EMPLOYMENT TRIBUNALS

Claimant: **Mrs A S Koffi**

Respondent: **Permanent Representation of Cote d'Ivoire to International Commodity Organisations**

At: **Central London Employment Tribunal (by CVP)**

Date: **8 July 2020**

Before: **Employment Judge Norris**

RESERVED JUDGMENT – REMEDY

The Respondent is ordered to pay the Claimant the total sum of £101,853.07.

REASONS

Background to the claim

1. The Claimant, who was employed by the Respondent between 5 November 2014 and 31 January 2019 as an adviser, submitted a claim on 10 June 2019, complaining of unfair dismissal, discrimination because of religion or belief and/or discrimination because of sex. She was represented throughout by Mr Cormac Rice of Paul Doran solicitors.

2. The grounds of claim set out allegations of the sexual harassment of the Claimant by her manager, Mr Aly Touré, between 23rd February and 20 December 2018. She asserted that on 20 December 2018, when she told Mr Touré that she was not interested, he threatened that if she said anything about it, she would be "done". On 15 January 2019, the Claimant and her colleagues were informed of a budget reduction and the need for a commensurate staffing reduction. The following day, Mr Touré again propositioned the Claimant and on 17 January 2019, he told her that she would be dismissed because she continued to refuse his sexual advances.

3. On 22 January 2019, the Claimant refused to sign for receipt of a letter dismissing her and felt physically threatened by Mr Touré into doing so. On 4 February 2019, Mr Touré refused to give her a copy of the letter and propositioned her once more. She eventually received a copy of the letter of dismissal at her home address on 7 March 2019.

4. Under a separate heading "Political/Philosophical Belief", the Claimant further asserted that she was dismissed for refusing to enter a sexual relationship with Mr Touré, and because she is a supporter of a different political party from him. She did not set out any particulars in relation to this latter assertion.

5. In relation to the complaint of unfair dismissal, the Claimant asserts that no procedure was followed and that consequently her dismissal was both procedurally and/or substantively unfair. She was not given any right of appeal. Three colleagues performing identical roles to hers were not dismissed. By implication, there was no pooling of the four advisers, suggesting that redundancy was not the real reason for her dismissal. The Claimant concluded by asserting that her treatment constituted direct discrimination and/or harassment contrary to section 13 and/or 26 Equality Act 2010.

Tribunal proceedings

6. The claim form was served by post on the Respondent by the Tribunal on 24 September 2019 with a deadline for presenting a response of 22nd October and listing a full merits hearing for 10 to 13 March 2020. On 19 November 2019, the Tribunal wrote to the Respondent (which had not entered a response) seeking confirmation of whether it regarded itself was entitled to state immunity on the basis of exercising sovereign powers and whether it intended to file a defence. It was given until 3 December 2019 to reply. No reply was received by 3 December or at all.

7. On 11 February 2020, the Tribunal sent out a letter warning the Respondent that it was considering whether to enter default judgement. The letter confirmed that an Unless Order had been made giving the Respondent until 25 February 2020 to enter its defence, and that if it did not do so, judgement would be entered in default and the hearing listed for 10-13 March converted (on the first day only) to a remedy hearing. Again, no response was received.

8. On 4 March 2020, default judgement was entered in the Claimant's favour and the Hearing listed for 10 March accordingly converted to one before an employment judge sitting alone and dealing with remedy only. The Claimant was notified that she would have to bring to the hearing all documentation which she relied for remedy purposes, including a schedule of loss and a statement confirming her case on remedy. She was to serve a copy on the Respondent by 9 March 2020 and the Respondent was notified that it would be permitted to participate, if it attended at all, only to the extent directed by the judge.

9. On 10 March 2020, neither the Claimant nor the Respondent (nor any representative for either party) attended. Employment Judge Norris, who had entered the default judgement, caused Mr Rice to be called on the telephone and he explained that the Claimant would not be attending. A small bundle of documents had been served

along with a modest witness statement running to 18 short paragraphs and a schedule of loss seeking compensation of £131,444.65. The statement made little reference to the Claimant's medical condition and none at all to her efforts to secure new employment. In the circumstances, I considered it inappropriate to award such a sum of money without having heard from the Claimant in person, in particular in relation to her injury to feelings, for which she was claiming £27,500 plus interest as well as future loss of earnings in excess of £20,800 for a further six months out of work.

