EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr S Sheun	v	**Sheffield Teaching Hospitals NHS Foundation Trust**

Heard at: **Sheffield** **On:** **19 March 2020**

In Chambers 24 March 2020

Before: **Employment Judge Rostant**

Members: **Mr M Firkin**

Ms S Robinson

Appearance:

For the Claimant: **Mr L Bronze, of Counsel**

For the Respondent: **Mr P Sangha, of Counsel**

RESERVED JUDGMENT

1. The respondent is ordered to pay the claimant as compensation for lost earnings the agreed sums of **£5037.36** (net) and £630 (gross).

2. The respondent is ordered to pay the claimant the sum of £511.32 of interest on that amount calculated as follows:

   Estimated net equivalent of £630 gross £477.50
   Estimated total lost earnings net £5509.87
   Interest calculated at 8% per annum from the midpoint between the date of discrimination and the date of hearing.

   Estimated date of discrimination: 24 November 2018, date of hearing 24 March 2020, therefore midpoint 24 January 2019
   Total of period one year and two months, or 1.16 years.
   8% of the estimated total figure = £440.78

   £440.78 x 1.16 = £511.32

3. The respondent is ordered to pay the claimant £19,000 in compensation for injury to feelings.

4. The respondent is ordered to pay the claimant interest on that sum of £3541.16 calculated as follows:

   Interest calculated at 8% per annum from date of discrimination (est. 24 November 2018) to date of hearing 24 March 2020 i.e. 2.33 years.

   8% = £1520

   £1520 x 2.33 = £3541.16

REASONS

1. The Tribunal heard evidence from the claimant Mr Sheun, and we had the benefit of a remedy bundle and we were referred to the witness statements for the original hearing. Both advocates made submissions which will be referred to as relevant in the course of our reasons.

2. The parties had exchanged schedules of loss which are contained within the file of documents.

3. The issues before the Tribunal were as follows:
   a. What sum should be awarded to the claimant by way of compensation for lost earnings?
   b. What sum should be awarded to the claimant by way of injury to feelings?
   c. Whether any award should be made to the claimant by way of aggravated damages and if so, how much?

4. The issue of the correct calculation for compensation for lost earnings was resolved by agreement during the course of the hearing. The Tribunal was asked to make a finding of fact as to the correct approach for the calculation of lost opportunity to do weekend overtime. The Tribunal having given that judgment the parties were able to agree that the respective sums were £5037.36 (net) for lost earnings relating to the period of time when the claimant was off sick from work and had gone on to half pay and, in relation to lost opportunity to do weekend shifts, £630 gross.

5. When the Tribunal came to calculate interest on the compensation for financial loss it was obliged to estimate the net equivalent of the £630 gross figure in order to apply the 8% calculation to a figure which represented the likely figure that the claimant would receive in compensation for lost earning. When doing this calculation therefore the Tribunal worked on an estimated net equivalent of the £630 of £477.50 giving a total net figure (estimated) of £5509.86 to which the Tribunal applied the 8% calculation.

6. In establishing the date of discrimination as required for the calculation of interest on both the award to injury to feelings and the award for compensation, the Tribunal has taken a date half way between the first acts of discrimination

(November 2016) and the last act of discrimination (December 2018) and settled on the date of 24 November 2018.

7. With that explanation the Tribunal takes the view that the calculations set out above are self-explanatory.

The Tribunal's findings on the issue of aggravated damages

8. As part of his claim for compensation for injury to feelings the claimant made a claim for aggravated damages.

9. In his witness statement for this hearing the claimant set out, at paragraphs 31 to 34, that the way in which he claims that the respondent's method of pursuing this litigation had added insult to injury and therefore fell to be considered as aggravating his injury to feelings.

10. In his submissions to the Tribunal, Mr Bronze set out four aggravating features of the way in which the respondent had conducted these proceedings. The first of those, dealt with at length in paragraphs 31 and 32 of Mr Sheun's witness statement was the fact that the respondent's witnesses had all chosen to make reference to Mr Sheun's character, describing him variously as aggressive, short tempered, and quick to take offence. In his witness statement, Mr Sheun dealt with his upset at that portrayal of him at some length.

