Case Number: 2207611/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS D OLULODE**
MS L JONES

BETWEEN:

Ms S Khan

Claimant

AND

SN Estates Property Services Limited (1)
Mr M Miah (2)

Respondents

ON: **2 September 2019**

Appearances:
For the Claimant: **In person**
For the Respondents: **Mr A Otchie, counsel**

JUDGMENT ON RECONSIDERATION ON REMEDY

The judgment on Reconsideration on Remedy is that the award to the claimant is varied and the respondent shall pay to the claimant the sum of **£81,833.91.**

REASONS

1. This decision on Reconsideration was given orally on 2 September 2019. The claimant requested written reasons.

2. The judgment on remedy was delivered orally on 15 February 2019. Written reasons were sent to the parties on 18 February 2019 at the claimant's request.

3. Neither respondent was present. They were represented by counsel. Counsel had only been instructed on Friday afternoon 30 August 2019, the last working day before the hearing. He had not been provided with a copy

of the Remedy judgment or the medical report of Dr Stein and he asked for 20 minutes further reading time. We granted half an hour and we provided Mr Otchie with a copy of the medical report. He said that during the hearing he had been sent by his solicitors a copy of the Remedy Judgment. The claimant made the pertinent point that the Remedy Judgment is available on line in any event.

The respondents' written application for reconsideration

4. On 1 March 2019 the respondents made an application for reconsideration under rule 71. The grounds were as follows:

5. Failure to apply the correct test of causation: the respondents said that the evidence before the tribunal namely the report of Dr Stein could not support the conclusion that the claimant's depression and PTSD was caused by the respondents. They said the burden was on the claimant to prove her depression was caused by the discriminatory actions of the respondents rather than any non-discriminatory actions.

6. They said that the evidence of Dr Stein failed to discharge the burden of proof in that he said "*it is totally impossible or beyond the level of psychiatric knowledge to determine which type of remark was the most damaging or how much of the emotional damage was exclusively due to the issue on which the claimant succeeded and how much is due to other items which the court did not uphold as amounting to sexual harassment or racial abuse…"*

7. The respondents submitted that the correct test is derived from the Court of Session's decision in ***Dignity Funerals v Bruce 2005 IRLR189*** which they accepted was not put before the tribunal at the remedy hearing. They say the tests was the loss caused by the discrimination to any material extent. They say that the matter should be reconsidered by the tribunal to apply the correct test and to obtain further medical evidence.

8. Failure to apportion the causes of the psychiatric illness: the respondents said that the tribunal considered the issue of apportionment but failed to take into account the Court of Appeal's decision in ***Allen v British Rail Engineering Ltd 2001 ICR 942*** per Schiemann LJ. Again this was an authority that was not put before the tribunal at the remedy hearing despite the respondent being represented by counsel.

9. The respondents said that all losses should have been reduced by at least 30% given the probable attribution by other non-liable causative factors.

10. Vento: The respondents said that the award should not have been in the top band because it occurred over a relatively short period of time, four months, and was significantly shorter than the period in ***Simpson v BAA*** – referred to at the Remedy hearing.

11. They say that the appropriate award should have been the middle band in the sum of £15,000.

12. Psychiatric injury: they say that this fell within low to moderate range of severity and the award of £34,000 was "manifestly excessive".

13. Aggravated damages: they said that the award of £10,000 of aggravated damages was outside the recognised range for such awards. They relied on ***Alexander v Home Office 1988 ICR 685***, ***Prison Service v Johnson 1997 ICR 275***, ***McConnell v Police Authority for Northern Ireland 1997 IRLR 625***, ***ICTS (UK) Ltd v Tchoula 2000 IRLR 643*** and ***HM Prison Service v Salmon 2001 IRLR 425.***

14. The respondents also gave notice that they would appeal the full merits judgment out of time. This is a matter for the EAT and not this tribunal.

15. They also said that the tribunal failed to consider whether or not the second respondent should be jointly and severally liable for the acts of discrimination complained of.

The issues for this hearing

16. The issue for this Reconsideration hearing was whether to vary or revoke any of the above awards referred to in the respondent's application.

Documents

17. We had written submissions from both parties and they both made oral submissions. The claimant submitted documents from Companies House regarding the respondents. These documents went to the issue of her difficulties with enforcement.

