Appeal No. UKEAT/0275/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 April 2019

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR E KOMENG — APPELLANT

CREATIVE SUPPORT LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR E N KOMENG (The Appellant in Person)
For the Respondent	MR BERNARD WATSON (Legal Consultant) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

RACE DISCRIMINATION – Injury to feelings

RACE DISCRIMINATION – Other losses

There was no error of law in the ET's Decision to place the award of injury to feelings compensation in the lower of the Vento bands. The ET had correctly directed itself to consider the effect of the unlawful racially discriminatory treatment on the Claimant, not the gravity of the acts of the Respondent in accordance with **Cadogan Hotel Partners Ltd v Ozog** [2014] UKEAT0001/14 and **Essa v Laing** [2004] IRLR 313. There is no hard and fast rule that the lower band is only appropriate for one off acts.

But the ET had erred in failing to calculate interest on the compensation awarded and it had failed to apply the **Simmons v Castle** [2012] EWCA Civ 1039 uplift. On the parties agreeing the applicable figures derived from the findings of the ET Judgment and consenting to the EAT substituting the ET's compensation figure with the correct amount inclusive of applicable interest and uplift, in accordance with s35(1)(a) **Employment Tribunals Act 1996**, the award was quashed and substituted with the correct total figure of £12,757.

HER HONOUR JUDGE STACEY

1. This is an appeal against the Judgment of the Employment Tribunal ("ET") sitting in Birmingham on 6 and 9 February 2018 before Employment Judge Butler and members, Mrs D P Hill and Mrs N Gill, in a direct race discrimination complaint, which was sent to the parties on 10 April 2018, and the reconsideration Judgment which was heard on 21 September 2018 before the same panel which was sent to the parties on 12 October 2018.

2. Two narrow points were raised in the appeal. Firstly, the ET's failure to award interest on the compensation it awarded to the Claimant and secondly, the placing of the award in the lower, rather than the middle, of the three bands in the **Vento** guidelines.

3. A third matter arose during the course of today's hearing which was that the Tribunal had failed to make the required award of a 10% uplift in accordance with **Simmons v Castle** [2012] EWCA Civ 1039 which Mr Watson for the Respondent agreed was an error. He further agreed and consented to this Tribunal correcting the Tribunal's oversight, notwithstanding that it had not previously been raised by the Claimant.

4. The brief facts of the matter are these; the Claimant, who describes himself as black African, has continuous service with the Respondent from 13 June 2011 as a Waking Night Care Worker. He initially worked at Glebelands Residential Unit and moved to at the Wickets project for vulnerable adults with mental and physical health needs working 30 hours per week, from November 2013. He remains in employment today.

5. The Employment Tribunal noted that the Claimant was keen to learn and develop himself professionally and asked if he could be enrolled on a Level 3 NVQ course at his supervision sessions, which commenced after he started employment. The Tribunal found that the Respondent's failure to take any steps to enrol him on such a course, in contrast to the way that named comparators of a different race had been treated, constituted unlawful direct race discrimination. The Tribunal also found that it was unlawful direct race discrimination for the Claimant to have had to work every weekend. He had asked if he could have some weekends off and if other employees could share the burden of weekend working, but his request had been refused.

6. The Tribunal described the effect of the treatment on the Claimant and their approach to the assessment of the injury to his feelings as follows:

> **"37. In assessing compensation for injury to feelings, we have considered the Vento bands as amended and updated. We also bear in mind the decision in Cadogan Hotel Partners Limited v Ozog [2014] UKEAT/0001/14 where the EAT held that the focus should be on the actual injury suffered by the Claimant and not the gravity of the acts of the Respondent.**
>
> **38. In this case, the Claimant continued to work for the Respondent for several years in the face of its refusal to help him to access the Level 3 course. It refused to allow him to have some weekends off. This must have caused significant upset and distress when he had to work with colleagues with less continuous service who had the Level 3 qualification and did not work every weekend. That he persevered with his aspirations to obtain better qualifications for several years whilst receiving no support indicates his distress was not insignificant. In our view, the appropriate level of compensation should be near the top of the lower band and we assess this as £8,400. There was no claim for interest."**

7. On a reconsideration application the Tribunal confirmed its original Decision. The Claimant had sought, amongst other things, to revisit the Tribunal's Decision not to award him interest on his losses. The Tribunal cited the applicable regulations – Employment Tribunals (**Interest on Awards in Discrimination Cases Regulation 1996**), but held in paragraphs 10 and 11 of its Reconsideration Judgment as follows:

