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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Miss S Hartley	**AND**	**Foreign and Commonwealth Office Services**

HELD AT: **London Central** **ON:** 12 & 13 August 2019

BEFORE: Employment Judge Glennie
Members: Mr R Lucking
Dr V Weerasinghe

Representation:

For Claimant: In person
For Respondent: Ms L Prince, of Counsel

JUDGMENT ON REMISSION AND COSTS APPLICATION

The judgment of the Tribunal is as follows:

1. **(Unanimously) The complaint of harassment in relation to Mr Fleet's comment made on 11 June 2013 is well founded.**

2. **(Unanimously) In respect of (1) above the Respondent shall pay to the Claimant compensation of £3,500 and interest of £1,728.33.**

3. **(Unanimously) The complaint of harassment in relation to Ms Brigden's comment on 11 June 2013 is dismissed.**

4. **(By a majority) The complaint of failure to make reasonable adjustments in respect of written communications is dismissed.**

5. **(Unanimously) The Respondent shall pay to the Claimant costs in the sum of £525.**

6. **The total sum payable by the Respondent to the Claimant is £5,753.33**.

REASONS

1. This hearing was arranged in order to determine the following matters:

(a) The two issues remitted to the Tribunal by the Employment Appeal Tribunal, i.e.

(i) whether two remarks made to the Claimant amounted to harassment of her;

(ii) whether there was a failure to make reasonable adjustments in relation to the provision of written communication training.

(b) The Claimant's application for a costs order in relation to the telephone hearing on 30 August 2016.

Procedural Matters

2. The Claimant, who is now acting in person, arrived at the hearing accompanied by Mr Stroud. She was evidentially distressed. She also made various observations that caused the Tribunal to have some concern as to her mental health and as to her capacity to present her case. Mr Stroud said that he believed that it would be in the Claimant's best interests to proceed with the hearing and that he had come prepared to make the relevant points on her behalf.

3. When the Employment Judge asked the Claimant directly whether the Tribunal could proceed to hear Mr Stroud, she continued to make observations that were not apparently related to the case. The Tribunal rose and discussed whether we should continue with the hearing. We decided that it was in the interests of justice that we should do so. The case has been under way since 2013 and should be brought to a conclusion. There would be no further evidence in the hearing and Mr Stroud was present to speak on the Claimant's behalf. Finally, there was no evidence that the Claimant was likely to be in any better position if we were to postpone the hearing.

4. The Tribunal was encouraged by the Claimant's response to this decision, which was to say, "thank you".

The Remitted Issues

5. The Tribunal referred to its original judgment and reasons for its findings on the evidence, and to the judgment of the Employment Appeal Tribunal for guidance on the law to be applied.

Harassment

6. The Tribunal reminded itself of the provisions of s.26 of the Equality Act 2010 as follows:-

> *(1) A person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or if effective of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) In deciding whether conduct has the effect referred to in sub section (1)(b), each of the following must be taken into account –*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

7. The Employment Appeal Tribunal said the following in paragraph 23 of its judgment about the issue as to whether A's conduct relates to the protected characteristic of B:

> "The question posed by s.26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round – recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic… the Equality Code says (paragraph 7.9):
>
> 7.9 Unwanted conducted "related to" a protected characteristic has a broad meaning such that the conduct does not have to be because of the protected characteristic …"

8. The Employment Appeal Tribunal continued that A's knowledge or perception of B's characteristic is relevant to the question whether A's conduct related to a protected characteristic, but was not in any way conclusive. The Tribunal should not focus on the perception of A, but rather consider in the round whether the remark concerned related to disability.

9. The first comment to be considered was that made by Mr Fleet when he asked the Claimant:

> "Are you not intelligent enough to understand the spread sheet?

10. The Tribunal revisited the question whether this comment was related to the Claimant's disability. At first sight, a comment about the Claimant's intelligence is not obviously related to her disability as it is common ground that individuals with Asperger's may be of significantly higher than average intelligence.

11. However, the context of the Claimant's difficulty with the spreadsheet, as set out in paragraph 53 of the Tribunal's original reasons, was that she had said that she would find numerical PIP scores easier to understand than a narrative. The Tribunal concluded that this was an aspect of the Claimant's difficulty with communication, arising from her disability.

