Case Number: 3334167/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss A Smith	v	Luton and Dunstable NHS Foundation Trust

Heard at: Watford **On**: 1 October 2020

Before: Employment Judge George
Members: Mrs S Wellings
Mr R Clifton

Appearances
For the Claimant: In person
For the Respondent: Ms E Grace, Counsel

RESERVED REMEDY JUDGMENT

The respondent is to pay the claimant compensation for injury to feelings in the sum of £5,000 plus interest from 9 October 2017 to 1 October 2020 at the rate of 8 % per annum. This is 1089 days at £1.095 per day, or £1,193. The total award is £6,193.00.

REASONS

1. Following the liability judgment, which was given orally with reasons in this case on 1 October 2020, the Tribunal identified the issues which arose for determination on remedy. The claimant had succeeded on one of the claims which she had brought but not on the allegation that there had been disability discrimination in relation to the decision to withdraw the provisional offer of a job or on the allegations against Dr Sayed in relation to the recommendations which she made for adjustments.

2. We asked the claimant what types of loss she argued that she should be compensated for. We explained to her the guidelines given by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] I.C.R. 318 CA** by which claims for compensation are divided into three bands and said that we anticipated that she was claiming compensation for injury to feelings. She confirmed that she was not seeking a recommendation and when asked whether she was seeking to argue that there was a discreet psychological injury that had been caused by the one incident that we have found proved, she confirmed that she was not and

that any medical evidence which she wished to rely on was already in the bundle.

3. Her evidence at the liability stage had been that part of the reason why she did not assert herself at the occupational health consultation appointment with Dr Sayed was because of the comment that had been made by Ms Davies which we have found to be an act of direct discrimination. When asked about that she said that she thought the impact of the things that Ms Davies said to her was the beginning of the severe mental health decline and it definitely affected her ability to challenge anything: because she felt that the job was not hers, she was not sure that anything she would say could make a difference which had not been how she felt before she went to the interview. She acknowledged that it was hard to know what she would have done or what difference it would have made and said it was how she felt but it was an unknown matter. She accepted that it was speculation and acknowledged that she was not going to be in a position to prove that specific identifiable loss resulting from the withdrawal of the job was caused by the comment made by Ms Davies. On that basis, she accepted that the only head of loss that she was claiming compensation for was injury to feelings caused by the comments of Ms Davies and she said that she was arguing that the appropriate level of compensation should be in the lower **Vento** band. In those circumstances the respondent agreed that they were in a position to proceed. Ms Smith was then cross examined on the relevant parts of her statement which she had identified as relevant to assessing compensation for injury to feelings. She was also cross-examined upon various texts messages between herself and her mother and various friends during the relevant time period.

The Law

4. The law in relation to the assessment of compensation of injury to feelings can be stated fairly briefly for the purposes of this oral judgment. We remind ourselves of the case **HM Prison Service v Johnson [1997] ICR 275 EAT** where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

5. We also remind ourselves of the cases of **MOD v Cannock [1994] IRLR 509** and **Alexander v The Home Office [1988] ICR 604**. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved.

6. As mentioned above, the well-known case of **Vento** (followed in **Da'Bell v. NSPCC [2010] IRLR 19 EAT**) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in

Da'Bell, which increased the levels of the bands to take into account inflation since the **Vento** decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In **De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA**, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

7. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the **De Souza** case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in **De Souza**, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the **Vento** bands are updated annually. The present claim was presented on 14 October 2018 and therefore the applicable bands are

   7.1. Between £25,700 and £42,900 for the most serious cases;

   7.2. Between £8,600 and £25,700 for serious cases not meriting an award in the highest band;

   7.3. Between £800 and £8,600 for less serious cases, such as an isolated or one-off act or discrimination

Findings and conclusions

8. Submissions were made on behalf of the respondent that the claimant was now seeking to argue that significant mental decline had started with the comment made by Ms Davies when that was contrary to what she had argued previously. It was also suggested, on behalf of the respondent, that we should make sure that we only awarded compensation for the injury to feelings caused by Ms Davies' comments. We need to identify how long the impact of those comments lasted, the degree of the impact and how long they had persisted given the intervening acts of Dr Sayed's recommendations and the withdrawal of the job neither of which we found to be unlawful however upsetting they may have been to the claimant.

9. It was further argued on behalf of the respondent, that the texts suggest that on 9 October 2017 after the consultation meeting, the claimant was more worried about the prospect that information from the Occupational Health department at her previous employer, Scarborough Hospital, might lead to her job being withdrawn. Therefore, it was argued that we should reject the claimant's evidence that she was concerned about Jackie Davies' comments from that point. It was argued that the texts show anger or rather annoyance as opposed to the deep hurt and upset that she was seeking to rely on and therefore her allegation that this was the start of her mental

health decline should be rejected. It was argued that one would expect more in the texts if the claimant had been as upset as she said and that the claimant's case had changed.

10. Our conclusion on these submissions are firstly, that we do not think that it necessarily follows that the claimant would put in texts the matters that she was genuinely upset about. It depends entirely upon the circumstances and the person to whom she is talking. She said, and we accept, that she rang her mother to tell her what had happened but had not previously put that in her statement. Some might put more in texts but some would not. We do not think that it can fairly be inferred from the limited references to the meeting with Ms Davies in the text that the claimant was not upset. We have already referred to the details of some of those texts in our liability judgment because they were part of the reason why we accepted that something had happened in the meeting with Ms Davies to so change the claimant's mood following her successful interview.

