EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Piper**

1st Respondent: **Nairobi Coffee and Tea Company Limited**
2nd Respondent: **Mr A Merali**

Heard at: **Birmingham**

On: **15 January 2020**

Before: **Employment Judge Flood**
Mr N Forward
Mrs M Howard

Representation
Claimant: In person
Respondent: Mr Isherwood (Consultant)

JUDGMENT ON REMEDY

1. The first respondent is ordered to pay to the claimant the following sums:

    a. £18,860 for injury to feelings in respect of the findings of unlawful direct discrimination and harassment against the first and second respondent; and
    b. £3,443.37 interest on the above sum for injury to feelings.

2. The claimant's application for an Order for Preparation time to be made against the respondent under rule 76 (1)(a) or (b) of the Employment Tribunals Rules of Procedure 2013 is not successful and is dismissed.

REASONS

Introduction

1. The claimants claim was heard on 10-13 June and 2-3 July 2019 and judgment on liability was given orally at the end of that hearing together with the tribunal's reasons for that judgment.

2. The written judgment was sent to the parties on 5 July 2019. Following a request for written reasons at the end of that hearing, reasons were sent to the parties on 17 September 2019.

3. The claimant having succeeded partially on her claims, the cases were listed for a remedy hearing which took place on 15 January 2020. Judgment on remedy was given orally at the end of that second hearing together with the tribunal's reasons. The respondent's representative made a request for written reasons at the conclusion of the hearing.

4. The tribunal had heard evidence from the claimant, Ms Price and Mr Journet-Robins on behalf of the claimant and from Mr Merali, Mr Goddard and Mr Rawal on behalf of the respondents at the liability hearing and had been provided with a number of documents in a Bundle and Supplementary Bundle. At the remedy hearing the tribunal heard further evidence from the claimant and the claimant's husband, Mr Piper, on issues relevant to remedy in respect of her successful claims.

5. In light of the all the evidence read and heard by the tribunal at both hearings, it made the following findings and came to the following conclusions on remedy.

Direct sex discrimination and harassment

6. At the end of a 6 day hearing on 6 July 2019 this tribunal found that the claimant's complaints for sex discrimination partially succeeded against the first respondent in respect of 6 incidents of harassment and 6 incidents of direct discrimination. We also found that 5 acts of direct discrimination were successful against the second respondent. For the purposes of this remedy hearing, we decided that it was in the interests of justice for an award to be made against the first respondent (as all acts were carried out by the second respondent in the course of his employment with the first respondent). We did not make any direct awards for compensation to be paid by the second respondent.

Financial loss

7. Firstly, we concluded that we could not make an award in respect of any period prior to 1 June 2018 which is the date the claimant's employment terminated. The claimant made a claim in her updated Schedule of Loss for the sum of £1,538.15 representing what she says was her loss of earnings when she was off sick due to stress whilst still employed by the respondent. We have made no findings of fact or indeed heard any evidence about that period of sick leave and what it was caused by. The claimant was at that time still employed and receiving statutory sick pay from the respondent in accordance with the terms and conditions of her employment. We do not find any loss sustained here to be attributable to the acts of discrimination and made no awards in respect of it.

8. The claimant was out of work for a period of 13 weeks following the termination of her employment at the respondent on 1 June 2018 until she started new employment (at a higher rate of pay) on 14 September 2018. Therefore, any possible financial loss would be for this period only and the claimant conceded this point. We went on to consider if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result. We make specific reference to our findings of

fact on the liability decision and paragraphs 9.72, 9.78, 9.80, 9.83 and 9.84 of the written reasons for that decision. The claimant has admitted that she sent an e mail on 5 March 2018 to a client of the respondent providing a quote for coffee products on behalf of another provider. We conclude that having found out this information, the respondent would have been able to (and indeed would have chosen to) terminate the claimant's employment either on the grounds of gross misconduct or by serving one week's notice under the terms of her contract. Therefore we conclude that any award for financial loss should be reduced by 100% to a nil award.

