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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Miss S Benavides	**AND**	Britannia Services Group Limited

Heard at: London Central **On**: 15 February 2019
12 March 2019 (in Chambers)

Before: Employment Judge Pearl
Members: Ms C I Ihnatowicz
Mr I McLaughlin

Representation
For the Claimant: Mr R O'Keefe, Union Representative
For the Respondent: Mr L Godfrey, of Counsel

JUDGMENT AS TO REMEDY

The unanimous Judgment of the Tribunal is that the Respondent shall pay to the Claimant the following sums:

A basic award for unfair dismissal of **£5,853**.

A compensatory award of **£10,530**.

Compensation for injury to feelings and personal injury of **£21,250** (including s207A uplift).

Compensation of **£2,230** for financial loss.

These sums total: **£39,863.**

REASONS

1. This was the remedy hearing in this case, the reserved Judgment on liability having been sent to the parties on 8 January 2019. This was a Judgment that established that the Claimant had been unfairly dismissed for taking part in trade union activities, the dismissal also being ordinarily unfair under s.98(4). In addition, her pre-dismissal claims of trade union detriment succeeded to the extent of the six matters that were set out in paragraphs 71-85. The most substantial of these claims related to a Respondent–inspired, or instructed, campaign of ostracising the Claimant at work. In addition, there was a disciplinary investigation which was also a substantial detriment.

2. On the findings of fact that we made and our conclusions in terms of liability, this was not a minor or insignificant catalogue of detriment on the ground that the Claimant had participated in the activities of the union and it was followed by a dismissal for the same reason.

3. There were written submissions prepared by both parties for the hearing on 15 February. Thereafter, they have exchanged further written submissions and in Mr Godfrey's case he has also written a reply to the Claimant's second written argument. At the conclusion of all of this there are a number of heads of agreement. The parties agree that the basic award for unfair dismissal is £5,853. They also agree that the statutory cap applies to her compensatory award and this produces £10,530. In addition, they agree that a further £500 is appropriate to be paid to her for loss of statutory rights.

4. They also agree that there can be no uplift to the compensatory award. There is also a further agreed sum of £2,230.84 which accounts for financial loss up until the date of dismissal.

5. The Claimant gave evidence at the remedy hearing. She described one episode of depression in 2011 and was then prescribed sleeping pills and anti-depressants for seven months. From 2013-2015 she was symptom free. She was taking no medicine.

6. In paragraph 4 of her witness statement she gave evidence about her injury to feelings and, in particular, about her feelings after she discovered that her work colleagues were isolating her. She refers to the effect it had on her relationships at home. She said she was constantly crying and could not sleep. This was shortly after mid-March 2016. The first relevant entry in the GP records is 18 April 2016. She had been "crying all the time". She had not gone to work in the previous week and she assured the doctor that there was nothing else causing her distress. She was given a sick certificate.

7. Two days later the GP notes describe her as being very emotional and she spoke of her problems at work. On 22 April she told the doctor that she had been crying although she was not suicidal. She wanted to see another doctor sooner than the appointment that had been fixed in May.

8. The entry dated 28 April 2016 refers to an acute reaction to stress and Mirtazapine was prescribed (15mg). "Difficulty at work being accused of trouble making. Accusing her of saying things she did not, v tearful not slept in a week". By 12 May there is a diagnosis of depressive disorder and this was repeated on 31 May. There is, therefore, medical evidence to support what the Claimant states in her witness statement. Although we do not cite the entries, there is also evidence here of the depressive episode back in March 2012.

9. We note also that the Claimant between paragraphs 9-13 of her statement explains how she felt, and how her depression impacted on her, in the months leading up to her dismissal in October 2016. It is of some interest that she says that when she was dismissed she felt low about it and disappointed but does not believe that she suffered at that stage a depressive relapse. She also said she has been in good mental health since then. In other words, this is not a statement that contained within it any overt signs of exaggeration.

10. Some points of detail that arose in cross examination may be referred to later in our conclusions. One of these was the allegation that was put to her again, that on 18 April 2016 she was well enough to attend a demonstration at SOAS. She referred to the evidence she had given earlier. We find that her attendance at this event does not connote that she was necessarily well and even less could we conclude that she was fit to work. On the contrary, she appears by 18 April 2016 to have been ill and there is no reason in our view why she should not attend a demonstration in the street if she was physically well enough to do so. It does not necessarily have any bearing on her mental state.