> **"10. The Claimant made no application for interest. That is of course not fatal to attain interest and it is one the Tribunal has a discretion as to whether to award it [sic]. At the Reconsideration Hearing the Claimant introduced new evidence which attempted to show that the first act of discrimination was the Respondent's failure to invite him to apply for further courses within three months of his appointment. The document he relies on is at page 45 of the Reconsideration**

> **Bundle and this was not drawn to our attention in the Substantive Hearing. It is a version dated March 2010 whereas the Claimant commenced employment in 2011.**
>
> **11. In the Substantive Hearing the Respondent was unable to provide written evidence of the Claimant's various supervisions for the first few years of his employment. We have no specific dates upon which those supervisions took place. Accordingly, it was our view, which we accept was perhaps not adequately explained in the Judgment that it would be impossible to accurately calculate an award of interest, given that no specific dates were available. This remains the Tribunal's view and we do not consider it necessary or in the interests of justice to reconsider it."**

8. The Claimant also asked the Tribunal to reconsider its assessment of compensation, arguing that it was too low. At paragraph 16 the Tribunal found as follows:

> **"16. Although he did not argue this in the Reconsideration Hearing, in his written application the Claimant requested that we increase the award for injury to feelings. The basis of our award was explained in the Judgment. For the avoidance of doubt, it took account of the fact that the Claimant was discriminated against by having to work every weekend. This award equated to approximately two thirds of his annual net salary. Had it been established before us, or even argued, that the Claimant would have been promoted had he been allowed to obtain the Level 3 Qualification, this would have pushed the award for injury to feelings into the middle Vento band. There was however no evidence before us that the Claimant would have been promoted with the Level 3 qualification, although we did hear evidence that he did not require the Level 3 Qualification for the work he was currently carrying out. We considered that the Claimant would have been very disappointed by being overlooked for the opportunity to obtain the Level 3 requirement over a considerable period of time. However, there was no evidence that he suffered further disappointment in failing to secure promotion."**

The appeal was allowed to proceed to a Full Hearing on a sift before Laing J and, following amendment by the Claimant, on both the interest point and the assessment of injury to feelings in the lower **Vento** band, were both permitted to be raised.

9. The law relating to the award of interest in discrimination claims starts with the Judgment of the European Court of Justice as it then was in **Marshall v Southampton and South West Hampshire Area Health Authority (No 2)** [1993] IRLR 445, which found that the lack of provision of interest on awards of compensation at that time, breached the Claimant's right to an effective remedy for the discrimination she had experienced. It held at paragraph 31 that:

> **"…full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment."**

10. Effect was given to that ruling in the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996** (SI 1006/2803) which provide that:

> **"2(1) Where, at any time after the commencement of these Regulations, an [employment] tribunal makes an award under the relevant legislation—**
>
> **(a) it may, subject to the following provisions of these Regulations, include interest on the sums awarded; and**
>
> **(b) it shall consider whether to do so, without the need for any application by a party in the proceedings."**
>
> **…**
>
> **6(1) Subject to the following paragraphs of this regulation –**
>
> **(a) In the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of the calculation;**
>
> **(b) In the case of all other sums of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the day of calculation.**
>
> **…**
>
> **(3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may –**
>
> **(a) calculate interest for such different periods in respect of various sums in the award, or**
>
> **(b) calculate interest for such different periods in respect of various sums in the award,**
>
> **As it considers appropriate in the circumstances, having regard to the provisions of these Regulations.**

Tribunals therefore shall consider making an award of interest, whether or not the parties have raised it, and, unless serious injustice would be caused, have a prescribed method of calculation of the amount of interest to be awarded.

11. The inevitable conclusion from a plain reading of the Regulations is that it is simply not correct for the Tribunal to have recorded, as it did in its original judgment, that no application for interest was made in its original judgment implicitly in support of its decision not to award

interest. The Regulations specifically require the Tribunal to consider interest whether or not an application has been made by a party.

12. Nor does the retrospective explanation provided in the Reconsideration Judgment withstand scrutiny. In asserting that "it would be impossible to accurately calculate an award of interest" it ignores its findings of fact in the Original Judgment at paragraph 10 that the Claimant had consistently raised the issue of being able to pursue the Level 3 Course with his line managers throughout his employment and that as per paragraph 19(ii) the documentary evidence showed that the earliest supervision is recorded as taking place on 21 November 2013. The Respondent's inability to provide written evidence of more of the supervision sessions is immaterial when the Tribunal has explained that it has accepted the Claimant's evidence and its truthfulness. In any event it is the task of the Tribunal to do the best it can on the information before it, especially where, as here, it is the Respondent record-keeping that has caused a potential difficulty. If a precise starting point could not be identified from the evidence then, as Mrs Justice Laing J stated in giving her opinion on the sift, the Tribunal could have considered making an award to run from the date when a reasonable time had elapsed from the earliest of the reviews at which the Tribunal found the Appellant had asked for access to the Level 3 course.

