EMPLOYMENT TRIBUNALS

Claimant:		Respondent:
Miss D Richards	v	Longacre Garden Centre Ltd

REMEDY HEARING

Heard at:	Reading	On: 1 July 2019
Before:	Employment Judge George Members: Mrs AE Brown and Ms HT Edwards	

Appearances
For the Claimant: In person
For the Respondent: Mr T Gillie of Counsel

JUDGMENT

(1) The Respondent is to pay to the Claimant compensation for unfair dismissal in the sum of £5,213.73 calculated as follows:

Basic Award	£674.46	
Compensatory Award		
Loss of Statutory Rights to long notice	£500.00	
Loss of earnings	£2,996.52	
Total:	£4,170.98	
To which we apply a 25% uplift for an unreasonable failure to follow the ACAS Code of Conduct in relation to grievances	£1,042.75	
TOTAL		£5,213.73

(2) The Respondent shall pay to the Claimant as compensation for wrongful dismissal the sum of £562.05

That is calculated as 2 weeks' gross pay of £449.64 (to be paid net after deductions for tax and national insurance) to which is to be applied an uplift of 25% for an unreasonable failure to follow the ACAS Code of Conduct

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(3) The Respondent is to pay to the Claimant compensation for sexual harassment of £5,000.00 to which is to be applied a 25% uplift for unreasonable failure to follow the ACAS Code of Conduct making £6,250.00

(4) The total award is therefore: £12,025.78

REASONS

1. In this remedy hearing, we had the benefit of a bundle of documents that had been prepared by the parties and ran to 180 pages. We also had a witness statement that had been prepared by the claimant and which she had signed on 28 March. She confirmed the truth of that statement in evidence and was cross-examined upon it.

2. The tribunal had decided that a number of the complaints originally brought by the claimant should succeed at the previous liability hearing and we do not repeat the findings that we made on that occasion but have our findings in mind when considering the compensation which it is just and equitable that the respondent should pay the acts that were foundto be unlawful. The claim had prepared a schedule of loss and the respondent a counter-schedule of loss. Having read those, the tribunal suggested that it appeared that the following issues were actively in dispute between the parties and this was agreed by the claimant and the respondent at the start of the hearing:

    2.1 What would the claimant have earned with the respondent between the end of her notice period, had she been paid for a notice period, from 21 July 2017 to the date of the hearing: 1 July 2019?

2.2 What did the claimant earn in the two different employments that she has had since leaving employment with the respondent over the same period?

2.3 Should the claimant be compensated for future loss of earnings?

2.4 Did the claimant duffer any loss in respect of employer's pension contributions?

2.5 Should there be a separate award for aggravated damages and if so how much?

2.6 What compensation for injury to feelings was it just and equitable to award?

2.7 What level of uplift there should be pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. That section gives the tribunal the discretion to apply an uplift to compensation where there has been a culpable failure to follow the ACAS Code of Conduct and there have been findings in favour of the claimant on a number of possible jurisdictions that are set out in Schedule A2 to the 1992 Act. All three of the jurisdictions in respect of which the claimant brought successful claims are listed in Schedule A2.

The Law

3. We have applied the applicable law when calculating the relevant elements of compensation but set out in detail only the legal principles to be applied when assessing compensation for injury to feelings under s.124(2)(b) of the Equality Act 2010 and aggravated damages since those were the areas which were most hotly disputed between the parties. We remind ourselves of the case HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the antidiscrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

4. We also remind ourselves of the cases of MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved.

5. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

6. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is all the more so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. The present claim was presented on 21 September 2017, just after the 2017 Presidential Guidance took effect, and therefore the applicable bands are:

   6.1 Between £25,200 and £42,000 for the most serious cases;
   6.2 Between £8,400 and £25,200 for serious cases not meriting an award in the highest band;
   6.3 Between £800 and £8,400 for less serious cases, such as an isolated or one-off act or discrimination.

7. The claimant argues that this is a suitable case for an award of aggravated damages. They are, in principle, available for an act of discrimination: Armitage, Marsden and HM Prison Service, Johnson [1997] I.R.L.R. 162 EAT. They are compensatory rather than punitive and are available when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant. In Metropolitan Police Commissioner v Shaw [2012] I.C.R. 291 EAT, Underhill P, as he then was, cautioned against the risk that a separate award of aggravated damages can lead a tribunal, unconsciously to punish a respondent rather than compensate the victim. There is also a risk of duplication of compensation and the tribunal must be satisfied that there is a causal connection between the exceptional or contumelious conduct and the aggravation of the injury. In many cases it will be appropriate rather to include in compensation for injury to feelings an element which reflects the way in which the victim was treated.