10. I therefore adjourned the remedy hearing on 10 March and listed it for 14 May 2020. By then however, the Tribunal had closed due to the pandemic and associated restrictions, and hearings were not taking place in person. The instant case could not be concluded and instead a further Telephone Preliminary Hearing (Case Management) was held with Mr Rice attending by telephone (Teams). The Respondent was neither present nor represented. At that hearing, I made orders as to the further progress of the case and relisted it for 8 July 2020. In advance of the hearing on 8 July, the hearing was converted to take place via CVP, and did eventually take place before me on that date via that means.

Conduct of the remedy hearing

11. At the hearing on 8 July 2020, the Claimant gave evidence via CVP from her home with Mr Rice attending from his office. The Respondent was once more neither present nor represented. During the evidence, an issue arose as to the question of whether the Claimant's employment had been lawful, in that it appeared she had paid neither tax nor National Insurance on her salary throughout her employment for the Respondent. Mr Rice informed me that a tax treaty between the UK and Côte d'Ivoire was in place and that the Claimant had been told she was part of the exemption to avoid double taxation. I asked whether the Claimant had in fact paid tax in Ivory Coast and was told she had not. The tax treaty was in the bundle and I was informed that the Claimant held dual nationality. Her passport was not in the bundle.

12. I was concerned that if the Claimant had not paid any tax at all there may be a question of the remedy to which she would be entitled. Mr Rice indicated that he would be grateful for further time to research the matter and to present the results of such research in support of the Claimant's remedy submissions. I agreed to give him until 29 July for that purpose. Having not heard from him by that date or indeed throughout the month of August, I caused a letter to be sent to him requiring him to confirm the position and make any further submissions within seven days. For the purpose of the remedies hearing, however, we proceeded on the basis that the Claimant had the right to claim £3270 net per month in salary on the basis of the tax treaty alluded to.

13. On 28 September, Mr Rice responded to the Tribunal's further requests for the submissions by noting that he had complied on 9 September and forwarding a further copy of the submissions, authorities and covering letter lodged on that date. I accept his unchallenged submissions that the Claimant was not subject to the UK tax regime by virtue of the tax treaty or, in the alternative, that if she was so subject (or if the Respondent failed to account for her tax in Ivory Coast), any illegality was at the Respondent's door and the Claimant was neither responsible nor even aware of it.

Accordingly, it would be disproportionate to deny the Claimant relief, for the reasons advanced on her behalf.

Evidence and findings on remedy

14. At the remedy hearing, the Claimant gave evidence on oath before me, relying on her witness statement. Since the Respondent was neither present nor represented, the Claimant's evidence in all aspects of remedy was unchallenged. Mr Rice took her through her actual losses since dismissal.

15. The Claimant informed me that when she started working for the Respondent on 5 November 2014, she earned £3,000 per month, being both the gross and net figure. Over time, this was increased to £3,270. She did not have to work her notice when she was dismissed and was paid in lieu thereof, as well as being paid for her accrued but untaken holidays.

16. The Claimant had still not served any written evidence dealing with applications for alternative employment. I asked her about this. Her evidence, which I accept, was that she had attended the job centre regularly until she received an email telling her not to attend in person until further notice as a result of the pandemic restrictions. She made job applications via a teaching website as a supply teacher in an assistant teaching role. She was unsuccessful in that application, and this was true for all applications that she had made since her dismissal. In any event, the schools to which she was applying were also closed because of the pandemic. The Claimant has been asked if she would be available when schools reopen and she has replied that she will be available to start in September 2020.

17. I asked if there were any jobs where she had a firm belief that she would be able to avail herself of them within the next three to six months (from July 2020) and she replied that she had been told they may be available when the schools reopen. She has teaching experience from before she joined the Respondent and would earn between £75 and £85 per day Monday to Friday in term time through agencies. She wishes to revert to that sort of work in schools if that is where she can find a position.

18. I am mindful that the onus is not on the Claimant to show that she has behaved reasonably in seeking new work but on the Respondent to show that she has behaved unreasonably in failing to mitigate her losses. I was satisfied that the Claimant has not behaved unreasonably. She has returned to seek work in the education sector, in which she has experience. Since the remedy hearing, schools in England have reopened from September, and it appears that they should expect to remain open wherever possible in order that children's education does not suffer further as a result of the pandemic. I find that the Claimant's losses should therefore cease after the six months for which she has claimed.

