EMPLOYMENT TRIBUNALS

Claimant: Miss S Decoteau

Respondent: Fired Earth Limited

Heard at: Manchester **On:** 5 February 2019

Before: Employment Judge Ross
Ms L Atkinson
Ms E Cadbury

REPRESENTATION:

Claimant: Miss J Wilson-Theaker, Counsel
Respondent: Mr B Frew, Counsel

JUDGMENT ON REMEDY

We make the following award:

1. Injury to feelings (inclusive of interest) £8,000.

2. Loss of earnings of one day's pay for Saturday 17 February - £52.33 plus interest of £2.09.

REASONS

Injury to Feelings

1. The Tribunal reminds itself of the long-established guidance in **Prison Service v Johnson [1997] ICR 275**, that the general principles underlying awards for injury to feelings are as follows:

- Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.

- An award should not be inflated by feelings of indignation at the guilty party's conduct.

- Awards should not be so low as to diminish respect for the policy of discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.

- Awards should be broadly similar to the range of awards in personal injury cases.

- Tribunals should bear in mind the value in everyday life of the sum they are contemplating.

- Tribunals should bear in mind the need for public respect for the level of awards made.

2. The Tribunal also reminds itself of the present Vento guidelines as set out in the joint Presidential Guidance on uprated Vento bands from the Presidents of the Employment Tribunal in England and Wales and Scotland for claims presented after 6 April 2018. The bands are:

Lower band	£900 – £8,600 (for less serious cases)
Middle band	£8,600 - £25,700 (for cases that do not merit an award in the upper band)
Upper band	£25,700 - £42,900 (for the most serious cases, with the most exceptional cases capable of exceeding £42,900.

3. In this case the claimant's representative contended the appropriate award was in the middle band of Vento and sought an award of £15,000. For the respondent it was contended that the awards should be split up for the different allegations of discrimination which succeeded. Mr Frew suggested there should be an award from the lower band of Vento for the first allegation of discrimination in relation to the handling of the annual leave request in the sum of £900; and in relation to the other successful allegation, namely the ostracisation and constructive dismissal, an award of £6,000 in total. He further argued that each award should be reduced by 60% to reflect non-tortious concurrent causes of the claimant's injury to feelings.

4. The Tribunal reminds itself that the claimant is a young woman in the early stages of her career. She is a graduate and explained to us at the last hearing she had hoped for a career with the respondent and had a particular interest in design. We rely on her evidence that she had hoped to remain with the respondent and to progress with them. We have borne in mind that this was a dismissal case and the facts which caused the dismissal were acts of direct race discrimination in the way the respondent dealt with her annual leave request, and the fact they left her isolated and ostracised at Hale Barns.

5. We rely on our finding that two allegations of direct discrimination which culminated in the claimant's dismissal occurred over a relatively short period of time and are inextricably linked, to determine it is appropriate to make one award for injury to feelings for race discrimination.

6. We did not have a separate witness statement from the claimant for the remedy hearing. We rely on paragraphs from the claimant's original statement. She told us that following the ostracisation of her at Hale Barns she became upset and felt worthless and useless. At the remedy hearing she told us that this triggered her to visit her GP on 5 February 2018, who signed her off with work-related stress. We have taken into account the claimant told us at Tribunal that there have been long-term consequences of the discriminatory treatment. She told us she “can’t work normally”. She stated she is “conscious, because of this experience, of her behaviour and how she is perceived by others”. We find the claimant is a reserved and dignified young woman.

7. We have borne in mind our findings in our original Judgment that when the claimant was left to work alone at Hale Barns and ostracised she had no idea how long that state of affairs would continue. We have taken into account the claimant's evidence that at the point she resigned she felt she could not continue working “in a hostile environment which involved colleagues who had little regard for me, my efforts and my wellbeing”.

8. Although the claimant was fortunate to obtain another job promptly after her resignation, she has been left with the lingering damage to her confidence which she described to us.