The original decision on remedy

18. We found that this was a lower end top band case. We put it at the lower end of the top band because of the four-month period compared with other cases. We made an award for injury to feelings in the sum **£27,000.**

19. We made an award for psychiatric injury of **£34,000** plus the cost of treatment at **£5,000**

20. We found that this was a case justifying an award of aggravated damages which we awarded at **£10,000**.

21. We awarded financial loss, not including pension and interest at **£44,241.59.** We awarded pension loss at **£661.05.**

22. We made a reduction of 15% based on our finding that there were some non-discriminatory reasons causing upset to the claimant but they were minimal.

23. We gave credit for receipt of Universal Credit of **£8,581.14.**

24. Based on the figures in question we found that there was no need to do any grossing up.

25. The total of award to the claimant was **£100,877.49.** This made up as to injury to feelings £35,749.36 (injury to feelings + aggravated damages + interest less 15% reduction); psychiatric injury less 15% reduction (no interest as that award was not an award for injury to feelings and the *Interest Regulations* did not apply to it) £28,900; financial loss including interest plus pension, less 15% equalled £31,228.13 and cost of psychiatric treatment £5,000.

The respondents' oral submissions

26. The respondents did not deal orally with the causation issue and the written argument that we had failed to apply the correct test of causation (paragraphs 2-6 of the written application).

27. On the failure to apportion the causes of the psychiatric illness, we raised a point with counsel on paragraph 8 of the written application which referred to paragraph 71 of our Remedy decision in which we said that we had an expert medical report that attributed causation by 100%. The written application said that no such conclusion was expressed by the expert. We drew to Mr Otchie's attention paragraph 37.8 of Dr Stein's report in which he said: "*With regard to the depression there is no previous history of depression or family history of depression and I attribute that wholly (100%) to her experiences at SN Estates."* When we drew this to counsel's attention he said he no longer pursed the point.

28. Also on the issue of failure to apportion the causes of the psychiatric illness, counsel made no oral submission on the case of ***Allen v British Rail*** (above and below).

29. The written submission that our conclusion that financial losses should be reduced by 15% was untenable and not in accordance with established case law was not argued orally. We were not told the case law relied upon.

30. Vento band: The respondents' submission was that our award was too high because of the short period of time spent in employment and the focus of the claimant's injury. It was submitted that she should not recover for insults against others. We were taken to paragraphs 92 and 93 of our Remedy decision which makes reference to insults to the claimant's family and her fiance.

31. In relation to aggravated damages, the respondents submitted that the second respondent had been convicted of an offence which was racially aggravated and it would be double jeopardy to award for this.

32. We asked the respondents what oral submission was made in relation to the award for psychiatric injury in the light of 37.6 of Dr Stein's report. Mr Otchie submitted that we should have awarded at the bottom of the moderately severe range in the Judicial College Guidelines at Chapter 4 section B at £20,290.

33. No oral submission was made on the reduction of 15%, contended for in the written application as 30% and on ***Konczak.***

The claimant's oral submissions

34. The claimant submitted that insults to her family and fiancé hurt her as well. It offended and upset her to have her family and fiancé insulted in that way.

35. The claimant submitted that all matters had been dealt with and considered at the Remedy hearing in detail and she considered that our findings should stand.

36. To the extent that the claimant made submissions in relation to enforcement we explained that this was not a matter for this tribunal or the hearing on Reconsideration.

The law

37. **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.

38. The respondents relied upon the decision of the Court of Session in ***Dignity Funerals v Bruce 2005 IRLR 189****,* a case concerning a compensatory award and not a discrimination case and based on section 123(1) of the ERA 1996. At paragraph 11 of the judgment in that case the Court of Session said: *"A compensatory award depends on proof of loss* (*Leonard v Strathclyde Buses Ltd [1998] IRLR 693). Therefore any application of the just and equitable test (supra) in a case such as this must be underpinned by findings in fact establishing that the loss was caused to a material extent by the dismissal."*

39. On apportionment for multiple causes, the respondents relied upon the decision of the Court of Appeal in ***Allen v British Rail Engineering Ltd 2001 ICR 942.*** This was a case in which the claimants worked for the defendant using percussive tools and sustained a condition known as "vibratory white finger". The first claimant ceased working for the defendant but continued in different employment using the same tools and suffered further injury. It was a question of apportioning compensation to the different periods of employment with different employers.

40. 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.

41. At the same time tribunals must be aware of the risk of double recovery and consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant. Aggravated damages should usually be formulated as a subheading of injury to feelings. On the current case law the sum of £20,000 is considered to be the top of the bracket for aggravated damages.