12. The evidence did not suggest that Mr Fleet himself perceived his remark as relating to the Claimant's disability. Looked at in the round however, the Tribunal concluded that querying the Claimant's intelligence in this particular context was related to her disability, in the terms of the test as explained by the Employment Appeal Tribunal.

13. The Tribunal then asked itself whether this comment had the prohibited purpose or effect. We have previously found that Mr Fleet said what he did because he was frustrated with the Claimant's apparent inability to understand the spreadsheet. We found that his remark did not have the purpose of harassing the Claimant.

14. With regards to the effect of the remark, the Tribunal reminded itself again of the terms of s.26(4) of the Equality Act and the need to take into account the perception of the Claimant, the other circumstances of the case, and whether it is reasonable for the conduct to have had the effect of harassing her. The Tribunal accepted that the Claimant's perception was that this remark violated her dignity and/or created a humiliating environment for her. Her reply to the remark that Albert Einstein was also autistic, but no one questioned his intelligence, demonstrated this. The other circumstances of the case included the fact that this was said in the presence of Miss Brigden and that Mr Fleet did not offer any apology. The Tribunal concluded that it was reasonable for this comment to have the effect of harassing the Claimant. It was a rude and hurtful remark, particularly in the light of the Claimant's difficulties with communication.

15. The Tribunal reminded itself of what was said by the Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 340** at paragraph 22 of its judgment, as follows:-

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

And later in the same paragraph

> "… it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"

16. In the present case, the Tribunal found that, although this was a one off incident, it was not trivial and that this was not a case of hypersensitivity. A remark by a manager at work querying an individual's intelligence would be rude to anyone. If Mr Fleet had not appreciated this when he said the words, he must have realised that the Claimant was offended when she responded with her point about Albert Einstein and, as we have already said, there was no apology offered.

17. The Tribunal therefore found that the complaint of harassment was made out with regard to this comment.

18. The second issue concerning harassment also arose from the meeting on 11 June 2013. Ms Brigden referred to the Claimant constantly being rude, and said something to the effect that she believed that this was a facet of her personality rather than her disability. As recorded in paragraph 56 of the Tribunal's original reasons, Ms Brigden sent an email containing an apology the following day but also repeated the point that there was a difference between being tenacious, which she recognised could be related to Asperger's, and being rude and aggressive, which she understood as more related to the Claimant's personality.

19. The Tribunal first asked itself whether this remark was related to the Claimant's disability. Applying the test of looking at it in the round, we concluded that it did relate to the disability, not least because Ms Brigden referred specifically to that.

20. Did the remark have the purpose or effect of harassing the Claimant? The Tribunal was unanimous in finding that it was not said with the purpose of harassing her. There was an issue with the Claimant's colleagues perceiving her to be rude and aggressive in her interactions with them and the Tribunal was satisfied that Ms Brigden's purpose in saying what she did was to try to address this.

21. The members of the Tribunal took different views about how serious the comment, viewed on its own, was as regards its effect on the Claimant. The Employment Judge and Mr Lucking viewed it as different from Mr Fleet's comment, in that it was not rude. Dr Weerasinghe took a more serious view of it, considering that it was hurtful to refer to the Claimant's disability and personality in this way. In any event, the Tribunal found that the Claimant perceived the comment as having a harassing effect.

22. Ultimately, however, the Tribunal was unanimous in finding that once the written apology had been taken into account, it was not reasonable for Ms Brigden's words to have the effect of harassing the Claimant. It is true that this was said in the presence of Mr Fleet and that her words were critical of the

Claimant. The circumstances of the case included the need for Ms Brigden to speak to the Claimant about the way in which her behaviour was perceived by others. One could not have expected the Claimant to be pleased about what Ms Brigden said, but nor could the latter ignore the problem for fear of offending her. Put in the terms that it was, and given the apology (which the Tribunal found was sincere), it was not reasonable for what Ms Brigden said to have the effect of violating the Claimant's dignity or creating a harassing environment for her. The Tribunal also considered that the apology meant that this was a transitory event in the **Richmond Pharmacology** sense.