Non Financial Loss

Injury to feelings

9. We heard evidence both at the liability hearing and today from the claimant about the effects that the acts of discrimination had on her. The claimant described herself as feeling uncomfortable, upset, intimidated. hurt, distressed, offended, embarrassed and shocked by the incidents that took place from the start of her employment. She then describes herself as being anxious as the discrimination continued. We also note that from 4 October 2017 the claimant became more anxious and felt that what was going on at work was starting to affect her home life. She was exhausted, her confidence suffered and we note that she was emotional and was not sleeping well. We note that the claimant visited her doctor in January 2018 and was prescribed with anti-depressants and relaxants at that time. She was later prescribed with sleeping tablets and said she was depressed, stressed and completely exhausted. There is no doubt that what happened to the claimant whilst she was employed at the respondent had a serious impact on her.

10. We do note that there were other factors at play during her employment with the respondent that we did not find to be acts of discrimination. The claimant described herself as being under pressure to perform and she complains about the way she was managed. This no doubt contributed to the way she was feeling. However we are satisfied that overall the discriminatory acts we concluded took place caused a significant impact on the claimant's health and well being and were the effective cause of the distress and suffering she described.

11. We have considered the Vento bands and we remind ourselves of the principles of awarding damages for injury to feelings as set out in Prison Service v Johnson [1997] IRLR 162 that injury to feelings should be compensatory in nature and just to both parties; should not be too low as to diminish respect for the policy of anti discrimination legislation but awards should be restrained and not excessive. We remind ourselves that we should take into account the value in everyday life of the sum awarded and the need for public respect for the level of awards made. The three broad Vento bands are firstly the top level (which for the time of the claimant's complaint encompasses a range of between £25,700 and £42,900) which should be awarded in the most serious of cases where there has been a lengthy campaign of discriminatory harassment; the middle band between £8,600 and £25,700 which is for serious cases which do not merit an award in the highest band and the lower band £900

to £8,600 which deals with less serious cases such as one off or isolated acts. We also take note of the Presidential Guidance - Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 and note that the bands as adjusted at this point (and in the first addendum to this guidance issued on 23 March 2018) takes account of the decision of Simmons v Castle and De Souza and the uplift of 10% is already taken account of within those bands.

12. We note that there were a number of different acts of discrimination over a lengthy period of time. The acts of harassment relate to one particular employee but we also found in our liability decision that there was a culture at the respondent where sexist and derogatory comments against women were tolerated. There was an ongoing state of affairs that started on 23 April 2017 and ended on 5 March 2018. We note the comments of Mr Isherwood that the acts of harassment were not deliberate in the sense that it was the effect on the claimant that was found to be the key factor rather than the intention of the perpetrator. However in addition to this there were six acts of direct discrimination of which did by their very nature amount to intentional acts. The claimant refers to a campaign of discrimination and therefore says that any award should sit within the upper band of Vento.

13. We conclude that the award should sit within the middle band. This is a serious case but we do not believe it warrants being placed in with the most serious elements of discrimination and harassment which in many cases may include physical assaults and a sustained campaign of deliberate harassment. However we conclude that the conduct sits at the middle to higher end of the middle Vento Band. We have applied a percentage approach to this and conclude that the conduct in question should be placed at around 60% of the range within the middle band. Applying that approach, we have determined that the claimant should be awarded the sum of £18,860 in respect of her injury to feelings.

Adjustments

14. We note that in relation to injury to feelings awards, the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 2013 (SI 1996/2803) and the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 (SI 1669/2013), Regulation 3(2) provide that for claims presented to the tribunal on or after 29 July 2013, that interest of 8% may be awarded on any awards made for injury to feelings. Regulation 6 (1) (a) of the first such regulations provides that interest should be awarded from the date of the act of discrimination complained of. Here the acts of discrimination spanned the period 23 April 2017 until 5 March 2018. We have looked at the issue globally and have considered that the main part of the claimant's injury to feelings was incurred on or after the meeting in October 2017. She gave evidence today of things changing at this point and about her feelings developing from distress/discomfort/anger to those of anxiety and that it started to affect her wellbeing and mental health and that she was suffering problems sleeping. Therefore it is in the interests of justice and equity for an award of interest to be made at the statutory rate and to be calculated from 4 October 2017 (which we have concluded was the date of the act of

discrimination for these purposes) to 15 January 2020 (the day of the remedy judgment). The sum of £3443.37 should be awarded by way of interest. The calculation was: (833 days/365) x 8% x £18,860 = £3443.37. This brings the total award to £22,303.37.

