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EMPLOYMENT TRIBUNALS

Claimant: Ms E Osei
Respondent: Basildon and Thurrock University Hospital NHS Trust
Heard at: East London Hearing Centre
On: 23 November 2018
Before: Employment Judge Brown
Members: Mr T Burrows
Ms H Edwards

Representation

Claimant: In person
Respondent: Ms K Fudakovski, Counsel

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

The Respondent shall pay the Claimant a total of £6,693.04 in compensation for injury to feelings; comprised of £6,000 for injury feelings plus £693.04 interest at 8% from the date of the victimisation to the date of the hearing.

REASONS

Relevant Law

1 The Tribunal is guided by principles set out in *Prison Service v Johnson* [1997] IRLR 162 in relation to assessing injury to feeling awards. Awards for injury to feelings are

compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong.

2 Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power. It is helpful to consider the band into which the injury falls, see *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. In *Vento*, the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race or sex. The middle band should be used for serious cases which do not merit an award in the highest band the lower band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

3 *Joint Presidential Guidance on Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury following Da Vinci Construction (UK) Limited* [2017] EWCA Civ 879 was issued on 4 September 2017. It reviewed the effect of recent case law and inflation on the Vento Bands and said that, when awards are made by Tribunals, the Vento bands should have the appropriate inflation index applied to them, followed by a 10% uplift on account of *Simmons v Castle* [2012] EWCA Civ 1039 *Simmons v Castle* [2012] EWCA Civ 1288.

4 The Joint Presidential Guidance concluded as follows, "...as at 4 September 2017, that produces a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,000 (cases that did 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. ... the Employment Tribunal retains its discretion as to which band applies and where in the band the appropriate award should fall."

5 In *Kemeh v Ministry of Defence* [2014] EWCA Civ 91, [2014] IRLR 377, the Court of Appeal approved the EAT's reduction of an Employment Tribunal's award for injury to feelings of £12,000 in respect of a one-off racial slur. The Tribunal had seen the case as one falling within the middle band of Vento, but the EAT reduced the award to £6,000. The Court of Appeal considered that a one-off slur such as this, with no lasting employment consequences, would normally only qualify for the lower Vento band.

6 Aggravated damages are available for an act of discrimination (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275, EAT). The award must still be compensatory and not punitive in nature, *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, EAT. In that case, a whistleblowing case, compensation was assessed on the same basis as awards in discrimination cases. The EAT said that the circumstances attracting an award of aggravated damages fall into three categories: (a) The manner in which the wrong was committed. The basic concept here is 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 – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. 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. 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. There is thus in practice a considerable overlap with (a). (c) Subsequent conduct. This can cover cases including where: the defendant conducted his case at trial in an unnecessarily offensive manner; the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously; the employer fails to apologise; and the circumstances are such as those in *Bungay v Saini*.

7 In *HM Land Registry v McGlue* UKEAT/0435/11, [2013] EqLR 701, EAT. The EAT said that aggravated damages 'have a proper place and role to fill', but that a tribunal should also 'be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”’. Such damages are not intended to be punitive in nature

Relevant Facts

8 The Tribunal found that Mr Shah was responsible for a single act of victimisation. This was an isolated event. The Tribunal did not find that the Claimant had succeeded in her other claims. The Tribunal found, at paragraphs 191 – 193 of its liability judgment, that Mr Shah did say that the Claimant should look at herself in the mirror, giving an example of a nurse who had behaved unreasonably to illustrate his point.

9 The Tribunal found that Mr Shah had said that, if the Claimant was looking for anyone to be dismissed, that would not happen. The Tribunal found that he did all this to put pressure on the Claimant to pursue an informal, rather than a formal, complaint.

10 In the circumstances that Mr Shah was a very senior employee and the Claimant was a very junior one, it was reasonable for the Claimant to feel - and the Tribunal found that the Claimant did feel - intimidated by Mr Shah's behaviour. The Tribunal found that a reasonable employee would feel intimidated by Mr Shah and worried about her grievance and how she would be seen by senior employees thereafter. Mr Shah's words suggested that the outcome of the Claimant's grievance had been predetermined and that the Claimant would not receive a fair and impartial outcome.

11 The Claimant told the Tribunal at this hearing that she had had sleepless nights as a result of Mr Shah's conduct. She told the Tribunal that she was worried about her grievance because she knew that Mr Shah was on Dr Sharma's side and that he was trying to intimidate her. She told the Tribunal that part of the reason that she went off sick in July and August 2017 was because of Mr Shah.

12 The Tribunal accepted the Claimant's evidence that she did have sleepless nights and was intimidated by Mr Shah and that she was worried about how her grievance would

be treated in the future, because she knew that Mr Shah was on Dr Sharma's side.

Discussion and Decision

13 Mr Shah's conduct was a one-off act of victimisation. The Claimant failed in her other claims. The Tribunal considered that this single act of victimisation should fall in the lower band of *Vento*.

14 The Claimant also told the Tribunal that she believed that her blood pressure had been raised by Mr Shah's conduct and she pointed to a letter from a medical practitioner at page 186 of the Remedy bundle. The Tribunal noted, however, that while the medical practitioner recorded that the Claimant's blood pressure had increased in September 2017, the medical practitioner specifically said, "Whether or not related to work stress, her blood pressure was up today". The Tribunal found that the medical evidence did not say that the Claimant's blood pressure had risen because of Mr Shah's treatment. The Tribunal concluded that was not appropriate to make an award for personal injury.

15 The Tribunal found that the fact that Mr Shah was a senior employee and the Claimant a junior one did aggravate the circumstances of the case, but that a separate award for aggravated damages was not appropriate. The Tribunal did not conclude that Mr Shah's conduct was exceptionally upsetting, nor that it was high handed malicious, insulting or oppressive. Furthermore, while it was an act of victimisation, the Tribunal did not find that the conduct was evidently based on prejudice, or animosity, or was spiteful, or vindictive, or intended to wound. Further, aggravated damages are not appropriate for the way in which the Respondent had conducted the case.

16 Mr Shah's conduct was not sufficiently serious to warrant a separate award of aggravated damages, but it did inform the Tribunal's decision about where, in the lower band of *Vento*, the appropriate award lay.

17 The Tribunal considered that it lay towards the upper end of the lower band of *Vento*, as updated at the time: £800 - £8,400. The Tribunal noted, however, that the Claimant did pursue her grievance and therefore she was not intimidated to the extent that she was dissuaded from pursuing her grievance against Dr Sharma.

18 The Tribunal did not find that, when the Claimant resigned, she did so because of Mr Shah's victimisation of her. The Tribunal did not consider that an award at the very top or the bottom band *Vento* was appropriate.

19 Taking all matters into consideration, it decided that the appropriate award for injury to feelings was £6,000. It also awarded interest from the date of the act of victimisation, 16 June 2017, until the date of the Tribunal remedy hearing; that was a total of 527 days. Interest at 8% per year for 527/365 days is £693.04 interest.

20 The Tribunal did not make an ACAS uplift. The Claimant did not pursue a grievance in relation to Mr Shah's conduct, but only in relation to Dr Sharma's and therefore the grievance was not relevant to the remedy award.

Case Numbers: 3201328/2017 & 3200136/3018

Employment Judge Brown

12 December 2018