11. Next, Mr Bronze relied on the fact that two of the respondent's witnesses had referred to things said by Mr Sheun in a mediation sponsored by the respondent as a way of trying to improve the relationship between Mr Sheun and his colleagues as a preparation for him returning to work. Mr Sheun pointed out in his witness statement that he understood the mediation to be confidential and that he had been encouraged to be frank in it as a way of trying to repair relationships between himself and his colleagues. Mr Sheun was distressed that things that he had said in the mediation were now being relied on by at least two witnesses to "blacken his name" for the purposes of this hearing.

12. Thirdly, Mr Bronze relied on the fact that the respondent's witnesses had all taken care to make references to their own credentials as people unaffected by racial bias, in some cases referring to friendships or connections they had with people from other ethnic backgrounds and in one case referring to their own membership of the LGBTQ community. Added to that, Mr Bronze observed that the respondent had made great play of the fact that it was an equal opportunities employer with appropriate policies in place. This the claimant described as hypocritical (see paragraph 34 of the claimant's witness statement for this hearing).

13. Finally, Mr Bronze referred to a matter dealt with at some length in the Tribunal's judgment on liability which was the complete about face of Mr Temple on a key factual matter when giving evidence, changing entirely his approach from that which he had set out in his witness statement.

14. The Tribunal reminded itself of the key authorities on the subject of aggravated damages. It can be the case that the way in which a respondent chooses to conduct litigation in a claim against it for discrimination can amount to an aggravating feature which can sound in damages – see the case of *Zaiwalla & Co and another v Walia* [2002] IRLR 697. However, the Tribunal must be satisfied before making any award that the claimant's feelings were actually further injured by the aggravating feature. The Tribunal must always recall that an award for aggravated damages is the subset of the award to injury to feelings and is compensatory and not punitive (see for example *HM Prison Service v Salmon* [2001] IRLR 424). Furthermore, the Tribunal notes that it is important when considering the way in which a defence is conducted to distinguish between unobjectionable (if nevertheless potentially hurtful to the claimant) ways conducting a defence and unnecessary aggression.

15. The Tribunal examined each of the four heads of complaint in turn and were able to dismiss three. Dealing first with the complaint about Mr Temple's about face, whilst it is true that Mr Temple did change his evidence in a dramatic manner, and the Tribunal did deal with that in its Judgment, see paragraph 29, this is not something that the claimant has singled out in his witness statement as having caused him further upset. In view of the case law set out above, the Tribunal takes the view that absent evidence of hurt feelings this cannot amount to an aggravating feature which should sound in damages.

16. On the subject of the mediation the Tribunal does indeed take a dim view of the respondent's witnesses being permitted to refer to matters said in the mediation when on the evidence of Mr Conway for the respondent, that mediation was described as confidential. In other circumstances a Tribunal might well have taken the view that this amounted to unnecessary aggression calculated to further injure the claimant's feelings. However, we observe that the claimant himself saw fit to refer to matters said to him by Mr Ringrose and Mr Baldwin in the mediation as part of his evidence and the Tribunal take the view therefore that the breaching of that confidentiality cannot amount to an aggravating feature which injured the claimant's feelings if he himself was prepared to take the same steps in pursuing his claim. We would further observe that the claimant's description of the use of the evidence about what he said in the mediation as "blackening his name" is an exaggeration. At worst Mr Ringrose and Mr Baldwin were referring to comments which suggested that the claimant had accepted that in some cases he may have overreacted to comments.