Financial Loss

8. We deal first with the compensation for the financial loss and it was accepted by the respondent that, following our findings of unfair and wrongful dismissal, they would need to pay to the claimant a basic award calculated as set out in s.119 of the Employment Rights Act 1996 (hereafter the ERA) and two weeks' notice as compensation for wrongful dismissal, that being the statutory and contractual right of notice that the claimant had at the applicable time.

9. The basic award is to be calculated on the basis of "a week's pay" which itself is calculated as set out in Chapter II of Part XIV of the ERA. We have considered the claimant's pay slips and think that it is only right that the claimant should be properly compensated for the losses that she suffered by the calculating the gross weekly pay over a 12-week period (as provided for in s.221(3) of the ERA). That is demonstrated by three pay slips that are at pages 131 to 133 of the bundle. Averaging the gross pay in those pay slips out over the 12-week period, her weekly gross pay was £224.82. Her nett weekly pay averages at £215.10. This is slightly higher than the figure that was claimed by the claimant in her schedule of loss but it seems to us that this is because the claimant had done her calculations on the assumption that she was paid on a monthly basis where it is clear from the pay slips that she was paid on a four-weekly basis. Her figures therefore contain an arithmetical error. We have therefore calculated the basic award using that adjusted figure. Given her age during her employment, the claimant is entitled to three times her weekly wage and that comes to £674.46. The parties are agreed that £500.00 is an appropriate award for loss of statutory rights.

10. We turn then to the loss of earnings claim. The claimant has through her hard work and also some good luck been able to obtain new employment and was able to do so fairly shortly after resigning. She started work with Blue Diamond UK Ltd in another garden centre on about 12 August 2017 and continued to work for them until 11 March 2018 as we see from the P45 at page 154 of the bundle. She had applied for other employment with other garden centres before obtaining that one. She stopped working for Blue Diamond and moved to Hillier Nurseries Ltd who are her current employer on 19 March 2018 because she was having to travel a long distance to go to Blue Diamond. We are quite satisfied that she has taken reasonable steps to obtain alternative employment and that she should be compensated for the period of unemployment from 6 July when she handed her notice in.

11. Two weeks' notice that she should be compensated for under the wrongful dismissal claim takes us to 21 July 2017. Wrongful dismissal should be calculated on the basis of the gross sum and paid by the respondent through the payroll. Two weeks at £224.82 = £449.64.

12. So far as the compensatory award for unfair dismissal is concerned, we accept that the appropriate way of evaluating this is to calculate what the

claimant would have earned had she remained in employment with the respondent and to deduct from that what she has in fact earned in her alternative employment. The claimant makes the point that she is working greater hours in order to obtain the same money. However, the losses that she has suffered should be calculated taking into account what she has actually earned in alternative employment.

13. However, this figure should be calculated using the net loss of wages: that is the way that the compensatory award is calculated under the ERA and it leads to the precise sum that should be paid by the respondent.

14. We have therefore added up the net sums paid to the claimant as disclosed by all of the pay slips that she has produced and that means that the nett pay that she received from alternative employment during the period 21 July 2017 to today's date is £18,728.58. That covers a period of 101 weeks, her loss of earnings should be calculated at the nett weekly amount for her earnings with the respondent, namely £215.10; so she would have earned, had she remained in the respondent's employment during that period, £21,725.10. Taking the earnings from alternative employment from that, her compensatory award for past loss of earnings is £2,996.52.

15. She has claimed pension loss. However, looking at the figures that have been paid into her pension in her recent employment we are satisfied that there has been no pension loss over the period. The pension contributions in her new employment seem to be greater than in her old employment.

16. So far as future loss of earnings is concerned, under the unfair dismissal claim, the claimant left the respondent's employment two years ago. We have taken into account that the claimant has been able to find work relatively soon after her resignation and the jurisdiction that we have to award compensation as is just and equitable.

17. The claimant has to a large extent mitigated her losses and we do not think that it is equitable to award a future loss beyond today's date.

18. We will deal with the reasons for the percentage uplift under the Trade Union and Labour Relations (Consolidation) Act 1992 further on in these reasons.

Compensation for sexual harassment

19. So far as injury to feelings is concerned, we make the following findings about the extent to which the act that we have found to be unlawful has caused injury to feelings on the part of the claimant. We remind ourselves that it is the injury to feelings suffered as a result of that one act as detailed in paragraph 15 of the liability judgment that we need to consider.

