Aggravated damages are thus not, conceptually, a different creature from "injury to feelings": rather, they refer to the aggravation – etymologically, the making more serious – of the injury to feelings caused by the wrongful act as a result of some additional element. Indeed if this were not so, the fact that Scots law does not recognise aggravated damages as such would mean that substantially different remedies were available in identical cases north and south of the border, which is a state of affairs to be avoided if at all possible. As it is, however, as Judge Clark*

*observed in **Tchoula**,* loc. cit.*, whether a tribunal makes a single award for injury to feelings, reflecting any aggravating features, or splits out aggravated damages as a separate head should be a matter of form rather than substance.*

Criteria. *The circumstances attracting an award of aggravated damages fall into the three categories helpfully identified by the Law Commission: see para. 16 (2) above. Reviewing them briefly:*

*(a) The manner in which the wrong was committed. The basic concept here is of course 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 (as it was by the Tribunal in this case). It derives from the speech of Lord Reid in **Broome v Cassell & Co. Ltd.** [1972] AC 1027 (see at p. 1087G), though it has it roots in earlier authorities. It is there used to describe conduct which would justify a jury in a defamation case in making an award at "the top of the bracket". It came into the discrimination case-law by being referred to by May LJ in **Alexander** as an example of the kind of conduct which might attract an award of aggravated damages. It gives a good general idea of the territory we are in, but it should not be treated as an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear[8], 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. It is unnecessary to say much about this. 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 – see **Ministry of Defence v Meredith** [1995] IRLR 539, at paras. 32-33 (p. 543). There is thus in practice a considerable overlap with head (a).*

*(c) Subsequent conduct. The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see **Zaiwalla and Co. v Walia** [2002] IRLR 697 (though N.B. Maurice Kay J's warning at para. 28 of his judgment (p. 702)); and **Fletcher** (above). But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind can be found in **Armitage**, **Salmon** and **British Telecommunications v Reid**. A failure to apologise may also come into this category; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. (For another example, see the very recent decision of this Tribunal (Silber J presiding) in **Bungay v Saini** (UKEAT/0331/10/CEA).) This basis of awarding aggravated damages is rather different from the other two in as much as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately associated with them. A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of subsequent*

> *misconduct only on the basis that they are said to be relevant to a claim for aggravated damages."*

CONCLUSIONS

17. Given that there are broad areas of agreement in this case and it is not disputed that the Claimant would undertake a course of CBT (or at least would not be averse to it) it has not been necessary for us to make findings of fact at this hearing and instead it is possible for us to move directly to our conclusions on the areas of dispute between the parties.

Injury to feelings and personal injury

18. We deal firstly with the question of injury to feelings and personal injury. It is without doubt, and it is not disputed by either Respondent, that the Claimant has been deeply affected by the actions of the First Respondent and, particularly, by her dismissal. Those were serious matters and they affected the Claimant considerably. As we shall come to further below, that is reflected within a medical report produced before us which was commissioned by the Claimant for the purposes of this remedy hearing.

19. There is no doubt, therefore, that the acts of the First Respondent were serious and had a profound effect on the Claimant. That needs to be reflected within the level of award for injury to feelings to be made.

20. We agree with the assessment of the Respondents that this is a case which falls within the middle of the middle band of **Vento**. Taking into account paragraph 10 of the Presidential Guidance and the figures reflected within that for the middle band i.e. £8,400.00 to £25,200.00 we are satisfied that an award of £18,000.00 is an appropriate one in the circumstances, taking into account the severity of the discrimination which we have found to be made out and the other matters to which we shall refer to below.

21. Whilst the Claimant was undoubtedly caused a considerable amount of upset, we observe that following the Liability Judgment she was quickly reinstated into her "old position". That was the remedy which the Claimant had been seeking and whilst it does not make up for the upset caused from her dismissal, putting her back into the job that she clearly loved will have mitigated to some degree that position.

22. Taking such matters into account and the respective positions of the parties, we consider a sum of £18,000.00 for injury to feelings to be an appropriate one in this case.

23. We have taken into account in reaching that conclusion the medical report to which we shall refer below and also the content of the Claimant's witness statement. Although in respect of that witness evidence we observe that whilst we have taken those matters into account it was agreed that it was not necessary for the Claimant to give live evidence before us. We have noted, and considered, however the matters raised in her statement.

