Case Numbers: 2205197/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR M REUBY**
MR K ROSE

BETWEEN:

Ms R Campbell

Claimant

AND

Permateelisa (UK) Ltd (1)
Mr R Verolini (2)

Respondents

ON: **16 May 2019**

Appearances:
For the Claimant: **Mr S Martins, consultant**
For the Respondents: **Mr K Potter, solicitor**

JUDGMENT ON RECONSIDERATION AND REMEDY

The unanimous Judgment of the Tribunal is that:

1. On Reconsideration the decision that the claimant succeeded on a claim for victimisation in relation to the termination of her engagement with the first respondent is revoked because it was not properly in issue for this tribunal.
2. On Remedy the respondents shall pay to the claimant the sum of **£13,257.20.**

REASONS

1. This decision on Reconsideration and Remedy was delivered orally on 16 May 2019. The respondents requested written reasons.

2. By a judgment delivered orally on 5 April 2019 and with reasons sent to the parties at the request of the respondents on 9 April 2019, the claims for harassment related to sex and victimisation succeeded.

The issues for this hearing

3. The issues for reconsideration are set out below under the heading "The respondent's application for reconsideration".

4. For the remedy hearing the issue for the tribunal was the award for injury to feelings. There was no claim for financial loss.

Witnesses and documents

5. The tribunal heard from the claimant and her mother Ms Shariffa Lewis.

6. On the evening before this hearing the claimant served a new 25-page witness statement on the respondents. No leave had been given for a supplemental witness statement. The claimant sought only injury to feelings and she dealt with this for the last hearing in her original witness statement at paragraphs 39-43.

7. We recalled that at the end of the liability hearing the claimant asked for leave to introduce a statement from her partner in addition to the existing statement from her mother. We refused leave for this. There was no application either at the end of the liability hearing on 5 April 2019 or subsequently for leave to admit a further remedy statement from the claimant. We considered it unfair to the respondents to expect them to deal with this with no notice. The respondents had prepared for this hearing on the basis of the witness statements already before them. We therefore refused leave for the new witness statement.

8. There was a small remedy bundle of documents of around 30 pages and we had our original bundles from the liability hearing.

9. We had written submission from both parties to which they spoke, they are not replicated here. All submissions and any authorities referred to were fully considered, whether or not referred to below.

The respondent's application for Reconsideration

10. On 18 April 2019 the respondent made a lengthy application for Reconsideration of the tribunal's judgment. Much of what was said in that application related to the respondents' disputes with this tribunal's findings of fact and their view that such findings of fact could not be supported or should not have been made.

11. We confirmed with the respondents at the outset the three points upon which their application was based. These were confirmed as:

    a. That termination of the claimant's engagement was not an issue for determination by the tribunal. It was not part of the issues for our consideration.
    b. That the tribunal failed to make a finding of fact that the claimant was not

given work for the best part of the day on 20 March 2018.

c. We were asked to reconsider our findings of fact at paragraphs 79-85 because the respondents submitted that we approached this wrongly on the basis that Ms Hare was being asked to consider an allegation of harassment instead of marginalisation and ostracisation. The respondent submits that the findings of fact we made were contrary to the evidence before us.

Issue a: Was termination of the claimant's engagement and issue for our determination as an act of victimisation

12. The respondents rightly reminded the tribunal that the termination of the claimant's engagement as an act of direct discrimination was struck out by Employment Judge Glennie on 11 December 2018.

13. The respondents' case was that the termination of the engagement did not go on to form part of the issues under any other heading and that it had been "abandoned". We had seen no withdrawal and Mr Martins for the claimant told the tribunal that it was not withdrawn. Mr Martins took us to the ET1 in the bundle at page 7 which showed that it was relied upon as victimisation and harassment.

14. As is the tribunal's normal practice, we took time at the outset of the hearing on 3 April 2019 to clarify the issues with the parties. All three members of this tribunal had notes showing that the termination of the engagement on 4 April 2018 was an issue. The notes showed that Mr Potter for the respondents mentioned that the claimant did not deal with this in her statement. Mr Potter's point made in this Reconsideration application was that it did not appear in the versions of the claimant's Scott Schedules in the bundle.

