



EMPLOYMENT TRIBUNALS

Claimant: Ms K Clements

Respondent: Eddie Stobart Limited

Held at: Liverpool

On: 23 January 2020

Before: Employment Judge Holbrook
Mrs J L Pennie
Mr R Cunningham

Representation:

Claimant Mr P Sigee, Counsel
Respondent Mr J Boyd, Counsel

RESERVED JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

1. It is not appropriate for the Tribunal to make a recommendation.
2. The claimant is entitled to compensation for any loss of earnings suffered by her during the 2018 Formula 1 season by reason of her re-assignment to general haulage duties, and for 50% of any such loss of earnings suffered during the 2019 season. Such losses (if any) are to be quantified in the manner explained below.
2. The claimant is awarded £15,000 in compensation for injury to feelings.
3. In addition, the claimant is awarded £2,360.55 interest.
4. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

REASONS

INTRODUCTION

1. On 17 May 2019, we upheld Katherine Clements' claim against Eddie Stobart Limited ("ESL") for unlawful harassment related to the protected characteristic of sex. Ms Clements' other complaints of discrimination were dismissed. Judgment was sent to the parties on 29 May and, on 1 July, written reasons were provided ("the Reasons").

2. Case management orders were made with a view to facilitating the determination of remedy and, following some delay in complying with those orders, a remedy hearing was held on 23 January 2020. On that occasion we heard oral evidence from Ms Clements and, for ESL, from Dawn Webster (HR Business Partner). We also heard oral submissions made on behalf of the parties and we were provided with a supplementary hearing bundle running to more than 250 pages.

3. Ms Clements seeks a recommendation that ESL should assign her to its F1 contract for 2020. She also seeks compensation for the loss of earnings which she claims to have suffered as a consequence of the unlawful harassment, an award for injury to feelings (within the top *Vento* band), and interest thereon.

4. Although a substantial remedy hearing bundle had been agreed in advance, the claimant sought to introduce a significant amount of additional documentary evidence at the outset of the hearing. That evidence (which had not previously been disclosed to the respondent) comprised documentation about Ms Clements' pay and a financial analysis thereof. Whilst we agreed to admit that evidence, which is relevant to the question whether Ms Clements has suffered loss of earnings, it soon became apparent that we could not safely rely upon it without the respondent first having the opportunity to consider it more carefully. Following a discussion with both counsel, it was therefore agreed that the hearing would be limited to dealing with the following issues:

- Whether the Tribunal should make a recommendation.
- How much compensation should be awarded for injury to feelings.
- The methodology which should be adopted to determine the measure of Ms Clements' loss of earnings, and the period in respect of which she should be compensated for any such loss.

5. The parties also agreed that they would use our findings of principle in relation to the third of these issues as a basis for seeking to agree the amount of any compensation payable for financial loss. Should they be unable to do so, however, the determination of that question will be the subject of a reconvened remedy hearing in due course.

FACTS

6. As noted in the Reasons, the acts which we have found to constitute unlawful harassment all occurred between 5 February and 5 March 2018, while Ms Clements was assigned to ESL's Special Operations Team ("SOT") providing logistics services

in connection with F1 motor racing events. Those unlawful acts concerned the conduct of Ms Clements' then team leader, "MTL". They are summarised at paragraph 35 of the Reasons, but may briefly be described as follows:

- Hostile reception given to Ms Clements on 5 February 2018.
- MTL's deliberately unhelpful driving behaviour.
- Aggressive and unhelpful behaviour whilst at the Gnode factory.
- Unjustified criticism of Ms Clements' abilities.
- Harassment concerning use of a scissor-lift.
- Making comments of a sexual nature.
- Comments made on 5 March 2018 about Ms Clements' suitability for her role.

7. The Reasons also note that, as a consequence of the complaint which Ms Clements made about MTL's conduct, ESL required her to return to the UK from Barcelona (where she was working with SOT at the time). With effect from 9 March 2018, Ms Clements was assigned to general haulage duties, based at ESL's depot in Widnes. She is still employed by ESL in this role. Ms Clements has made a number of applications to be re-assigned to SOT, working in F1, but these applications have been rejected by ESL.

8. Throughout the period during which Ms Clements worked with MTL, she had felt that his conduct towards her (including that described above) was "grinding her down". She found his conduct humiliating and offensive and had problems sleeping because she was worried, and because "I could not stop thinking about what was happening and what I had done wrong". Ms Clements tried not to let MTL (or anyone else at work) see how she was feeling, but she was very upset, and would phone home to express to her husband how upset and deflated she felt. Looking back at the events in question, Ms Clements says that they have caused her to doubt her view of herself as a strong person: those events have made her feel weak, as she was unable to cope. Ms Clements started her assignment with SOT as an "upbeat, cheerful, positive person" but, by the time of her return to the UK, she felt completely deflated and describes herself as being "emotionally and physically drained".