Reasonable Adjustments

23. In paragraphs 49 to 51 of its judgment the Employment Appeal Tribunal set out the steps that the Tribunal should follow in relation to the issue about written communication training. The first question is whether the Respondent's requirements in respect of written reports placed the Claimant at a disadvantage in comparison with persons who were not disabled. The Tribunal reminded itself that we should answer this question as a whole, and without trying to make a distinction between different aspects of writing.

24. The Tribunal noted that the Claimant's witness statement referred to communication difficulties, including with being understood (paragraph 16.2 of the original reasons). Her employment began in August 2012. The first occasion on which a difficulty over writing (broadly concerning the organisation of the report) came to light was in January 2013 (the Moscow report, paragraph 37.3 of the original reasons). In February 2013 Mr Fleet noted that he was not seeing the improvement in the Claimant's reports that he had hoped for. A similar difficulty to that with the Moscow report arose with the Dubai report in March 2013 (paragraphs 46-48).

25. Taking the matter as a whole, the Tribunal concluded that the organisational problem with the reports was something that arose, at least substantially, from the Claimant's disability. The difficulty was the communication of technical competence in an organised, well written report. We concluded that the Respondent's requirements in respect of written reports placed the Claimant at a disadvantage in comparison with persons who were not disabled.

26. In paragraph 50 of its judgment, the EAT stated that the next question for the Tribunal would be whether, and if yes, when, the Respondent knew or reasonably could be expected to know of the disadvantage. The relevant events from the date of the Dubai report in March 2013 were that the Claimant and Ms Todd of Key 4 Learning met on 19 March and that Ms Todd and Mr Fleet agreed on a further reasonable adjustments plan on 27 March 2013. This plan included sessions with Richard Todd on writing and communication skills.

27. The members of the Tribunal differed over when it was that the Respondent knew or reasonably could be expected to know of the disadvantage. The majority (Mr Lucking and the Employment Judge)

considered that this was on about 27 March 2013, when Mr Fleet and Ms Todd agreed on the further adjustments. Before this, Mr Fleet knew that there was a problem with report writing but did not, in the majority's judgment, know that this was linked to the Claimant's disability, or have the means of knowing that. The original reasonable adjustments plan, made with assistance of an advisor from Prospect (paragraphs 19 and 20 of the original reasons) had not made any reference to writing skills; and it would not be uncommon for a new employee to have difficulty with the required format and organisation of reports, quite apart from any disability.

28. The minority (Dr Weerasinghe) considered that the Respondent could reasonably have been expected to know of the disadvantage when the difficulty with report writing first came to light (i.e. around January 2013) as it would have been reasonable to have enquired at that stage whether the problem was related to the Claimant's disability. Alternatively, he considered that the possible need for assistance with report writing could have been identified at the original meeting when the reasonable adjustments plan was agreed, had the Respondent raised the question of the need to write technical reports.

29. In paragraph 51 of its judgment, the EAT stated that the next question was what steps was it reasonable to have to take and when was it reasonable for the Respondent to have to take them.

30. The Tribunal was unanimous in finding that it was reasonable for the Respondent to have to take the step of organising training on writing skills for the Claimant, as they in fact did. The first session with Richard Todd was on 18 April 2013 (not 17 April as stated in the original reasons) and is recorded at page 932 of the bundle. It follows from the conclusions reached above about knowledge that the majority considered that the Respondent took the step when it was reasonable to have to take it (i.e. within about 3 weeks of it being identified) while the minority considered that it should have been taken earlier, in about late January / early February.

31. Apart from the issue of timing, did the Respondent take such steps as it was reasonable to have to take? The recommendation was for 6-8 sessions of training, and only 3 took place (18 April, page 932; 23 April, page 933; 16 May 2013 at page 936). In cross-examination Mr Fleet had said that Richard Todd told him that the Claimant was not engaging with the training and that she "spent her time moaning about me" (i.e. about Mr Fleet). This was consistent with an email that the Claimant sent on 14 June 2013 to Richard Todd and others, at page 523, in which she wrote: "I require assistance in management understanding my condition, I don't care who provides this, but I need it. Occasional meetings with Richard or Jo does not address management's approach to managing me or how I deal with their management of me." At a session on verbal communication on 25 June 2013 (noted at page 940), Richard Todd recorded the Claimant as saying that she was sure that most of the difficulties were with management not being consistent.