15. The respondents say that had they known this was in issue they would have addressed it.

16. Upon considering the list of issues at paragraph 5f of our decision, we noted that we clarified with the parties that this was only for consideration as an act of harassment and not direct discrimination. We did not identify the termination of the engagement in paragraph 6 as an act of victimisation. We accept that we made a finding that the termination was an act of victimisation.

17. We agree with the respondent that based on the authority they rely upon ***Chapman v Simon*** (below) that they are entitled to know the case they have to answer. Paragraph 21 of Ms Hare's statement dealt with the termination of the engagement but stated that she understood that this was no longer in issue following the decision of Judge Glennie. Whilst the decision of Judge Glennie only went to direct discrimination under section 13, we accept that there may have been misunderstanding as to whether the claim for termination survived as an act of victimisation.

18. We also accept from what Ms Hare said in paragraph 21 of her statement

and from the respondents' submissions on Reconsideration, that they may have wished to call further evidence had they understood this to be in issue.

19. The determining factor for us was that on 11 December 2018 Judge Glennie ordered that the claimant provide an updated Scott Schedule by 4 January 2019 in the light of his judgment. The difficulty for the claimant is that the termination of the engagement was not included in the Schedules we had in the trial bundle at pages 37-38 and 41-43.

20. For these reasons we agree with the respondent that the termination of the engagement was not in issue for the tribunal and therefore the claimant does not succeed on that issue. That part of the tribunal's judgment is revoked.

Issue b: That the tribunal failed to make a finding of fact that the claimant was not given work for the best part of the day on 20 March 2018.

21. The issue before us was set out in paragraph 6d of our decision, that on 20 March 2018 the claimant had no tasks allocated to her and emailed the second respondent about it. The claimant submitted that we dealt with this at paragraphs 75-77 of our decision.

22. We made a finding on it at paragraph 76 by saying: "*….but we find that he had been away since the previous Thursday, she had emailed asking for work and he did not allocate anything to her until 2:30pm by email after being in the office for four hours. We find that he was ignoring her because he was upset and unhappy about her complaint made to him on 14 March 2018".* Our original decision is confirmed.

Issue c: On paragraphs 79-85 of our decision the respondents say we approached this wrongly on the basis that Ms Hare was being asked to consider an allegation of harassment, instead of marginalisation and ostracisation and that the findings we made were contrary to the evidence.

23. We find that this is a request that we vary our findings of fact. The tribunal understands that an unsuccessful party is likely to dispute findings made by the tribunal and consider them wrong, but this of itself is not enough for us to vary or revoke our decision, which was fully considered.

24. By way of example, the respondents dispute the tribunal's finding as to the timing of the decision to terminate the claimant's engagement with the first respondent and they rely on a transcript of a call between the claimant and Mr Alderton of her agency Workstream (bundle page 134). This does not lead us to change our finding about a decision made by the respondents. We saw this as an attempt by the respondents to reargue the case when a finding of fact did not go in their favour.

25. This issue is now academic as the tribunal has accepted that the termination of the claimant's engagement was not in issue before us and we have revoked that part of our decision and the claimant will recover no award on this issue.

26. For completeness we clarify for the parties that we did not misunderstand what Ms Hare was dealing with. We found that Ms Hare's evidence was that the way she intended to deal with the claimant's harassment allegations was to call her to a meeting in the hope that she would "open up" about the harassment allegations. Based on her own evidence we find that Ms Hare was aware it was a harassment allegation and we accept the claimant's submission that whether it was described as ostracism or marginalisation is part of the same thing.

The law on reconsideration

27. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

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29. In ***Chapman v Simon 1994 IRLR 124 (CA),*** dealing with the predecessor legislation, the Race Relations Act 1976, Lord Justice Peter Gibson said at paragraph 42: "*the complainant is entitled to complain to the Tribunal that a person has committed an unlawful act of discrimination, but it is the act of which complaint is made and no other that the Tribunal must consider and rule upon*. *If it finds that the complaint is well founded, the remedies which it can give the complainant under [the predecessor legislation] are specifically directed to the act to which the complaint relates. If the act of which complaint is made is found to be not proven, it is not for the Tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act."*

Submissions on Remedy

30. We summarise some of the submissions made below. It is not intended as a full account of all of the submissions which were both oral and in writing and which were fully considered.

31. It was submitted for the respondents that the 23 February 2018 comment on the claimant's WhatsApp message (liability bundle page 95) should be regarded as less serious because it has a smiley emoji next to it. The respondents submitted that it would be more serious if it had no such emoji next to it.