42. In ***Shaw*** at paragraph 29 having reviewed the current authorities Underhill P as he then was said "*The large majority of awards were in the range £5,000–£7,500".* Shaw was decided in 2011. In ***Shaw*** itself the award was reduced from £20,000 to £7,500.

Conclusions

43. The respondent did not pursue its contention that Dr Stein formed no conclusion that there was 100% causation, in the light of paragraph 37.8 of his report.

44. On this issue of the causes of psychiatric injury the respondents relied upon ***Allen v British Rail.*** As set out above this was a case in which the claimants worked for the defendant using percussive tools and sustained a condition known as "vibratory white finger". The first claimant ceased working for the defendant but continued in different employment using the same tools and suffered further injury. It was a question of apportioning compensation to the different periods of employment with different employers. The respondent at this hearing did not expand on what was relied upon in this respect. This is not such a case, we are not called upon to attribute between different employers and in any event, Dr Stein made clear that there was no pre-existing condition (his report paragraphs 37.6 and 37.8). We make no variation in relation to this.

45. We find that the *Vento* award was appropriate and we do not vary this. We agreed with the claimant's submission that insults to her family and fiancé were hurtful to her as well. We find that this is the case for most people, it is hurtful to have those closest to you offended in a discriminatory fashion. The claimant reported to Dr Stein (paragraph 3.2) that she was offended by the respondent's comments and racist comments directed to her fiancé. The offensive comments were in any event directed to her. We see no reason to vary the *Vento* award. We considered the period of employment.

46. The respondents took us to the very recently reported authority of ***Komeng v Creative Support Ltd EAT/0275/18.*** This confirmed we must direct

ourselves to the effect of the unlawful discrimination on the claimant not the gravity of the acts of the respondent. The respondents submitted that there should be no award, because the focus should be on the effect on the claimant. We did focus on the effect upon the claimant, which was significant, as set out, for example, in the jointly instructed medical report.

47. On aggravated damages, the oral submission was that was that to make an award in respect of a matter on which the second respondent had received a criminal conviction was double jeopardy. We disagreed. The purpose of our award to the claimant was compensatory under the Equality Act. A criminal conviction does not deal with this in terms of injury to feelings. It does not compensate the claimant under the Equality Act. We find no such double jeopardy.

48. The respondents also submitted that the award for aggravated damages was "*just about sweets*" – our paragraph 93. We find that it not just about that issue, it was one of the many we referred to in that paragraph including the offensive racial remarks about her fiancé.

49. We deal with the oral submission that we should have awarded at the bottom of the moderately severe range in the Judicial College Guidelines at Chapter 4 section B at £20,290.

50. The categories in the Judicial College Guidelines are: Severe, Moderately Severe, Moderate and Less Severe. At the Remedy hearing the respondent submitted that we should interpret Dr Stein's report as saying the condition was Moderate. The claimant submitted that we should regard it as Moderately Severe. We considered that there was some ambiguity in Dr Stein's report where he said in relation to the classification "*in my opinion she falls into the classification of "moderate severity" and within the moderate severity range I would place her roughly in the middle of this range"*. We considered that because there was some ambiguity in Dr Stein's wording, we accept the respondents' submission and we vary our award to the sum specifically contended for, namely £20,290.

51. We therefore reduce £20,290 by 15% in accordance with our original Remedy findings, which produces a further reduction of £3,043.50 the sum of £17,246.50. The reduction is £16,753.50 (ie £34,000 - £17,246.50 = £16,73.30).

52. We also need to reduce the interest we awarded on that amount for 624 days at 8%. The daily rate on £16,753.50 at 8% (£1,340.28 annually) divided by 365 is £3.67 x 624 = £2,290.08. Therefore we reduce the award by £16,753.50 and £2,290.08. The total reduction is therefore **£19,043.58.**

53. The final award to the claimant is varied on reconsideration from £100,877.49 to **£81,833.91.**

54. We made reference in our remedy decision to the decision of the Court of Appeal in ***London Borough of Hackney v Sivanandan 2013 IRLR 408***

and the usual award, but we accept that we did not say in terms – and now do so - that following ***Sivanandan,*** we find that the respondents are jointly and severally liable.

_____

Employment Judge Elliott
Date: 2 September 2019

Judgment sent to the parties and entered in the Register on: 3 September 2019.
_____ for the Tribunals