11. In light of the various agreements that have been reached, there is no need to set out extensively what the Claimant says about her subsequent employment. In brief, she only started working again on 2 January 2018 when she obtained paid employment with her union, UVW. She also decided to improve her English after October 2016 and her studies took her up to July 2017. She also volunteered to do work with UVW.

12. The essence of the Claimant's injured feelings claim is her statement at paragraph 24 that this was "the most terrible period of my life in psychological terms and in economic terms. I have never felt so humiliated, discriminated against, harassed or insulted". She talks about the trauma she experienced. Our assessment of the Claimant's evidence is that she is an accurate narrator of events and has spoken honestly about her feelings.

Submissions

13. We are grateful to the representatives for their written submissions that number five in total. We will refer to some of these in detail below.

Conclusions

14. It may be convenient before setting out our reasoning to summarise the conclusions we have come to in addition to the agreed amount that we have referred to above as heads of compensation. For injury to feelings we consider

that the award to the Claimant should be £17,000. In addition, we consider that the uplift for failure to comply with the ACAS guidelines is appropriate at 25% and this would add a further sum of £4,250 so that the total for injury to feelings is £21,250. This sum takes in to account psychiatric damage or the evidence of psychiatric injury and is therefore a global sum.

Injury to Feelings/Personal Injury

15. As Mummery LJ said in Vento [2002] EWCA Civ 1871: "Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The Courts and Tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury … striking the right balance between awarding too much and too little is obviously not easy".

16. As to the three bands, the top band should normally be reserved for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. The middle band should be used for serious cases, which do not merit an award in the highest band. Our assessment is that this is where this case falls.

17. We note the important citation from HM Prison Service v Johnson [1997] ICR 275 as follows:

> "(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
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> (2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham MR, be seen as the way to 'untaxed riches'.
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> (3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.
>
> (4) In exercising their discretion in assessing a sum, the Tribunal should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
>
> (5) Finally, the Tribunal should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made".

18. We would also add that while it is appropriate in some cases to assess separate figures for injury to feelings and psychiatric injury, it is important that the Tribunal is alert to the problem of over-compensation or double recovery. Frequently medical evidence can be relied upon for an award under either head. In this case, we have chosen to safeguard against double recovery by running injury to feelings and psychiatric damage together, so as to produce a global sum that can be placed under the head of injury to feelings, but which fully takes in to account the psychiatric damage that has been caused.

19. Mr Godfrey's first submission that we deal with is that no psychiatric damage has been established by the Claimant at all, separately from injured feelings. We disagree and consider that his analysis of the medical records is legalistic. The Claimant may not have gone immediately in March 2016 to the doctor, but in the experience of this Tribunal that is not especially unusual. When she did go she was clearly suffering from depressive symptoms and she described having done so for some while beforehand. However they are characterised, those symptoms on the available evidence are, in the view of the Tribunal clearly linked to the detriments that she had suffered. The further argument that she sought medical input because she was reluctant to attend a hearing with the Respondent is one that we reject. Nor, as we have commented, do we consider that her attendance at meetings or demonstrations, that had some connection with her experiences, nullifies or contradicts her claim.

20. In the alternative, Mr Godfrey argues that liability should be apportioned in accordance with the principles to be found in the cases of Thaine v LSE [2010] ICR 1422 (EAT) and Konczak [2014] IRLR 676 (EAT) and [2017] EWCA Civ 1188 (Court of Appeal). In our view there is no case whatsoever for apportioning liability as Mr Godfrey submits. There is no basis in the evidence for saying that there is another cause of the psychiatric symptoms reported in 2016. Nor is there any basis for saying that these symptoms would have occurred either at that time, or shortly thereafter in any event because of any preexisting vulnerability. On the contrary, we find the Claimant to be relatively strong willed and to have dealt robustly with the previous mental ill health that she described. There was first the incident of poor mental health following the work place experiences in 2011. She only took medication for seven months. And we are satisfied that she was symptom-free within two years at most. Then there was a relatively short period of medication at the beginning of 2016 for one month only.

21. We consider that Mr Godfrey is on stronger ground when he submits that the total period of time spent on anti-depressants was from 28 April 2016 to about 14 July 2016 which is about ten weeks. We tend to agree with him that personal injury should be limited to this period, together with the period before 28 April during which we are satisfied the Claimant was experiencing symptoms for which she did not seek medication from the doctor. As we have indicated, we consider that the correct approach that fits the facts of this case is not to make any separate award for personal injury, but to take the medical evidence into account as evidence supporting the claim for injury to feelings. For completeness, we do not find any of Mr Godfrey's other arguments in relation to

injury to feelings or the reason why the Claimant went to the doctor to be persuasive.