11. Our assessment of the claimant's evidence, like Employment Judge Hyams', is that she did not come across as "over egging the pudding". She came across as dispassionate and quite analytical about her own state of mind.

12. We also look at the texts as a whole. It is true that she does express concern about the likely effect of information from the Scarborough Occupational Health department but we remind ourselves of the texts on page 163 which says that "Occupational Health were diabolical" and that she was "totally appalled" by them. So, the words of Ms Davies were clearly on her mind. At page 60, going forward in time to the point where the job offer was withdrawn, she seems to be referring more to the stipulations from Dr Sayed and she says that she would phone to talk to her friend, who she is notifying of the withdrawal of the job but does not want to cry about it. It appears therefore she is on the point of tears when she hears about the withdrawal and she is angry at the stipulations put forward by the Occupational Health consultant which she recognised the department were unlikely to be able to accommodate.

13. There are other texts (pages 162 and 166) dated from around the time of the withdrawal, in which she refers to the injustice making her feel sick and feeling unemployable.

14. In our experience, people do not easily express themselves in texts which are, of their nature, generally short, succinct forms of conversation in which abbreviation is used to give the key information. We accept the claimant's evidence that she was trying to maintain her self-esteem and consider that she was being quite measured. The texts from around February 2018 do suggest that she was extremely upset by the withdrawal of the job and understandably so.

15. Her evidence was that the statements made by Jacky Davies had not come across to her as reassuring. She had come out feeling disabled and disheartened. She had not felt supported in getting a job and she felt that

she had no right to contemplate applying. We accept that these were emotions she genuinely suffered.

16. Her email, at page 88, from April, talks about her being horrified as a result of the encounter and suspicious the job would "not be mine". However, she goes on in that email to refer to Occupational Health recommendations being purposely proposed and therefore it is fair to say that she is also angry at the time she wrote the email of complaint about the recommendations that we have found not to be unlawful.

17. We were taken by the respondent to paragraph 10 in the order of Employment Judge Hyams, at page 49.6, where the claimant is recorded as having given evidence - which was accepted - that the withdrawal of the job led to a dramatic downturn in her mental health. It was argued that this was a finding of fact binding upon the parties and that the claimant was seeking to put forward evidence which was inconsistent with it. We do not think that this finding is inconsistent with there having been some mental health impact prior to that and then a dramatic downturn when the job offer was withdrawn. We also note the claimant's comments in the statement prepared for the preliminary hearing on 29 June 2020 (page 43) that, following Ms Davies's comments, she felt "so deflated" and began to feel her mental health decline. That was in the same statement that formed the basis of EJ Hyams findings so it does not seem to us that the claimant is changing her story about the fact that she feels her mental health began to be affected by Jacky Davies' comments as alleged by the respondent.

18. We accept that those comments were not the whole cause of the poor mental health that the claimant experienced. Findings about the claimant's state of health from 12 February 2018 onwards it were made in the judgment of Employment Judge Hyams. We accept that the claimant suffered more from the job withdrawal but did suffer from the first encounter. We also find that those feelings of hurt caused by Ms Davies's comments continued following the job offer withdrawal, effectively as an undercurrent in the much larger stream of hurt feelings and mental health impact caused by the job withdrawal. This is how she put it, "Following the job offer withdrawal my mental health continued to suffer". There is an element of doubt in her mind that she will never know whether she would have asserted herself more to try to keep the role but for the comment that Jacky Davies made.

19. We accept and find that those comments (for which the respondent is liable) were the beginning of her mental health decline which became severe following the withdrawal of the job (for which they are not). The effect of Jacky Davies' comments did persist but, as found by Employment Judge Hyams, the dramatic downturn was caused by the job withdrawal. Had she not got the job for reasons that were connected with health and safety concerns, she would have found it easier to accept it had Jacky Davies not made the comments beforehand. That was her evidence and we accepted it.

20. By October 2018 she was feeling better. She did not suggest there were any continuing mental health consequences. However, she did say that the way that she had been met by the comment from the Occupational Health had damaged her confidence when applying for other jobs since then and will do in the future. It is part of the reason why she thought she had been foolish to try to return to midwifery.

21. It was agreed by the claimant that a lower band award would be appropriate. She gave evidence that the process of the Employment Tribunal claim had helped her find some peace because she was very glad that she had asserted her rights.

22. For a lower band case, taking into account the date on which the claim was presented, the appropriate award is between £900 and £8,600. Interest would have to be added to any award. This was, in our view, a one-off incident, which is reflected in the award being in the lower band. However, the impact of the comments had some continuing consequences. Those declined and were overshadowed by the greater impact of the withdrawal of the job but we accept that, to some extent, the mental health impact lasted for about a year. The claimant is still affected by the effect on her confidence of what was said when making applications for work. The consequences included, an element of impact on her mental health and therefore although it was a one-off incident it was one which had a relatively serious impact on the claimant although there were other matters that happened subsequently that have a more serious impact upon her. Had those matters been proved to have been unlawful, then the award would probably have been within the middle **Vento** band. Based upon the findings we have made we think that an award of £5,000 plus interest is the appropriate one to make in this case.

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Employment Judge George

Date: …1 November 2020 ……..

Sent to the parties on: 2 November 20

For the Tribunal Office