20. It was a meeting that lasted an hour and 40 minutes. It involved unwelcome physical contact and a number of elements of the conversation that made the claimant as she explained at the time feel extremely uncomfortable. Two people described her shortly afterwards as being very distressed as a result of the incident. She clearly felt confined in the room or constrained to remain in the room and uncomfortable because of the behaviour of the HR manager. We remind ourselves of the description of those two colleagues that are set out in paragraph 25 and 26 of the liability judgment and also what she said to her colleague by text that evening which gives an indication of the anger and distress that she felt on the day in question.

21. The claimant has provided an account of the way that this had affected her set out in her witness statement. Among other things, she says that she blamed herself for having been in the position of being on her own in the HR office to which she had been invited by the HR manager in order to discuss concerns about timekeeping. She said that she visited her doctor and undertook two free sessions of talking therapy. She said that she is unable to sleep and describes it in what I have labelled paragraph 3.2 as those these are feelings that she is still suffering, low moods, she says she has lost all confidence. She also in paragraph 3.5 of her statement attributes the breakdown of a relationship with her then boyfriend to this particular incident and also alleges that she has suffered specific anxiety in closed places with strangers.

22. We need to consider whether we accept this account as reliable and whether we accept that the effects that the claimant describes there, flow from the act that we have found to be unlawful rather than from something else.

23. It is argued on behalf of the respondent that we should reject her evidence and they point to a lack of documents that we might reasonably expect to have been provided with. They also argue that some of these matters were not mentioned before and remind us of our findings that the claimant has in the past exaggerated some of her claims, or the description she makes in some of her claims.

24. The claimant has not produced any medical evidence of anxiety in the form of GP's records, even to show a visit. She has explained that there would not be detail in the records because she had asked for it to be concealed and not put in the records but she has not produced any medical evidence even to show that a visit took place close in time to the incident relied on. She proffered a leaflet that she said she had been given on talking therapy but that of itself would not give any evidence that it had been provided at any particular point in time to show that any particular mental problem flowed from this particular act. We can believe that the claimant, based on her general demeanour, has suffered anxiety in general terms but she has not produced evidence from which we can conclude that she suffered medically diagnosed anxiety or any other mental health condition as a

result of the incident of 3 September. A GP's note has been produced for other purposes and therefore it has clearly been in her ability to obtain any documents that might have existed.

25. The claimant claims that she suffered a relationship breakdown as I said as a direct result of the actions of the HR manager. We remind ourselves of our earlier finding that the claimant tends to embellish her account and to use heightened language. Prior to the September 2016 incident, she had complained about actions of the employees at Perfect Choice and her descriptions of that earlier incident in her evidence at the liability hearing causes us to believe that Mr Murray's account of her as someone who tended to complain is pretty close to the mark. We accept that the claimant was upset, distressed, probably very upset and distressed and offended by the HR manager's conduct. Nothing we find in these reasons should be taken as suggesting that she was not upset and reasonably so. The HR manager's conduct was disgraceful. However, we consider it implausible that it can be blamed for the break-up in her relationship, although the relationship may have been caused some temporary pressures close to the time of the incident as a result of it. There could be many reasons for an estrangement, and we do not accept that the breakup was caused by this one unlawful act.

26. In terms of an ongoing sense of hurt and injustice, on the one hand, the respondent must take the claimant as they find her and if the claimant is an individual who tends to feel things more deeply, then the respondent must accept that. We remember the evidence that she gave at the liability hearing which made it vividly clear that the claimant felt let down by her employers for not having investigated the sexual harassment allegation but further and more than that, her perception, her genuinely held perception, is that they covered it up and they misled her into believing there was an investigation ongoing when there was not.

27. We did not find, we do not find, that there was an act of cover up but there was a culpable failure to carry out the investigation and that is why the claimant feels the way that she does. On the other hand, she is upset and is still upset by other things that she complains about the respondent having done which are nothing to do with the sexual harassment complaint that was proven.

28. We have to make findings of the length of time the claimant was upset and hurt that flows from the 3 September 2016 incident. She came to the tribunal and alleged a large number of allegations of sex discrimination and sex-related harassment which we rejected and she also claimed that there was a breach of the implied term of mutual trust and confidence that had led to her resignation. We accepted that but the failure to investigate the sex-related harassment complaint was only part of much more wideranging failings on the part of the respondent – see paragraph 104

and the paragraphs referred to in that. All of these were matters that upset the claimant.