32. Dr Weerasinghe was of the view, recorded above, that there was a failure to comply with the duty to make reasonable adjustments in that the Respondent had not acted sufficiently early, and that it was impossible to know what the outcome might have been had the adjustment been made sooner. The majority concluded that the Respondent had made such adjustment as it was reasonable to have to make in providing the written communication training: in the event, it had not had the effect hoped for, and came to an end because the parties involved did not believe that it was working.

33. The majority therefore concluded that the complaint of failure to make reasonable adjustments failed. The minority would have found that it succeeded.

Remedy

34. The Tribunal was unanimous on the issue of remedy for the successful complaint of harassment. This was a one-off incident which we found fell within the lower **Vento** bracket. It was not, however, a minor example of a single incident: it was a hurtful comment, and no apology was given. The Claimant's reaction to the comment and her complaint about it showed that she was hurt by it.

35. The Tribunal concluded that the appropriate award for injury to feelings was £3,500.

36. The parties made no submissions about interest. Regulation 2 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 requires the Tribunal to consider awarding interest on any award of compensation, without the need of an application for this. Regulation 3 provides that the rate if interest shall be the rate fixed for the time being by section 17 of the Judgments Act 1838 (namely, 8% per annum since 1993).

37. Regulation 6(1)(a) provides that, in the case of an award for injury to feelings, interest shall be for the period beginning on the date of the act of discrimination and ending of the day of calculation. Regulation 6(3) provides that, 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 award in accordance with the earlier provisions of regulation 6, it may calculate interest for such different period as it considers appropriate in the circumstances, having regard to the provisions of the Regulations.

38. Interest in accordance with regulation 6(1)(a) would be calculated as follows:

(a) Date of act of discrimination: 11 June 2013. Date of calculation: 13 August 2019. Total period therefore 6 years 63 days.

(b) Annual rate at 8% on £3,500 = £280.

(c) 6 years x £280 = £1,680. 63 days (280 / 365 x 63) = £48.33.

(d) Total therefore £1,680 + £48.33 = £1,728.33.

39. The Tribunal noted that the figure for interest amounted to nearly 50% of the award of compensation. We did not, however, consider that this gave rise to a serious injustice. The sum involved is not, in itself, very large. It is unfortunate that the litigation has become extended, such that the calculation has been carried out years after the original hearing, but we concluded that it was not a serious injustice that the tortfeasor should bear the burden of this.

Costs Application

40. Rule 76(1)(a) of the Rules of Procedure provides that a Tribunal may make a costs order when it considers that:

"(a) a party (or that party's representative) has acted…….unreasonably in…the way that the proceedings (or part) have been conducted."

41. The Tribunal noted that there is a discretion to be exercised if it concludes that a party has acted unreasonably: a costs order does not follow automatically from that finding.

42. The application related to a preliminary hearing by telephone listed on 30 August 2016. On 18 August 2016 the Claimant sought a postponement of the hearing: this was refused by EJ Grewal and that refusal was communicated to the parties on 26 August 2016. The Claimant instructed counsel to represent her at the hearing. The hearing was listed before EJ Glennie who was unable to proceed with it as no contact details for the Respondent's representative could be obtained.

43. Ms Prince, for the Respondent, was only able to say that there must have been some error on the Respondent's side in relation to this, and that any costs order should be restricted to counsel's fees for the telephone hearing.

44. The Tribunal concluded that there had been unreasonable conduct in failing to attend the telephone hearing. There was no real explanation for this, and we concluded that we should exercise the discretion to make a costs order.

45. The Claimant had produced counsel's fee note, which showed a fee of £437.50 plus VAT of £87.50 for the abortive hearing. No issue as to ability to pay arose. The Tribunal concluded that a costs order in respect of those sums (totalling £525) should be made.

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Employment Judge Glennie

Dated: 15 November 2019

Judgment and Reasons sent to the parties on:

19 November 2019

For the Tribunal Office