24. We have particularly taken into account, however, a medical report produced after the Liability Judgment and for the purposes of assisting us in determining the effects on the Claimant of the discrimination which we have found to have been made out. Of particular note in that report are the following extracts:

> *Paragraph 4.19: "Ms Wells highlighted during this time that she was highly distressed by the ongoing aspects of her medical care and the resulting suspension and dismissal from her place of work. She described how she had been capable of completing her work load and was unsure why people had recorded what she felt were untruths about her and her standard of work."*

Paragraph 4.20: "Ms Wells explained that she felt overwhelmed with the process of the Employment Tribunal and that she wanted the matter to be finalised as soon as possible. She spoke of wanting to move forward with her life and we reflected on her worries about her ill health and the potential for her physical condition and brain tumour to worsen."

Paragraph 4.21: "It was reflected upon with Ms Wells and her family that the brain tumour diagnosis and ongoing treatments, suspension, dismissal and resulting Tribunal had impacted greatly on their family relationships as well as the distress it had caused for each as individuals."

Paragraph 5.4: "Ms Wells struggled to recall some information however the dates of her dismissal seemed highly prominent in her mind and were emotive for her."

Paragraph 5.5.2: "The suspension, dismissal and failure to make reasonable adjustments to allow Mrs Wells to continue in her role is suggested to have resulted in a period of time when Mrs Wells experienced feelings of self-doubt and questioned her self-worth. The issues over employment resulted in this coping strategy being removed from Ms Wells and it is likely that this will have caused significant distress. The self-report measures that Mrs Wells was able to complete whilst not wholly valid would suggest she is experiencing mild depression and anxiety."

Paragraph 5.5.6: "Mrs Wells shared feelings of anger towards the actions of the employer and explained how she felt this was unjust. It is suggested this has greatly impacted Mrs Wells' sense of self and confidence. This ongoing stress is likely to have resulted in Mrs Wells experiencing significant levels of distress which are likely to meet clinical diagnosis of depression, anxiety and potentially some symptoms of PTSD."

Paragraph 5.6: "Mrs Wells presented during the assessment as an individual who has experienced significant psychological distress as a result of the employment issues she has faced over the past 2 years."

25. We also take into account an addendum to that report produced by the same medical practitioner following questions from the Respondents to these proceedings. This set out a list from (a) to (g) at paragraph 3.7 of other issues which were said to have contributed to the Claimant's present mental health picture. Those were underlying health conditions; ongoing care and treatment; development and progression of underlying health conditions; management of relationships at work; dismissal; reinstatement and any other stressors or potential causes unrelated to those factors.

26. When asked for an apportionment in relation to those matters and how they impacted upon the Claimant's present position, the medical practitioner opined that it was not possible to provide an apportionment of the Claimant's symptoms to the factors identified by the Respondents. It was simply set out that it was likely that the factors listed would have had a cumulative impact on the Claimant's mental health.

27. Again, having regard to those matters we are satisfied that an award of £18,000.00 for injury to feelings is sufficient and appropriate to compensate the Claimant for the upset caused by the acts of discrimination made out and as dealt with within the Liability Judgment.

28. We have also determined whether we should make a separate award for personal injury as contended for by Ms. Jeram. On balance, we have decided that we should not.

29. In this regard it is clear from the medical report and the sections which we have already highlighted, that the Employment Tribunal proceedings themselves have taken their toll on the Claimant. Although ultimately we are satisfied on balance that the report shows a clinical diagnosis of mild depression and anxiety, we do not consider it appropriate in the circumstances to hive off any aspect of the injury to feelings award for a separate and specific award for personal injury.

30. That is on the basis that, firstly, we have taken that view on the basis that we can adequately reflect the Claimant's suffering in this regard by making an award for injury to feelings award at an appropriate level as we have done above. Such an award can therefore compensate the Claimant adequately in that regard.

31. Secondly, as is openly accepted on behalf of the Claimant there is no prognosis set out within the report itself and no adequate medical assessment on any personal injury element to allow us to adequately quantify what might be an appropriate award for such injury in these circumstances.

32. Thirdly, we agree with the submissions of both Respondents that we cannot apportion the effect of those factors set out at page 95 of the hearing bundle and also the impact of the Employment Tribunal proceedings to the Claimant's diagnosis of mild depression and anxiety. That being the case, it is not possible for us to determine and apportion in a personal injury context what impact the discrimination that we found to be made out in the Liability Judgment had on that condition.