29. At this hearing, she must be compensated for injury to feelings that directly flow from the unlawful act, not injury to feelings which have an entirely separate cause. For example, the claimant was particularly upset by Mr Long's rebuke to her for drinking water on the shop floor on 15 May 2017 – that was a completely separate matter.

30. It is clear to us that she is still upset about Mr Long's perceived behaviour in early July that was the proximate trigger for resignation and looking at paragraph 72 of the liability judgment, we found against her on that incident.

31. Our conclusion is that by the time of resignation, the continued feelings of upset that she had at that time were as much caused by the other acts, which were not unlawful under the Equality Act 2010, as they were by the actions of the HR manager. We find that the injury to feelings caused by the act of sexual harassment were very much reduced some nine months after the incident and had been superseded by other matters about which the claimant complained.

32. She argues that there should be an award of aggravated damages and we have taken into account the authorities; in particular, the explanation of Mr Justice Underhill as he then was in the Metropolitan Police Commissioner v Shaw. We note that we have to be careful to avoid double recovery and that it is relatively unusual to have a separate award of aggravated damages.

33. Our finding is that a failure to investigate the complaint exacerbated the claimant's sense of hurt and injustice because nothing was done despite manifest opportunities to do so which might have reduced her hurt. The claimant argues that there were the following aggravating features.

    33.1 She points to the witness statement that was put forward as being that of Mr Gimlett. We cannot make a finding on the allegation which is essentially of witness intimidation or of falsifying the second witness statement. There is insufficient evidence to do so and we cleared the respondent of the allegation of victimisation in relation to Mr Gimlett. Similarly, with regard to the allegation that there had been interference with the other witness, Mr Barlow.

    33.2 Although we took into account the demeanour of Mr Long before us when rejecting or accepting his evidence, in our experience, there was nothing about the behaviour of the respondent's witnesses that was out of the ordinary for witnesses at an employment tribunal who are engaged in contentious litigation where of its very nature, people

are not going to agree with the evidence that is being said against them.

33.3 The claimant did question the presence of Mr Long's son at the time and was reassured that at a public hearing, there was no reason to exclude him.

34. None of these actions were oppressive or malicious behaviour by the respondent and it is not alleged that it affected the fairness of the hearing, nor was that said at the time. It is entirely normal for witnesses to pass instructions to legal representatives by note during the hearing and we do not recall that there was any behaviour that disrupted the proceedings, nor do the matters set out by the claimant and allegations made against the respondent's representatives seem to us to be out of the ordinary run of conduct of litigation.

35. Although the tribunal found some of the respondent's witnesses to be unreliable in some respects, in general we did not think there was a deliberate attempt to mislead. Far more than this is needed to found a claim of aggravated damages which is reserved for occasions where the behaviour had been high-handed, insulting or oppressive.

36. It seems to us that the right way to assess this is to recognise that the claimant's injury has been exacerbated by the failure to investigate and the way the complaint was handled. Prompt action might have reduced or eliminated her feelings of hurt and upset far sooner.

37. For this one-off act, which has had some continuing consequences to her, we think that an award in the lower band is appropriate. By some 10 months later, at the date of resignation, the claimant was still upset by this incident but at least as much by other matters. She took some steps to avoid the individual concerned shortly after the incident, but she did continue in work and her eventual resignation was triggered by something wholly unrelated.

38. The respondent's representative has provided some allegedly comparable cases which we have read but we do not rely on them because all cases need to be decided on their own facts. Taking all our findings into account, we have concluded that an appropriate award would be £5,000.00.

39. Finally, we reach the argument that there should be an increase in the compensation by reason s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The claimant argued that the failure to investigate her grievance merited the maximum award. It was argued on behalf the respondent that some sort of grievance procedure was followed and that this pointed to an award of less than the maximum. Our finding is that the response to the claimant's complaint was wholly inadequate and indeed dismissive and therefore we can see no reason to reduce the uplift

from the maximum which is set at 25%. This uplift will apply to all elements of compensation.

40. Therefore, in relation to the injury to feelings award with the uplift, it would be £6,250.00. Although we set out our findings sequentially, we had in mind when looking at the reasons for setting the compensation for injury to feelings at the level we did, that we had also found that there was a wholly inadequate grievance procedure which would merit the maximum uplift. We did step back and look at the effect on the award in the round to satisfy ourselves that we did not compensate the claimant twice for the same thing: compensation for injury to feelings compensates the claimant for feelings which were aggravated by the respondent's failures; s.207A of the TULR(C)A effectively penalises the respondent for those failures.

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Employment Judge George

Date: 19 September 2019

Judgment and Reasons
Sent to the parties on: 24/9/2019

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For the Tribunal Office