13. In relation to the start date from when the Claimant was treated less favourably because of race in being required to work every weekend, the Tribunal, it found that he had requested not to have to work every weekend on 11 February 2014, which would have assisted the Tribunal in assessing a start date. If the Tribunal had identified the relevant issues on remedy at the start of the hearing, it would have been alive to the fact-finding exercise required to enable it to make accurate calculations. In any event, the Regulations provide for some flexibility in the calculation of interest where the prescribed method would cause one or other party serious injustice as set

A out in regulation 6(3) above. I therefore find that the Tribunal erred in law in failing to award interest to the Claimant in this case.

B 14. Turning to the injury to feelings award, the starting point is the guidelines of **Vento** at paragraph 65 which identified the three bands as follows:

> **"Employment Tribunals and those who practice in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings as distinct from compensation for psychiatric or similar personal injury.**
>
> C **I). The top band should normally be between [currently £25,700 and £42,900][1].**
>
> **II). The middle band of between [currently £8,600 - £25,700][2] should be used for serious cases which do not merit an award in the highest band.**
>
> **III). Awards of between [currently £900-£8,600] [3]are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence and Tribunals are reminded not to award amounts so low as to not be a proper recognition of injury to feelings."**

D

15. The right of this Tribunal to interfere with a Tribunal Decision in relation to assessment of compensation was helpfully summarised by HHJ Eady QC at paragraph 32 of the **Cadogan**

E **Hotel Partners Limited v Ozog** as follows:

> **"The decision as to the level of an award for injury to feelings is generally for an Employment Tribunal. It will have heard the evidence of the impact of the discriminatory act upon the Claimant and will be best placed to determine the appropriate level of compensation for such injury. It is rare that it will be appropriate for this court to intervene in terms of the level of such an award, but it would be right to do if satisfied that the Tribunal had wrongly, on the facts of the case, categorised the injury within one of the *Vento* bands. So, if the EAT was satisfied that the Employment Tribunal had wrongly categorised a less serious case as falling within the higher category (or vice versa), the manifestly too high (or too low) award for injury to feelings may be overturned."**

F

16. **Essa v Lang** [2004] IRLR 313 is a reminder of the importance of assessing the impact

G of the discrimination on the individual concerned. We are all different and the impact of discrimination is an individual experience and unlawful discriminatory behaviour may affect

H

[1] ET Presidential Guidance 2019
[2] As above
[3] As above

different individuals differently, which will be for the Tribunal to assess and analyse from the evidence before it.

17. I accept that the Tribunal have not gone into very great detail in their findings in relation to the impact the discrimination had upon Mr Komeng, but they have correctly identified the principles. They have reminded themselves of the relevant case law and that:

> **"the focus should be on the actual injury suffered by the Claimant and not the gravity of the acts of the Respondent." (para 37)**

18. Having seen today the schedule of loss and the way the Claimant put his case, it would seem that he had not given evidence to suggest that he had been as adversely affected as many others might have been and that he had displayed a remarkable resilience in face of the discriminatory treatment that he had suffered over a considerable period of time.

19. It is possible that other Tribunals might have reached a different decision, but these are matters of judgment for a Tribunal to make on the facts before it and there is no error of law apparent in the Tribunal's judgment. It is not the case that only one-off incidents fall within the lower band: the **Vento** bands are not so prescriptive. The Tribunal had the opportunity to hear from Mr Komeng and assess the level of his hurt and the injury to his feelings from the behaviour of the Respondent. The Tribunal acknowledged the seriousness of the matter by putting it at the highest end of the lower band.

20. The appeal is therefore allowed in part. I quash the refusal of the Tribunal to calculate interest on the award, but uphold the Judgment of the Tribunal to award injury to feelings of £8,400 at the then top of the lower **Vento** band.

21. As for disposal, the parties both agreed that I should substitute the Tribunal's Judgment with the correct interest figure and the **Simmons v Castle** uplift. The figures were agreed in discussion at £840 uplift and £3,517 by way of interest.

22. I therefore substitute the compensation figure and Order that the Respondent do pay to the Claimant the sum of £12,757 in respect of his injury to feelings including uplift and interest.