



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss A Smith

v Luton and Dunstable NHS Foundation Trust

Heard at: Watford

On: 28 September to 1 October 2020

Before: Employment Judge George

Members: Mrs S Wellings
Mr R Clifton

Appearances:

For the Claimant: Mrs C Smith, Mother

For the Respondent: Ms E Grace, Counsel

JUDGMENT having been sent to the parties on 3 November 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following the liability judgment that was given orally with oral reasons in this case on 1 October 2020, the tribunal identified the issues.
2. We asked the claimant, now that she had heard our judgment, what did she argue that should be the types of loss that she should be compensated for. In particular, we explained to her the Vento bands and said that we anticipated that the compensation for injury to feelings should be a head that she was claiming. 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 had found proved, she confirmed that she would not and that any medical evidence that she wished to rely on was already in the bundle.
3. Her evidence had been that part of the reason why she did not assert herself at the consultation appointment was because of the comment that had been made by Ms Davies and 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 is 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 but said it was how she felt and it was an unknown matter. She did not act in a way that she might have done but it was speculating and she 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.

4. She was then cross examined on the relevant parts of her statement and upon various texts.
5. Submissions were made by the respondent that the claimant was now seeking to argue that significant mental decline had started with the comment 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 XXX Ms Davies comments, we need to identify how long those 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.
6. It was argued on behalf of the respondent that the texts suggest that on 9 October, after the consultation meeting, the claimant was more worried about the prospect that Scarborough Occupational Health information might lead to her job being withdrawn and therefore it was argued that we should essentially reject her evidence that she was concerned about Jacky 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.
7. Our conclusion on these submissions are firstly, that we do not think that it necessarily follows that a claimant would put in the text 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 and some might put more in the text but some would not. We do not think anything can be inferred from the limited amount XXX that we have already referred to in our liability judgment that the claimant was not upset.
8. As was assessed by Employment Judge Hyams, our assessment of the claimant is that she did not come across to us as overegging the pudding, she came across, in the most part, as quite analytical about her own state of mind.
9. We also look at the texts as a whole. It is true that she does express concern about the likely interaction of the Scarborough Occupational Health

but we remind ourselves of the text on page 163 which says that Occupational Health were diabolical and that she was totally appalled by them, so it was clearly on her mind.

10. At page 60, going forward to the point where the job is withdrawn, she is referring more to the stipulations from Occupational Health and she says that she would phone to talk to her friend so she notified of the withdrawal of the job but does not want to cry about it. It appears therefore that she is on the point of tears when she hears about the withdrawal and she is angry at the stipulations put forward by Occupational Health.
11. There are other texts at page 162 and 166, dated from around the withdrawal, that has her referring to the injustice that making her feel sick and her feeling unemployable. People do not easily express themselves in text and we accept that she was trying to maintain her self-esteem and being quite measured. The texts from around February do suggest that she was extremely upset and understandably so by the withdrawal of the job.
12. Her evidence was that the statements made by Dr Davies had not come across to her as reassuring. She had come out feeling disabled and disheartened and 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.
13. 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".
14. She also goes on at page 88 to refer to Occupational Health recommendations as being purposely proposed and therefore it is fair to say that she is also angry about the recommendations that we have found not to be unlawful.
15. We were taken by the respondent to paragraph 10 in the order of Employment Judge Hyams at page 49.6 where the claimant gave evidence, which was accepted, but the withdrawal of the job led to a dramatic downturn in her mental health. We do not think that this is inconsistent with some mental health impact prior to that and we also note her comments at page 43 that she felt so deflated and began to feel her mental health decline. That is in the same statement so it does not seem to us that she is changing her story about the fact that she feels her mental health began to be affected by Jacky Davies' comments.
16. We accept that those statements were not the whole cause of the poor mental health that the claimant experienced which findings about it were made in the judgment of Employment Judge Hyams. We accept that as the claimant described she suffered more from the job withdrawal but did suffer from the first encounter and we also find that those feelings continue.
17. Following the job offer 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 Davis made. We accept and find that it was the beginning of her mental

health decline which became severe following the withdrawal of the job. 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 is her evidence and we accepted it.

18. By October 2018 she was feeling much 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 it will do in the future. It is part of the reason why she thought she had been foolish to try to return to midwifery.
19. It was agreed by the claimant that a lower band award would be appropriate and 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 and we hoped that that proves to be the case.
20. The appropriate band, taking into account the date on which the claim was presented, the appropriate award is between £900 and £8,600 to which would have to be added interest.
21. It was, in our view, a one-off incident but it had some continuing consequences, those lasted at least a year. She still is affected by 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 had a more serious impact upon her. Had those matters been proved to be unlawful then the award would probably have been within the middle Vento band but as they are we think that an award of £5,000 plus interest is the appropriate one to make in this case.

Employment Judge George

Date: 7 December 20

Judgment sent to the parties on

7 December 20

For the Tribunal office