9. For all these reasons, although the period of discrimination was relatively short, nevertheless the serious nature of it resulting in the claimant's dismissal causes us to find that an award within the middle band of Vento is appropriate although the relatively short period of the discriminatory treatment means that an award towards the bottom of the band is merited.

10. Mr Frew for the respondent suggested to us that the award for injury to feelings should be reduced because of other causes of the claimant’s injury to feelings.

11. He relied on the fact that the claimant had brought an unsuccessful victimisation claim and had withdrawn one of her allegations of direct discrimination at the liability hearing. Although different legal labels were attached, both those legal claims arise out of the same facts namely the failure to permit her to transfer to Sycamore Farm. The claimant confirmed in evidence at the remedy hearing that she continued to have hurt feelings because of the failure to permit her to transfer to Sycamore Farm.

12. Although the Tribunal made findings in relation to this failure to transfer the claimant (see our Judgment), the claimant withdrew her claim for direct discrimination in relation to this so of there was no finding of direct discrimination in relation to that fact.

13. The claimant's victimisation claim failed because the Tribunal found there had not been a protected act. One of the detriments in relation to the victimisation claim was the failure to allow the claimant to move to the Sycamore Farm outlet.

14. The Tribunal reminds itself of the List of Issues document at Annex B attached to the Case Management Order of Employment Judge Franey. That List of Issues formed the basis of our judgment. We remind ourselves that the claimant relied on the same set of facts in her direct race discrimination claim and in her victimisation claim; she simply attached a different legal label to those facts. The only distinction was that the failure to allow the claimant to move to the Sycamore Farm outlet was withdrawn as a distinct allegation of direct discrimination. The facts relied upon in the other detriments in the victimisation claim resulted in successful claims for direct race discrimination.

15. Given that the claimant accepted in evidence at the remedy hearing that some of her injury to feelings was due to the failure to allow her to transfer to the Sycamore Farm outlet, we accept the respondent's argument that because compensation for injury to feelings is assessed on tortious principles, then the claimant can only be compensated for the loss that flows from the discriminatory treatment. Given that one of the factual matters was withdrawn as an allegation of direct discrimination and that same factual matter did not succeed as a victimisation claim, we find this means that there is one factual element for which the claimant cannot be compensated ie the failure to transfer her to the Sycamore Farm store.

16. Mr Frew asked the claimant what proportion of her injured feelings were due to the failure to allow her to transfer to Sycamore Farm. Unsurprisingly the claimant was unable to apportion her feelings in this way.

17. The Tribunal has attempted to do so. We accept the claimant's evidence that she was hurt because the respondent failed to move her to the Sycamore Farm outlet. However, the Tribunal is satisfied that this was not the key factor that distressed the claimant, injured her feelings and ultimately caused her dismissal.

18. The Tribunal relies on its finding of fact that it was the ostracisation of the claimant and leaving her to work alone at Hale Barnes, without knowing how long that situation would last, which was the allegation which triggered her to visit her doctor who signed her off with work-related stress. She never returned to work for the respondent.

19. We are satisfied that this was by far the major part in causing the claimant's hurt feelings because it caused her to visit her GP, be signed off sick and resulted in her constructive dismissal.

20. In awarding compensation, the Tribunal took into account that the way the respondent handled her leave request was also an act of race discrimination which was a factor in her constructive dismissal.

21. The Tribunal is mindful that **Thaine v London School of Economics [2010] ICR 1422** relied upon by the respondent, is a psychiatric ill health case, although the reduction in compensation in that case was made across all the awards. This case is

injury to feelings only. The Tribunal notes in that case there were a number of concurrent causes for the claimant's psychiatric condition. In this case there was only one matter that was a concurrent cause of the injury to feelings namely the failure to transfer the claimant to Sycamore farm.

22. The Tribunal has also reminded itself that there is no rule that the Tribunal should apportion damages across the board merely because one non-tortious cause has been in play (see **Dickins v O2 PLC [2009] IRLR 58 CA**).