32. It was also put to us that the messages on 22 January 2018 (liability bundle page 55) that the claimant was happy to continue working with the second

respondent so appeared not to be upset. In relation to the comments on 16 February 2018, it was submitted that we should have regard to our finding that part of this included a joke about the claimant making the second respondent a cup of coffee when he was in Italy and she was in London and other light-hearted comments.

33. The respondents' submission was that we should take account of the fact that the message chat continued. The message chat on the claimant's side was all about her finish time and the point to which she would get paid. It was no more than this on her side. It did not show us that she was not upset by his messages which we have found were attempting to move their relationship on to a more personal one (liability decision paragraph 39). We found that he was putting pressure on her to go out with him socially for dinner.

34. It was submitted that as it a series of light-hearted message exchanges and we should consider our findings in the light of this.

35. We were reminded that we found that the second respondent apologised at their meeting on 14 March 2018.

36. It was submitted that the claimant was composed both in the recording of 14 March 2018 meeting and at the liability hearing and that the matter appeared to have been resolved on 14 March 2018. The respondent submitted that it was unusual for a claimant to be so complimentary about the person who had harassed her and he took this from paragraph 15 of her witness statement. In that paragraph she described him as a "*good person to work with*" and was always there to help. She accepted that there was office banter which was "*innocent*". It was submitted that the claimant had "*forgiven him*".

37. So far as 20 March 2018 victimisation was concerned it was submitted it was a short period in which he ignored her on that day, it was submitted that the claimant has not given any clear evidence on how this upset her. It was also submitted that the claimant was not aware of the conclusions Ms Hare formed on the harassment allegations as she was told that it would be addressed on her return to work.

38. It was submitted that we should take account of the fact that the claimant continued to work and did not take up counselling.

39. The respondents considered an award of £3,000 to £3,500 would be appropriate for a matter which took place over a short period of time and which appeared to have been resolved between the parties.

40. On the issue of aggravated damages the respondents submitted it did not come near the test for this.

41. From the claimant it was submitted that this should be a mid-Vento award. The claimant said it was a chain of events starting on 23 January 2018 and

his conduct was repeated by asking again what he would get in return.

42. The claimant submitted that because the comment was repeated, this justified an award of aggravated damages. What mattered was how this affected the claimant. On 22 March 2018 her medical records showed she was finding it difficult to get off to sleep at night. She was given medication for this.

43. The claimant submitted that we should award an uplift for failing to properly investigate the claimant's grievance. The claimant accepted in submissions that we did not make such a finding.

44. It was submitted for the claimant that we should award £20,000.

The relevant law on remedy

45. There are three bands for award for injury to feelings following ***Vento Chief Constable of West Yorkshire Police 2003 IRLR 102 CA*** and uprated in ***Da'Bell v NSPCC 2010 IRLR 19 EAT*.**

46. There was an addendum to the Presidential Guidance with a recent uprating of the Vento bands for claims presented on or after 6 April 2018, which applies to this case as the claim was presented on 4 July 2018. The lower band is **£900 to £8,800;** the middle band **£8,800 to £26,300** and the top band **£26,300 to £44,000**. The claimant says this is a middle band case and the respondent says it is a lower band case.

47. Aggravated damages are compensatory and not punitive. They can be awarded where the act is done in an exceptionally upsetting way – ***Commissioner of the Police of the Metropolis v Shaw EAT 0125/11*** when the conduct is "*high-handed, malicious, insulting or oppressive*". It can be awarded where the discriminatory conduct is based on prejudice or animosity or which is spiteful or vindictive. It can be awarded if the conduct at the trial is unnecessarily oppressive, failing to apologise or failing to treat the complaint with the requisite seriousness.

48. We are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the ***Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803*** (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated.

Conclusions

<u>On Reconsideration</u>

49. The decision that the claimant succeeded on a claim for victimisation in relation to the termination of her engagement with the first respondent is revoked because it was not properly in issue for this tribunal. The claimant

is not entitled to a remedy on that issue. All other matters in our original decision are confirmed.

On Remedy

50. Our findings on remedy are as follows. We are in no doubt that the second respondent's conduct towards the claimant was very upsetting. She told us in evidence at the liability hearing that she found his messages "*creepy*". She felt uncomfortable when he touched her leg. We find based on her evidence as to her past experience of being on the receiving end of serious sexual misconduct that she was particularly upset and in relation to remedy the respondents must take her as they find her. The leg touching incident was of an intimate nature by a senior man in a position of authority towards a junior female agency worker.