33. In addition to those factors referred to in the addendum to the medical report referred to above, there are clearly the other stressors we have identified such as the Employment Tribunal proceedings and the acts which we did not find to be acts of discrimination which have clearly impacted upon the Claimant's mental health and wellbeing. We cannot, in our view, adequately and satisfactorily divorce all of those matters from the discrimination that we have found to be made out in determining that the Claimant should be made the subject of a separate personal injury award for the depression and anxiety from which she is now suffering. It is clear that that medical condition was not wholly attributable to the discrimination complaints which succeeded and, as we have already observed, the expert medical report could not assist us on the apportionment question.

34. In our view, an overall injury to feelings award to compensate the Claimant for such matters is therefore more appropriate that making a separate award for personal injury and as we have already said, we are satisfied that the award made above is sufficient to properly and adequately compensate the Claimant in that regard.

<u>CBT treatment and associated costs</u>

35. We turn then to the issue of the cost of CBT and costs of the travel associated with it. The need for CBT appears to us from the report to be as a result of the Claimant's present mental health and wellbeing, which, for the reasons that we have already given, is not only attributable to the acts of discrimination that we had found to be made out but also to the other matters and factors identified at page 95 of the hearing bundle, to the Tribunal proceedings themselves and other individual complaints brought before us which we did not find out to be made out as acts of discrimination.

36. Again we cannot divorce the impact of those other factors from the discrimination made out and so cannot apportion what percentage is attributable to those unlawful acts and therefore what contribution of costs of CBT the Respondents ought to be responsible for. We cannot say that it is only the acts of discrimination made out that have resulted in the need for CBT and, but for that, the Claimant would not have been recommended such a course of treatment.

37. In all events, there is nothing within the medical report to show that any further wait to enable CBT to take place would be detrimental to the Claimant and the Claimant could and therefore should seek to explore those issues by way of an NHS referral. There is nothing before us to show that the Claimant cannot access NHS treatment or that any wait would be lengthy or detrimental. It is, in fact, some time since a recommendation of CBT was made before the point of this hearing.

Aggravated Damages

38. We turn then to the final issue which is the question of aggravated damages. The grounds upon which aggravated damages can be considered is highlighted in **Commissioner of the Police of the Metropolis v Shaw [2012] IRLR 291**. The three categories which might attract an award of aggravated damages fall into:-

(a) The manner in which the wrong was committed; (b) motive;
and
(c) subsequent conduct.

39. Given the basis upon which the Claimant advances a submission that aggravated damages should be Ordered, it must logically be the first strand identified, that is the manner in which the wrong was committed, that is relevant to the Claimant's contention that such an award should be made.

40. We accept the submissions of Mr. Crozier that the act relied upon as justifying an Order for aggravated damages must of itself be a discriminatory act to fall within that first limb. That is clear from the reading of that first limb and the reference to the word "the wrong being committed". Particularly, as set out in **Shaw** when considering that particular limb, we note the following:

> *"The basic concept here is of course 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…."*

41. **Shaw** therefore makes plain in that regard that the first limb is talking about an act of discrimination and that act having been made worse by the conduct of the perpetrator. In those circumstances, we agree with Mr. Crozier that when considering this strand of the test, the act relied upon as evidencing an aggravated feature must of itself be a discriminatory act.

42. The only act of discrimination made out upon which the Claimant relies in this context is the misconstruing of the medical reports, which led in turn to her subsequent discriminatory dismissal. The other acts relied upon were not found by us in the Liability Judgment to be acts of discrimination.

43. We should firstly stress that we do not seek to diminish the seriousness of the fact that medical reports were indeed misconstrued. Particularly, the fact that that led to dismissal is significant, as was the effect that that dismissal had upon the Claimant.

44. However, whilst taking that into account, that falls in our view far short of a regime or situation which could be said to be high handed, malicious, insulting, oppressive or similar. It was ineptitude, bungling and ill-considered without doubt, but it does not reach

the threshold of the type of conduct meriting a separate award for aggravated damages and we are ultimately satisfied that the Claimant has been adequately compensated for all the hurt, aggravation and damage to her health by the injury to feelings award of £18,000.00 that we have made in this case.

Employment Judge Heap

Date: 1st March 2018

REASONS SENT TO THE PARTIES ON

10 March 2018…...

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FOR THE TRIBUNAL OFFICE