9. Ms Clements continued to feel hurt and upset by MTL's comments after she returned to the UK in March 2018. She also found the subsequent grievance process frustrating and upsetting (although, for reasons previously explained, we have found nothing unlawful about the manner in which that process was conducted by ESL). In July 2018, Ms Clements was absent from work for two weeks due to stress and anxiety, which she now attributes to the fact that she had to talk about her complaints again in the stage two grievance meeting. That period of absence was medically certified by Ms Clements' GP, but that had been the first occasion on which she had consulted her GP since returning to the UK and Ms Clements has not been prescribed any medication for stress and anxiety.

10. The unlawful conduct described at paragraph 6 above was not the only conduct which formed the basis of the grievance about MTL that precipitated Ms Clements' return to the UK in March 2018: she also complained about aspects of his conduct which we have not found to be unlawful. In addition, she has since raised numerous complaints about MTL which were not the subject of her claim to the Tribunal. All of these matters have contributed to the upset which Ms Clements has felt and continues to feel.

11. In addition, Ms Clements has submitted a series of additional grievances about ESL's treatment of her and about the conduct of other individuals employed by ESL. Reference to this was made at paragraphs 24 and 54 of the Reasons, but we heard that ESL's HR department has now opened 25 separate grievance cases in response to complaints made by Ms Clements, some of which concern matters which post-date the events these proceedings relate to. One of those grievance cases remains unresolved, but none of the others have been upheld in Ms Clements' favour. They relate to a number of different individuals, including some still working within SOT, and some of those individuals feel that Ms Clements has acted vindictively towards them because of the nature and extent of the grievances she has raised.

12. Finally, we turn to the basis on which Ms Clements was originally assigned to work in SOT. We find that, whilst ESL's contract with its customer (Pirelli) was for a three-year period, Ms Clements was seconded to work in SOT for the 2018 F1 season only. Although Ms Clements asserts that she was assigned to SOT for three years, there is no documentary evidence to confirm this, and we prefer the respondent's evidence – which was that there is an annual recruitment exercise to fill the roles within SOT's F1 division for the forthcoming season. Ms Clements accepted that there is an annual recruitment process, but she said that the managers who had recruited her to SOT had been keen that she should be available for three years. Nevertheless, we find that, whilst members of the previous year's team may re-apply for roles working in F1, there is no guarantee that they will be selected for a second, or subsequent, season.

LAW

13. The relevant powers of the Tribunal in respect of remedy are set out in section 124 of the Equality Act 2010. The Tribunal may make a declaration as to the rights of the parties; it may order the respondent to pay compensation; and/or it may make an appropriate recommendation – being a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate.

14. The Tribunal must not order the payment of compensation unless it first considers whether to make a declaration or recommendation. However, where the Tribunal does make an award of compensation, this may cover both financial loss and injury to feelings. Awards for injury to feelings are therefore compensatory – they should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Awards which are too low would diminish respect for the policy underlying the Equality Act. However, excessive awards could also have the same effect. Society has condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong. They must command public respect. Awards should

also bear some broad general similarity to the range of awards in personal injury cases, and tribunals must also remind themselves of the value in everyday life of the sum they have in mind by reference to its purchasing power or to earnings.

15. A truly like for like comparison of one case with another is seldom, if ever, possible. The decisive factor in every case is the effect of the unlawful discrimination on the particular claimant. Given the subjective nature of this enquiry, it is notoriously difficult to quantify the effect of the discrimination on the claimant, and ultimately it comes down to a question of judgment for the Tribunal. Nevertheless, in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871, the Court of Appeal has offered broad guidance on the approach to quantifying injury to feelings. Ordinarily, an award for injury to feelings should fall within one of three bands:

- Awards in the top band (of between £25,700 and £42,900) should be awarded in the most serious cases, such as where there has been a lengthy campaign of harassment.
- Awards in the middle band (of between £8,600 to £25,700) are appropriate for serious cases which do not merit an award in the top band.
- Awards in the bottom band (of between £900 and £8,600) are appropriate for less serious cases, such as one-off or isolated instances of discrimination.

Only in exceptional circumstances should an award for injury to feelings be less than £900 or more than £42,900.

16. Following the Court of Appeal's later decision in *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879, the financial range covered by each of the *Vento* bands is updated annually by guidance issued by the Presidents of the Employment Tribunals in England and Wales and in Scotland. The financial limits mentioned above are those applicable to claims presented between 6 April 2018 and 5 April 2019.

DISCUSSION AND CONCLUSIONS

Should the Tribunal make a recommendation?

17. Ms Clements seeks a recommendation that ESL assigns her to SOT for the 2020 F1 season, working on the delivery of its contract with Pirelli. For the two reasons explained below, we do not consider that to be an appropriate recommendation for the Tribunal to make.

18. The first reason is that, as a matter of law, the Tribunal should not exercise its power to make recommendations in a way which is tantamount to ordering the respondent to reinstate or re-engage the claimant in a particular role.