22. Turning to the Vento bands, Mr Godfrey contends for the upper end of the lower band and Mr O'Keefe for the lower part of the upper band. We consider that both arguments are inaccurate. The middle band should be used for serious cases and we have no doubt that this is a serious case. To describe it as "less serious" would be a misdescription, in our view. Therefore, we are satisfied that the middle band is appropriate and we also consider that there is no good reason to place the case in the top band.

23. Our best assessment is that this falls in the middle of the middle band and we approach the figures in this way. The middle band back in 2002 was between £5,000 and £15,000. In accordance with the Presidential guidelines and in cases presented before 11 September 2017 (ie this case) we uprate the boundaries of the band by applying the formula set out in the Guidance. When divided by 178.5 and multiplied by the correct figure for 1 November 2017 which is 275.8; and when that product is multiplied by 1.1, the uprated value of the band is £8,498 to £25,494. Accordingly, we award £17,000 for injury to feelings, to include the notional psychiatric damage. Were we assessing matters separately we would have ensured that the overall result for both heads was £17,000.

24. The next question that arises is whether or not there can be an uplift for breach of the code. Mr Godfrey concedes that s.207A applies to s.152 and s.146 ie this case. His submission is that that is beside the point because "the real question is whether a relevant ACAS code of practice applies and has not been complied with. This cannot be a code in relation to dismissal; it must be a code related to the detriments, therefore the uplift is not engaged. He then develops the point by saying that if wrongs are being compensated (here they are detriments caused by trade union activities) and procedure norms set out in an ACAS code of practice applying to disciplinary proceedings are not complied with, that is nothing to do with the detriments. He also submits that non-pecuniary losses such as personal injury and injury to feelings cannot be sought in relation to the dismissal, and he prays this in aid of his overall argument.

25. Mr O'Keefe draws attention to the words of 207A(2). If the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies and there has been failure to comply with that code in relation to that matter, and the failure was unreasonable, we may if it is just and equitable in all the circumstances increase "any award" up to 25%. The jurisdiction under s.152 and s.146 are jurisdictions to which s.207A applies. The claims do concern matters to which a relevant code of practice relates, namely disciplinary proceedings. He argues that the basis of the disciplinary problem and the opportunity to the Claimant to put her case were not afforded before decisions were made. Further, there was no impartial appeal. These are breaches of the code.

26. Where the procedure adopted by the Respondent was, as here, entirely unjustifiable and in breach of the code, any award can be enhanced. It can apply to non-pecuniary loss. This is clear from the facts of De Souza v Vinci [2017]

EWCA Civ 879 where the matter was remitted to the Tribunal to consider the uplift under s.207A and where the Court of Appeal Judgment expressly states that the figures that fell to be uplifted was for psychiatric damage and injury to feelings.

27. This does not answer the question as to what uplift it is just and equitable to award. We consider that we are obliged to look at the overall value of the amount awarded for injury to feelings, which is the only element of the award which the Claimant considers can be uplifted in the particular circumstances. Our conclusion is that 25% would be a reasonable figure. This is the maximum allowable and it reflects the cynical way in which the Respondent went about manipulating its own procedures so as to disadvantage the Claimant.

28. For clarity, although the sum of £500 has been conceded for loss of statutory rights this is a figure which has to be taken with net wage loss as part of the compensatory award. It therefore falls under the cap as set out above.

29. The Claimant has in effect abandoned any claim for interest for reasons set out in the last two paragraphs of the second written submission and we therefore make no award.

30. To summarise, the Claimant is awarded: a basic award of **£5,853**; the capped compensatory award is **£10,530**; injury to feelings and personal injury is awarded in the sum of **£21,250** after the 25% uplift; financial loss to the date of dismissal is **£2,230**.

31. This is an award to which the recruitment regulations apply. The total of all amounts awarded, the total monetary award, is **£39,863**. The prescribed element (taking into account the scaling down of the compensatory award so that it is reduced by 13.37%) is £9,122.14. The period of the prescribed element is 14 October 2016 to 2 January 2018. The excess of the monetary award over the prescribed element is £30,740.86.

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Employment Judge Pearl

Dated: 15 March 2019

Judgment and Reasons sent to the parties on:

18 March 2019

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For the Tribunal Office