15. The respondent asked us to reduce the award by 25% and we assume he is asking is to apply a reduction on the basis that the claimant unreasonably failed to comply with a relevant ACAS Code of Practice, and it is therefore just and equitable in all the circumstances to reduce the award by a percentage up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992. We did not find that the claimant was in breach of a relevant ACAS Code so no such reduction is appropriate. Any alleged breaches by the respondent of the relevant ACAS Code were not alleged and are not relevant to the determination of remedy on the acts of discrimination found and therefore it is not either appropriate to increase any award made by up to 25%. This was not a case that called for any adjustments to be made on the basis of arguments under Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604] or on any possible contribution/contributory fault arguments.

16. The claimant asks us to make an award for aggravated damages and refers to the way that the respondent treated her during employment and the way she has been treated since and by the respondent's legal representative during the conduct of these proceedings. It is clear to us that bringing these tribunal proceedings has had a very negative effect on the claimant. We expressed our hope that this judgment today will start to put an end to this very stressful period for the claimant. However we do not consider that this is a case where it is appropriate to award aggravated damages. These are potentially available to the extent that the aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury her feelings. This might be done where the act complained of is done in an exceptionally upsetting way; or where the conduct evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is likely to cause more distress than if done without such a motive –for example as a result of ignorance or insensitivity; or where subsequent conduct: for example, conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness. We referred ourselves to the authorities of Bungay & Anor v Saini & Ors UKEAT/0331/10 and Zaiwalla & Co v Walia [2002] UKEAT/451/00).

17. The main thrust of this argument from the claimant relates to the way that the respondent and its representatives have behaved since the acts of discrimination. She states that they have unnecessarily put her through the tribunal process when it was obvious that they were in the wrong and she vehemently complains about the way that Mr Isherwood conducted the proceedings which she says was in an aggressive and dismissive fashion which has added insult to her injury and made the discrimination worse. We entirely understand why the claimant may feel that the respondent has treated her in egregious way. It has not been an easy process and has no doubt caused significant stress and worry. Mr

Isherwood had conducted a robust defence on behalf of the respondents with an assertive approach. We do feel that at some times during the hearing he did not perhaps take account as much as he should have that the claimant is a litigant in person and did not have the benefit of his experience appearing in Tribunals and conducting litigation over many years. Perhaps a more conciliatory approach may have been more fruitful and reduced the stress on the claimant. However, we also accept that the respondents are entitled to vigorously defend claims made against them. Indeed, we note that the respondent was successful in defending some of the allegations made against it. On balance, whilst we sympathise with how the claimant feels, we do not find that this is a case where aggravated damages would be appropriate.

18. In a similar vein the claimant also made an application for a preparation time order to be made against the respondent, again relating to the way the tribunal proceedings were conducted. Mr Isherwood rightly identified that this is an application made under rule 76 (1) of the Employment Tribunals Rules of Procedure 2013 which gives the Tribunal the power to award a costs or preparation time order where it considers that:

    "(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
    (b) any claim or response had no reasonable prospect of success."

19. Given that we say above that the claim made was one that the respondent was able to partially defend, the second ground at (b) above is not made out. We repeat our comments above about the robust way the case was handled by Mr Isherwood. Whilst he was not always as accommodating as he could have been, we do not find that any of his conduct strayed into the realms of being vexatious, abusive, disruptive or unreasonable. There are no grounds for making a preparation time order against the respondent so the claimant's application in this regard is dismissed.

Signed by: Employment Judge Flood
Signed on: 15 January 2020