19. The second reason (which is material only if we are wrong about the jurisdictional limits of the Tribunal's recommendation-making power) is that, given the particular facts of this case, we do not consider it prudent to make such a recommendation anyway. We heard that there are particular sensitivities about the prospect of Ms Clements returning to work in F1, because of her extensive history of

making grievances against colleagues, and colleagues working for SOT in particular. The problem is illustrated by the following example: In December 2018 Ms Clements made a complaint that her driving records had been falsified by a number of colleagues, including Marco Astolfi, the head of SOT. This was a very serious allegation to make, as the misconduct alleged by Ms Clements would amount to a criminal offence. The complaint was not upheld by ESL, however, and Ms Clements now accepts that Mr Astolfi was not a party to any wrongdoing in relation to her driving records. Nevertheless, she told us that she cannot now see how making this serious allegation might reasonably cause ESL to be unwilling to re-assign her to a team led by Mr Astolfi. We find that surprising as the sensitivities of the situation are readily apparent. The question whether Ms Clements should ever return to work within SOT, and if so when, is one which should be left to ESL, exercising its proper management discretion, and is not a matter with which the Tribunal should interfere, whether by making a recommendation or otherwise.

Compensation for financial loss

20. ESL concedes that, if Ms Clements suffered a loss of earnings because of her return to the UK in March 2018, she should receive some compensation for that loss, but that such compensation should be limited to losses attributable to the 2018 F1 season. But ESL also argues that Ms Clements did not in fact suffer any such loss of earnings. Ms Clements disagrees: she argues that she has suffered a loss of earnings by virtue of her return to general haulage duties and that she should be compensated for such losses up to the end of the 2020 F1 season.

21. As we have already noted, the financial evidence available at the remedy hearing did not enable us to make findings of fact as to whether Ms Clements has actually suffered a loss of earnings. A further remedy hearing will be held for that purpose, if necessary. In order to make the relevant findings it will be necessary to compare the amount of earnings which Ms Clements has actually received since her return to the UK with the amount of earnings which she would have received had she continued to be a member of the SOT motorhome team until the end of the F1 season. Determining the latter of these two amounts is obviously a hypothetical exercise, and it should be done on a reasonable and realistic basis, taking account of the likely number of days when Ms Clements would have been working with SOT abroad; the likely number of days when she would have been performing other duties; and the appropriate rates of pay and allowances applicable to each.

22. Turning to the question of the period for which compensation should be awarded, we consider that, in addition to the entirety of any losses attributable to the 2018 F1 season, Ms Clements should be compensated for 50% of any such losses attributable to the 2019 F1 season. We consider it appropriate to discount the amount of her 2019 losses in this way in recognition of the possibility that Ms Clements would not have succeeded in gaining reappointment to SOT for the 2019 season. We do not consider that she should receive any compensation attributable to loss of earnings for the 2020 season, however, as the likelihood of her being reappointed for a third season is too uncertain.

Compensation for injury to feelings

23. On behalf of ESL, it was submitted that Ms Clements had been “stoical” in her

reaction to the conduct described in paragraph 6 above, and that this should be reflected by a modest award of compensation for injury to feelings (in the bottom *Vento* band). The implication of this is that Ms Clements did not suffer serious or significant injury to feelings as a consequence of the unlawful harassment she was subjected to. We do not accept that proposition as it is quite clear from the findings we make at paragraph 8 above that Ms Clements has suffered significant injury to feelings and that the unlawful and serious harassment she endured continued for a period of several weeks during which time Ms Clements was away from home (yet living and working in close proximity to MTL).

24. Nevertheless, it is also clear that the causes of injury to Ms Clements' feelings are not limited to the conduct which the Tribunal has found to be unlawful: there are a range of other issues which have doubtless added to her hurt and distress but for which she is not entitled to compensation for injury to feelings. It is, of course, impossible to make a precise apportionment of the contributions which different factors have made to Ms Clements' overall injury to feelings, but we are satisfied that the conduct described in paragraph 6 made a substantial contribution to it. Were we to be compensating Ms Clements for the entirety of her injury to feelings, an award towards the upper limit of the middle *Vento* band would be appropriate. As it is, we consider an award falling within the second quartile of that band will adequately compensate Ms Clements for her injury to feelings resulting from the unlawful harassment. We therefore make an award for compensation for injury to feelings in the sum of £15,000.

25. In addition, we consider it appropriate to include interest on this award pursuant to regulation 2(1) the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. This is calculated as simple interest which accrues from day to day for the period beginning on the date of the first unlawful act complained of (5 February 2018) and ending on the date of calculation (23 January 2020). The applicable annual rate of interest is 8% and the amount of interest to be included is therefore £2,360.55.

Employment Judge J Holbrook
Date: 3 February 2020

JUDGMENT SENT TO THE PARTIES ON
20 February 2020

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2411583/2018**

Name of case: **Ms K Clements** v **Eddie Stobart Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **20 February 2020**

"the calculation day" is: **21 February 2020**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office