51. The claimant consulted her GP in March 2018 directly around the time of the matters in question. We find from the medical records that she was finding it difficult to sleep and was given medication for this and she was experiencing headaches and anxiety. It is not disputed that she was offered counselling.

52. The claimant attended two counselling sessions but cancelled others. She had found work and we accepted her evidence that she did not want to tell her new employer that she needed time off for counselling.

53. We had in the remedy bundle a letter from a Consultant Psychiatrist Dr Pasternak in the Crisis Assessment and Treatment Team at Hertfordshire Partnership NHS Trust dated 21 February 2019. This showed that the claimant had taken an overdose of a mixture of medications and was referred by A&E in early 2019. A link was made with sexual harassment at work in the past psychiatric history section of the letter.

54. There was an earlier letter of 17 February 2019 from the Rapid Assessment Interface and Discharge team referring to ongoing anxiety and low mood accompanied by suicidal thoughts in the context of "*the upcoming court case*".

55. We find that any continuation by the claimant with the messaging with the second respondent was about her pay and not because she was indifferent to his harassing comments.

56. We considered the submission that at paragraph 15 of her witness statement the claimant described the second respondent as a "*good person to work with*" who was always there to help. Nevertheless we have made findings of fact that he sexually harassed her and this had a substantial impact upon her.

57. We accept the claimant's evidence as to the effect of the respondents' unlawful discrimination upon her feelings. She required medical treatment, she became anxious, upset, had difficult sleeping and based on the

consultant psychiatrists report of 19 February 2019 that she has become mildly depressed. Because of her past history, she is more likely to be affected by sexual misconduct and to be less resilient. The respondents must take her as they find her in that respect. The claimant has also been prescribed anti-depressants. The effect upon her feelings was corroborated by her mother's evidence.

58. We agree with the claimant that this is a mid-band Vento case. The relevant band is from £8,800 to £26,300. We consider this to be in the low to middle part of that band and we award the sum of £12,000. We noted that in her original schedule of loss, this was the sum sought by the claimant. At this hearing, the figure sought increased in oral submissions to £20,000 but we were not told the reason why the figure had increased by £8,000 from the original Schedule of Loss in the bundle at page 39-40.

59. We find that sexual harassment of this nature and victimisation are serious matters and it was highly upsetting to this claimant and should not be undermined by a low award. It should be properly compensatory to this claimant.

60. We find that aggravated damages are not justified in this case. The second respondent apologised in the meeting of 14 March 2018. The test of "*high-handed, malicious, insulting or oppressive*" conduct was not met in these circumstances.

61. As to the uplift claimed, the claimant's representative accepts that we made no finding as to a failure to properly investigate the claimant's grievance. There was no formal grievance. The claimant was an agency worker and the point was not argued before us as to whether she had the benefit of the first respondent's grievance procedure. We do not visit that issue at remedy stage and we award no uplift.

The award

62. We award the sum of £12,000. It was agreed that the period for which interest should be awarded was from 23 January 2018 to 19 May 2019. The rate interest is 8%.

63. For the period from 23 January 2018 to 22 January 2019 is one year at 8% is £960. The period from 23 January 2019 to 16 May 2019 was agreed as 113 days, which gives a sum of £297.20. The total award of interest is £1,257.20. The total award to the claimant is £13,257.20.

<u>Costs</u>

64. The claimant's representative had hand-written the word "costs" on the submissions for this remedy hearing. We did not have the grounds for any costs application and there was insufficient time to explore this during this hearing after dealing with reconsideration and remedy. The sum claimed was £1,000.

65. If the claimant wishes to pursue a costs application this must be done in writing, in the knowledge that costs are not the norm in the employment tribunal and on notice to the respondents with the grounds so that the respondents can answer it. It may be that a costs hearing will be necessary and the parties will need to consider the costs of this.

66. We asked the parties if they would consent to the costs application being dealt with on paper and by Judge alone in the interests of saving costs. The respondents would prefer to see the grounds before deciding whether to consent to this.

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Employment Judge Elliott
Date: 16 May 2019

Judgment sent to the parties and entered in the Register on: 21 May 2019.
_____ for the Tribunals