17. The question of the hypocritical nature of the respondent portraying itself as an equal opportunities policy is dealt with by the claimant in paragraph 34. We would first observe that Mr Sheun makes no references at all to the individual respondent's witnesses describing themselves as unbiased on racial matters by reference to friendships and connections with people from other racial backgrounds. That seems to have been an issue only in Mr Bronze's submission and there is no evidence that that aspect of the case upset the claimant. In any event, the Tribunal agrees with Mr Sangha's observation that respondents' witnesses frequently do this as a way of trying to support their contention that their motivations and behaviors were not subject of racial bias and we have no evidence that those observations on their part were hypocritical or untrue. As to

the respondent's corporate stance, again, that is entirely typical of a respondent in this type of case. To punish the respondent for referring to itself as an equal opportunities employer would be inappropriate unless it was manifestly the case that the respondent cared nothing for the subject and was inventing a concern solely for the purpose of litigation. We do not take the view that that is the case here. Furthermore, it appears that what has really upset the claimant is the respondent's refusal to negotiate settlement throughout the course of these proceedings. As was made clear by the Tribunal to the advocates during the course of their submissions, and accepted and acknowledged by Mr Bronze, the Tribunal is only too well aware that the likely reason why there was no settlement discussion between the parties. That is the constraint that the respondent is subject to because of the requirements that any settlement between the parties would require Treasury approval and that Treasury approval is almost never forthcoming. This is not something the respondent has any control over and it is therefore not a matter which the Tribunal take the view can amount to aggravating conduct, whatever view the Tribunal may take of the policy behind that situation.

18. That this leaves us however with the question of the way in which the claimant was portrayed. In his submissions, Mr Bronze took us to each one of the respondent's eight witnesses' statements. In every one of those, references made to the claimant's personality, all of them seeking, broadly speaking, to describe the claimant as aggressive and hot tempered. In some cases, witnesses refer to their own direct observation and experience, in other cases, for example Mr Temple, only to the claimant's reputation. It is entirely unsurprising that the claimant would find those references to be upsetting and hurtful. The question is whether those references amount to aggravating conduct which could be the source for the compensation or whether they are a legitimate part of a robust defence of these claims. In his submission to the Tribunal, Mr Sangha sought to explain the presence of those comments in the witness statements. He made the uncontroversial observation that section 26 of the Equality Act includes within it a consideration, where the unwanted conduct is said to have the *effect* of creating the prohibited atmosphere, of whether it is reasonable for the claimant to have treated it as having that effect. Mr Sangha pointed out that it might have been the case that the Tribunal could have concluded on the evidence before it that Mr Sheun was of a nature to take unnecessary and unwarranted offense from trivial and essentially harmless conduct on the part of his colleagues. On that basis the Tribunal might have dismissed the claim of harassment. The Tribunal acknowledged that is hypothetically the case, however, as we pointed out in our judgment, if that was the reason why those observations were in the witness statement they certainly did not feature in the respondent's case as put to the Tribunal in submissions. The net effect was therefore that there were eight witnesses all making apparently gratuitous and irrelevant observations about the claimant's character as an aggressive person. The Tribunal takes the view that if it was the original intent of the respondent to have that evidence available as a basis for that submission, ultimately failing then to make part of its case always ran the risk of having those statements stand out as apparently hurtful attempts to blacken the claimant's character to no good purpose. The Tribunal does take the view therefore, that this aspect of the way in which the respondent chose to put its case amounts to an aggravating feature which can sound in damages. The claimant's statement is eloquent on how this aspect of the respondent's case

made him feel and we have no reason to reject that evidence. We shall return to the size of the award for that aspect of the claim when we deal with the award for injury to feelings in the round.

Injury to feelings

19. The claimant and the respondent started from very different positions on the subject of the appropriate level for injury to feelings. The parties agreed that the current *Vento* bands situate an award in the middle band as being somewhere between £8,600 and £25,700. The claimant did not seek an award in the highest band and the Tribunal agrees that that is a sensible position. For the respondent, Mr Sangha urged on the Tribunal an award at the top end of the lowest band or, failing that, at the bottom end of the middle band.