23. However given that the failure of the respondent to transfer the claimant was a factor in causing the claimant's hurt feelings and that was not an act found to be in breach the Equality Act, the Tribunal reduces the award of £10,000 for injury to feelings to reflect this by 20% to £8,000. In apportioning in this way we have recognised the failure to transfer as was a factor but no more than that and it was not the cause of her constructive dimisaal. For the avoidance, our assessment of £10,000 as the appropriate award was inclusive of interest.

Aggravated Damages

24. The claimant's representative argued for an award of aggravated damages of £5,000. The Tribunal is not satisfied that this is a case where an award for aggravated damages is appropriate. The Tribunal reminds itself that aggravated can be awarded in a discrimination case where the defendants have behaved in a "high-handed, malicious, insulting or oppressive manner in committing the act of discrimination" (**Alexander v The Home Office [1988] ICR 685 CA**).

25. In **Commissioner of Police of the Metropolis v Shaw EAT 0125/11** three broad categories of case were identified:

(1) Where the manner in which the wrong was committed was particularly upsetting, namely "high-handed, malicious, insulting or oppressive manner";

(2) Where there was a discriminatory motive i.e. the conduct was evidently based on prejudice or animosity or was spiteful, vindictive or intended to wound;

(3) Where subsequent conduct adds to the injury, for example where the employer conducts Tribunal proceedings in an unnecessarily offensive manner or "rubs salt into the wound" by plainly showing that he does not take the claimant's complaint of discrimination seriously.

26. The Tribunal relies on its findings of fact in the liability Judgment. This was not a case where the respondent acted in a high-handed, malicious, insulting or oppressive manner. We found that this was a case of unconscious discrimination. There was no evidence of spiteful, vindictive or an intention to wound.

27. The claimant's representative relied on the last ground: the respondent had "rubbed salt into the wound" by showing that it did not take the claimant's complaint of discrimination seriously.

28. The claimant made a clear complaint of race discrimination after she left. That complaint was investigated and although the Tribunal expressed some concerns about the evidence given to the investigating officer, the Tribunal is not satisfied that the high threshold for an award for aggravated damages is made out and declines to make an award.

Increase in award for failure to comply with ACAS Code of Practice

29. The Tribunal is not satisfied that such an uplift is merited.

30. S207A(2) TULCRA 1992 provides if a relevant Code of Practice applies and the employer has failed to comply with the Code and the failure was unreasonable, the Tribunal may, if it considers it just and equitable to do so in all the circumstances, increase any award by up to 25%.

31. The relevant ACAS Code is the ACAS Guide :Discipline and Grievance at Work (2017). In relation to the claimant's original complaint about her annual leave, although we have found discriminatory treatment in the way the respondent handled the claimant's request for holiday, once she made a formal grievance to HR the HR officer was the one person who acted on the matter fairly and promptly (see our findings of fact). We find no breach of the Code.

32. In relation to the grievance she lodged after she left, the respondent took steps to investigate the matter and provided an outcome. Accordingly, we are not satisfied there was a breach of the ACAS Code.

Loss of Earnings

33. The claimant claimed a modest amount of two days' loss of pay. The respondent disputed the amount. The evidence from the claimant was that she gave in her notice which expired on Friday 16 February. She commenced a new job on Monday 19 February. The evidence we heard in the liability hearing was that the claimant normally worked 5 days a week and worked on a Saturday. Accordingly we find she had one day's loss of pay on Saturday 17 February between the end of her employment with the respondent and starting her new job. We calculated that day's loss of pay by relying on the figure in the original claim form for monthly pay (net) of £1,134. We multiplied that sum by 12 for the annual figure, then divided it by 52 for a week's pay and then by 5 for a day's pay, reaching the figure of £52.33.

34. The Tribunal is obliged to award interest at 8% from the midpoint, (a period of approximately 6 months) £52.33x 8%= £4.18 is the annual amount so a period of 6 months is £4.18 divided by 2 = £2.09. Therefore the Tribunal awards interest of £2.09 on the loss of earnings.

Employment Judge Ross

Date 13 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 February 2019

FOR THE TRIBUNAL OFFICE