19. So far as the injury to feelings is concerned, again there was still very little by way of medical evidence in the bundle notwithstanding the high level of injury to feelings compensation sought by the Claimant. The Claimant had set out no further details of the conduct alleged in her witness statement but she confirmed that the harassment and acts of discrimination detailed in her particulars of claim took place

and it is on these that she relies. I accept that the incidents took place as described in the claim form.

20. I therefore asked the Claimant to explain to me how the Respondent's conduct had impacted on her. She explained that she still feels humiliated by what was done to her and continues to take medication to help her sleep. She had recently called her general practitioner and given her the details of the medication that the Claimant had been administering to herself. She had not previously gone to the GP but had started taking medication that can be purchased over the counter in France ("Theralene"). She said she has taken this before when she has been unable to sleep and wanted something to help. When she could no longer travel to France, she called her GP who prescribed her medication. However, as this medication is quite strong and the GP does not want the Claimant to become addicted to it, she has been referred for counselling. The Claimant is waiting to start her counselling and does not know now when that will be.

21. I asked her how long she had been taking the Theralene for and whether she had been taking consistently since her dismissal. She said she thought she had started taking it around two weeks after her dismissal, i.e. from January 2019 onwards. She found it very hard to lose her job like that and had to take it every night to sleep. She had a lot of the medication in her possession and any time people she knew went to France, she asked them to buy for her. She said it had reduced her nervousness and help to sleep a little bit at night. However, she still had nightmares and was traumatised thinking of everything. She became extremely tired with headaches and also was in fear for her life because not sleeping dehumanised her. I asked why she did not seek counselling until relatively recently. She said that she was taking the medicine to help her sleep but the GP had told her she could not continue with this. She also needed counselling.

22. The Claimant said that the impact of the Respondent's conduct on her got worse over time and thinking about it was quite debilitating. She had lost everything and could no longer do what she used to do before. She described not being able to meet people, go out in the community, be with her friends or help people. She explained that when you do not have any money, it is difficult to help people and to organise yourself. Money, she said, gives you power and she had stopped being the powerful woman she used to be and to enjoy her life. She could not have relationships with her friends, family, or any partner. She said she no longer wants any man to approach her now and does not want to feel brutality of men near her. She does not go out and cannot socialise as she used to do before. She has lost confidence in respect of getting back into full employment. Her confidence in the workplace has evaporated because she feels like something has gone from her and she is not the same person she used to be. She added that she was really suffering in silence.

23. In light of the fact that the Claimant's evidence was unchallenged, I make findings which reflect the evidence she gave.

Conclusions

24. I reach the following conclusions on remedy.

a. The Claimant was unfairly dismissed. For that, she is entitled to a basic award and a compensatory award.

b. The basic award is calculated by reference to the Claimant's length of service (four complete years) multiplied by a week's pay capped at the statutory amount as at the date of her dismissal (£508 – not £538 as set out in the Schedule of Loss). Additionally, as all of the Claimant's service was while she was aged 41 or over, there is a multiplier of a factor of 1.5. Her basic award entitlement is therefore £3,048.

c. The compensatory award takes account of the Claimant's losses since her dismissal. From the date of her dismissal until the date of the remedy hearing was a period of just under 76 weeks. Her losses for that period (including employer pension contributions) come to £60,626.30. She claims £500 for loss of statutory rights and a week's pay (£754.62) for loss of her long notice period. Her total compensatory award is therefore £61,880.92. She gives credit for money received from the Respondent on termination (£20,753.00) leaving a balance of £41,127.92. Her annual salary was £39,240, which is therefore the appliable cap, leaving a shortfall of past loss of £1,887.92.

d. As to the discrimination element of the claim, I make no award for discrimination because of religion or belief. The Claimant gave me no details of either the discrimination suffered or the losses thereby incurred. However, I make awards for past and future losses and for injury to feelings in connection with the sex discrimination/harassment found.

