EMPLOYMENT TRIBUNALS

Claimant: Miss HL Cunningham

Respondents: (1) A Oasis Cars Limited
(2) Mr I Hussain

FINAL HEARING

Heard at: Nottingham **On:** 25 February 2020

Before: Employment Judge Camp **Members**: Mrs GK Howdle
Mr C Tansley

Appearances
For the claimant: in person
For the respondent: Mr S Swanson, lay representative (consultant)

JUDGMENT

(1) Both respondents are jointly and severally liable to pay the claimant, and must pay her, compensation for sexual harassment assessed in the total sum o**f** £10320, made up of £1920 for lost earnings and £8400 for injury to feelings.

(2) Respondent (1) – A Oasis Cars Limited – must also pay the claimant an additional sum of £5000, being further compensation for injury to feelings.

(3) In addition, the claimant is awarded, and the respondents must pay her, interest on her compensation at 8 percent per annum as follows:

(a) on the above sum of £1920, from 26 February 2019 (being, approximately, the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award), totalling £153.60 as at 25 February 2020 (i.e. one year's worth of interest);

(b) on the above sum of £8400, from 26 January 2018, totalling £1400 as at 25 February 2020 (i.e. 25 months' worth of interest);

(c) on the above sum of £5000, from 26 January 2018, totalling £833.33 as at 25 February 2020 (i.e. 25 months' worth of interest).

(4) In summary, the total sums that must be paid by the respondents to the claimant, inclusive of interest, are:

(a) by both respondents (a sum for which they are jointly and severally liable), **£11876.60**;

(b) by respondent (1) – A Oasis Cars Limited – only, an additional sum of **£5833.33** (making the total payable by respondent (1) £17709.93, including the above sum of £11876.60).

REASONS

1. This is the written version of the reasons given orally at the hearing, written reasons having been requested by the respondents' representative.

2. This is our decision at a remedy hearing following a final hearing. The final hearing took place on 11 and 12 March 2019 and for various reasons, the judgment was not actually sent to the parties until 3 June 2019. I [the Employment Judge] have already apologised to the parties for that, which was my own fault.

3. In that reserved decision, we gave judgment in the claimant's favour on various sexual harassment complaints against both respondents, the respondents being the claimant's former employer and the director and/or owner of that employer, and, in addition, judgment in the claimant's favour against the employer only in relation to one or two complaints.

4. We ought perhaps to start by explaining a few preliminary and procedural matters. The remedy hearing takes place today – 25 February 2020 – and it is unfortunate that it has taken us that long to get here. As part of our decision, we made a case management order which was that, "*The parties must endeavour to agree remedy between themselves, with the assistance of ACAS if necessary, within 28 days of the date that it was sent to them. Within five weeks of the date it was sent to them, if the case had not been concluded, the parties must submit their written proposals, agreed if possible, for the case management orders for a future remedy hearing, including a realistic time estimate for that remedy hearing and any relevant dates of unavailability.*"

5. Unfortunately, neither party complied with that case management order. What happened was that the claimant presented what was essentially a further copy of an email that she had sent a year previously containing a kind of schedule of loss and on 22 July 2019, the respondent simply wrote a letter stating: "*We envisage that a one day listing for remedy will be sufficient*".

6. The case was then referred to an Employment Judge who, unfortunately, just made a direction that there be a one day remedy hearing. It took some time for this to happen and today was the earliest mutually convenient date. The file was not referred back to me for me to make some case management orders. We therefore came into this remedy hearing without any case management orders and without any additional evidence over and above that which had been there before the previous tribunal. (The claimant's schedule of loss was, as already

mentioned, a repeat of a previous email and that previous email – of 24 June 2018 – had been in been in the trial bundle at the final hearing).

7. At the start of the hearing, we had a discussion with the parties about what we were going to do about this. It seemed to us that there were three options. The first would be to adjourn so that the parties could prepare properly. Nobody wanted that; we did not want it and the parties did not ask for it; it seemed to us that given the delay that there has already been in this matter, which relates to events at the end of 2017 and the beginning of 2018, we should not be in a position two years later where we have to adjourn yet again. We therefore dismissed that option. Another option, at least in theory, would be to say that as the claimant has not put in any further evidence, we should award her nothing. Realistically, the respondents' representative did not press us to do that. But we doubt we would have done it however forceful submissions he had made. At the very least, the claimant would be entitled to something for injury feelings, purely on the basis of the judgment we have already made.

8. We took the third option. Ultimately, we did so by consent, or at least without opposition, because the claimant said she left what to do entirely up to us and the respondents' representative said that they did not object to us taking this course. The third option – the course we followed – was to put the claimant into the witness box, get her to confirm the contents of her email schedule of loss and ask her a few questions about injury to feelings and mitigation, and allow the respondents' representative to cross-examine her. In evaluating her evidence, we would bear in mind the lack of corroborative evidence, in particular the absence of medical evidence. The state of the evidence has potentially affected the decision we have made, in the respondents' favour.

9. Moving on to the substance of our decision, the first remedy issue that we had to deal with is a point of principle. It is a point of principle referred to in paragraphs 64 to 66 of the reasons for our reserved judgment. It relates to whether the claimant is entitled to compensation for lost earnings at all given the fact that her employment did not end until, at the earliest, when she presented her claim form. That fact would undoubtedly have affected any claim for unfair dismissal, and there was an argument that it should also mean no compensation for discriminatory constructive dismissal.

10. We invited submissions on this point. Neither side chose to make any.

11. We can deal with the point shortly: we think there was clearly a direct causal link between the claimant's employment ending and the acts of sexual harassment, which feature in our judgment; it follows that the losses the claimant suffered as a result of her employment ending must also result from that harassment. Accordingly, we resolve that point of principle in the claimant's favour: losses flowing from the termination of the claimant's employment are losses for which she is entitled to compensation as part of this claim.

12. We turn, then, to what those losses are. They consist in our view of lost earnings, no more and no less than that. The claimant has referred to lost benefits and lost savings. Social Security benefits are outside of our jurisdiction and the reason that she lost her savings was because she lost she lost earnings so had to use up her savings. She is compensated for that loss of her savings by any award for

lost earnings she is entitled to. Loss of earnings is the only financial loss she has potentially suffered for which the respondents might be liable within these proceedings.

13. The claimant told us that she did not start to look for work until October/November 2018 and did not secure employment until December 2018. Her lost earnings stopped as on 14 December 2018, when she secured alternative employment.

14. The claimant has told us that the reasons for the delay in looking for alternative work are essentially two-fold: first, how she felt and her state of health following the harassment; and secondly, that she decided to focus on her family (she has three children).

15. Although we do not doubt that the claimant believes what she told us, the difficulty we have is the total absence of any medical evidence. She tells us she visited her GP before her employment ended, presumably in or around January 2018, and was put on anti-anxiety and any-depressant medication. She had not been on any such medication, she also tells us, for five years, and she continues to be on that medication to this day.

16. The respondents' representative has suggested that the treatment that she suffered cannot have affected her too badly because she carried on working for the respondent for more than a month after the assault that led to her tribunal claim. However, that suggestion ignores the fact that the person who assaulted the claimant was out of the country until 23 January 2018 and that things did not really come to a head until he returned and the second respondent told the claimant that she would be working with him (see paragraphs 27 and 28 of the reasons for our reserved judgment).

17. In the absence of medical evidence, we are not satisfied that it was reasonable for the claimant to wait until October/November 2018 to start to look for work again. We think that had she started to look for work again after a reasonable period, say two months from the date her claim form was lodged, she would have found alternative employment within around four months of then.

18. We therefore award her lost earnings at £120 per week (which is an agreed figure) for 16 weeks, which is £1,920. We think both respondents should be made jointly and severally liable to pay the claimant that amount because the ending of her employment resulted mainly from the harassment for which they are both liable. The claimant did not leave the first respondents' employment directly because of the sexual assault on 12 December 2017 but mainly because of the way in which the second respondent dealt with it and with her complaints about it.

19. We move on to injury to feelings. We refer to, and incorporate into our decision, the Presidential Guidance of 5 September 2017, which is the relevant Presidential Guidance because of the date when the claim was presented: February 2018. That Presidential Guidance has the middle *Vento* band starting at £8,400.

20. We think the appropriate way to deal with injury to feelings is to make the principal award against both respondents, but with an additional amount against the first respondent to reflect the additional injury to feelings attributable to the harassment referred to in paragraph 2 of our judgment. (Paragraph 1 of our judgment was against both respondents and paragraph 2 was against the first respondent – the employer – only).

21. We start with the award we are going to make against both respondents. Paragraph 1 of our judgment was:

> *The first and second respondents sexually harassed the claimant, contrary to section 26 of the Equality Act 2010 ("EQA"), by:-*
>
> *(a) requiring the claimant to work with someone who she had previously accused of sexual harassment and who had, in fact, sexually harassed her;*
>
> *(b) giving the claimant a choice between: not working at all for the first respondent; working the shifts she wanted to work and that she habitually worked but with someone who she had previously accused of sexual harassment and who had, in fact, sexually harassed her; working shifts it was inconvenient or impracticable for her to work and/or that she did not want to work.*

22. We note that this was not a one-off. It took place over a period of time, albeit a relatively condensed period of time of a couple of weeks in January 2018. We have already said that it was the main reason the employment ended.

23. We do remind ourselves that injury to feelings is compensatory; it is not punishment. The most important thing in assessing an award is the extent to which the claimant's feelings were injured. She has told us that she felt intimated. She has told us that she felt badly affected by it. We have already mentioned the lack of medical evidence but, equally, we have already decided (in effect) that this harassment led to a period of two months or so during which the claimant was affected badly enough to make it reasonable for her not to look for alternative employment.

24. There seems to us, even now, to be some residual effect on the claimant. However, in the absence of medical evidence, we cannot say how much of what the claimant now feels about it is attributable to the discrimination and how much to other things.

25. In all the circumstances, we think an award at the boundary between the lower and middle bands, as updated in the Presidential Guidance of September 2017, is appropriate: a sum of £8,400.

26. We award an additional £5,000 against the first respondent only. We note that the sexual harassment for which the first respondent only is liable includes the sexual assault itself. Effectively, this is an award of £13,400 for all the injury to feelings for all of the harassment – an award, in other words, well into the middle band of the Guidelines.

27. There does not have to be an additional award for interest but there is no good reason not to make an additional award for interest. We have not actually had time to do the calculation. When the written record of the judgment comes out, it will come out with an interest calculation.

EMPLOYMENT JUDGE CAMP

09 March 2020

Sent to the parties on:

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For the Tribunal:

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