20. The Tribunal's starting point is an assessment of the injury experienced by the claimant. We would observe that it is entirely possible for severe injury to feelings to arise from individual or one-off acts. In this case however, the Tribunal has found that there were two identifiable individual acts. Those were the Tsing Tao incident and the incident on 14 December. In addition we have found that on more than one occasion, and indeed, not uncommonly, Mr Baldwin made the Kung Foo noise between November 2016 and December 2018. We are not therefore, dealing with a one-off act. On the other hand, we are not, with the possible exception of the mimicry of the Chinese accent in saying the words Tsing Tao, dealing with comments which are obviously and on their face, racially wounding and here we would contrast the allegations, found not to be made out, but Mr Baldwin used the words "Chinks" "Chinky" and "Paki". We would also observe that it is our finding that this did not represent some sort of campaign of discrimination deliberately orchestrated to make the claimant feel uncomfortable or oppressed. Therefore, it seems to us that applying the guidelines in *Vento* and considering only those matters, this is an award that was always likely to be in the middle band.

21. The next question for the Tribunal however, is where exactly in the middle band that award should be. The evidence about Mr Sheun's ill health is compelling. There is ample medical evidence in the file to show that between December 2018 and January 2020 when he returned to work Mr Sheun suffered a very serious decline in his mental health. He harboured thoughts of self-harm, although at no point ever felt that he would give way to them, and described himself as having feelings of lack of self-worth, of hating himself for being Chinese and of being a different or changed person. On any view Mr Sheun suffered very greatly and had the Tribunal been satisfied that everything that we have been told was caused by the discrimination that we had found to have occurred, we would have regarded that this is a case where compensation at the top end of the middle band would have been appropriate.

22. However, that is not the case. In the first place there is nothing in Mr Sheun's witness statement that seeks to differentiate between the effects on him of the limited matters that the Tribunal has found did occur, and which were discriminatory, and the many other matters of which he complained. The Tribunal's conclusion is that Mr Sheun is unable to distinguish between the effects on him of the limited matters which the Tribunal has found against the respondent and the other matters which he has pursued before the Tribunal. Next, we observe that the medical evidence reveals that there were other matters which were troubling Mr Sheun and contributing to his ill health both before and

during his absence from work. Mr Sheun described to the Tribunal a racist experience at his gym and the medical evidence deals with another racist incident in a supermarket. The medical evidence also refers to an effect on the claimant of a car crash during the relevant time. The Tribunal think it unlikely that these matters would feature in the claimant's discussions with his Doctor if they were not, in his own mind, contributory factors explaining his current state of health.

23. Finally, we would observe that Mr Sheun was already suffering from anxiety in December 2018 and that this had started as early as 2010. Mr Sheun has been receiving anti-anxiety medication (Sertraline) from about 2010, see paragraphs 9 & 10 of his witness statement. He ascribes that to a difficult work environment and difficult relationships with colleagues although he does not suggest that his race had anything to do with that. In cross-examination Mr Sheun also made references to the negative effect on his health of regular restructures and reorganisations within the hospital trust and his moves from one site to another and from team to team.

24. Taken in the round therefore, the Tribunal consider that what we are dealing with here is a worsening of an existing mental health problem caused in part by the discriminatory conduct, in part by Mr Sheun's perceptions or feelings, (not substantiated before the Tribunal) that the discrimination against him was rather worse than the findings of the Tribunal suggest and other extraneous contributory matters. We have no expert medical evidence to guide us here and doing the best we can we have concluded that it would be appropriate to descend from the top of the middle band to the mid-point of the middle band and award £17,000 for injury to feelings.

25. We have taken the view that the claimant's upset has been aggravated by the way in which the case has been conducted and we award a further £2,000 for that producing an overall figure of £19,000. We would observe that that places the award just above the top end of the moderate psychiatric and psychological damage bracket set out in the general damages guidelines published by the Judicial College and we would observe that that seems to us right given the fact that we now know that the claimant's health has improved to the extent that he is able to return to work.

26. Mr Sangha has urged us not to double compensate the claimant by placing too much reliance, when assessing injury to feelings, on the fact that the claimant has been off ill for a year by pointing out that that has already been compensated by an award for loss of earnings. The Tribunal would observe that the award for

loss of earnings compensates the clamant for financial loss and it is not double recovery to find that the claimant should also be compensated for the upset and distress caused by the discrimination that the Tribunal has found over and above the effects of any financial loss.

Employment Judge Rostant

Date: 27 March 2020