e. In relation to loss of earnings, as I have found above, the Claimant is likely to be able to mitigate her loss within six months of the remedy hearing, and therefore she seeks (and I award) future losses of £20,820.02. With the shortfall in relation to the past loss, that comes to a total of £22,707.94.

f. In relation to injury to feelings, the Claimant seeks the sum (including a 10% uplift in line with *Simmonds v Castle*) of £22,000. I have had regard to the Second Addendum to the joint Presidential Guidance originally issued on 5 September 2017, which is applicable to cases presented on or after 6 April 2019 relating to injury to feelings awards and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd*[1]. Cases in the lower band fall to be assessed between £900 and £8,800; those in the middle band between £8,800 and £26,300; while those in the upper band are between £26,300 and £44,000 with only the most exceptional cases capable of exceeding £44,000.

g. I remind myself of the long-established guidance in *Prison Service v Johnson*[2], that the general principles underlying awards for injury to feelings are as follows:

    - Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.

[1] [2017] EWCA Civ 879
[2] [1997] ICR 275

- An award should not be inflated by feelings of indignation at the guilty party's conduct.
- Awards should not be so low as to diminish respect for the policy of discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.
- Awards should be broadly similar to the range of awards in personal injury cases.
- Tribunals should bear in mind the value in everyday life of the sum they are contemplating.
- Tribunals should bear in mind the need for public respect for the level of awards made.

h. The treatment that the Claimant received at the hands of the Respondent was persistent and lasted almost a year. It was deliberate, and it led to her dismissal when she refused to submit to it. Examples given in the claim form span the period 23 February 2018 until the notification in January 2019 that the Claimant was to be dismissed for refusing the sexual advances of her manager Mr Touré. It is clear that his behaviour and the loss of her job have had an enduring effect on the Claimant's loss of self-confidence and self-worth in her community, including not only her relationships with men but also her esteem as a working woman. The pandemic restrictions have no doubt also had an effect both on the Claimant's mental health and ability to find other work; while the Respondent is not responsible for the restrictions as such, it must take its victim as it finds her, and but for its unlawful conduct, she would not have been required to search for new work during a global pandemic. I find the Claimant's approach to her likely future losses was moderate and sensible.

i. That said, the Claimant has been able to look for other work in a profession in which she is experienced. Having initially visited the Equality Advisory Support Service in or around March 2019, the Claimant has been self-medicating with an over-the-counter drug, Theralene, which describes itself as suitable for minor sleeping disturbance and mild anxiety. She has not sought or been prescribed medication or counselling by her GP until comparatively recently, when she could no longer procure Theralene either directly herself or indirectly via friends travelling to France.

j. In all the circumstances, and having regard to the authorities to which I was referred by Mr Rice, I conclude that an amount in the middle of the middle *Vento* band is appropriate and the award for injury to feelings is £17,750, uplifted by 10% to £19,305.

k. There is no uplift for a failure to follow an ACAS Code of Practice. S207A(2) TULCRA 1992 provides if a relevant Code of Practice applies and the employer has failed to comply with the Code and the failure was unreasonable, the Tribunal may, if it considers it just and equitable to do so in all the circumstances, increase any award by up to 25%. The Claimant did not raise a grievance and was not dismissed for alleged conduct matters, but for redundancy, to which the ACAS Code does not apply.

l. The Tribunal is obliged to award interest at 8% per annum on financial loss from the "midpoint" between the date of the discrimination and the date of the remedy hearing (537 days, so the midpoint is 268.5 days), on losses of £112.68 per day. Interest on financial loss is therefore awarded in the amount of £2,420.37.

m. In addition, interest falls to be calculated on the award for injury to feelings. This is similarly 8% per annum, on the award of £19,305, for 866 days (starting on 23 February 2018 when the sexual harassment commenced), i.e. £3,664.25.

n. The amount to be grossed up is accordingly the compensatory award plus the injury to feelings (including interest) but not the basic award, (i.e. £87,337.56, less £30,000 deduction for nil rate is £57,337.56 @ 20%) which comes to £98,805.97.

25. The Respondent is therefore ordered to pay the Claimant the sum of £3,048.00 by way of basic award and the sum of £98,805.07 being the amount of compensation after grossing up, i.e. an overall total of £101,853.07.

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Employment Judge Norris
Dated: 17 October 2020
Sent to the parties on:
19/10/2020.
For the Tribunal: