



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Adeniran-Driver
Respondent: Vocalink Ltd
Heard at: Watford Employment Tribunal
On: 15 December 2020
Before: Employment Judge Quill (Sitting Alone)

Appearances

For the Claimant: In Person
For the respondent: Mr S Liberadzki, counsel

RULE 21 JUDGMENT

1. The complaint of direct discrimination because of race succeeds.
2. The complaint of direct discrimination because of disability succeeds.
3. The aggregate gross sum which the Respondent is ordered to pay to the Claimant by way of remedy is **£71473.00**. The breakdown of that sum is:
 - 3.1. The Claimant was awarded the sum of £16,000 for injury to feelings (and interest on that of £1609.65).
 - 3.2. The Claimant was also awarded the net sum of £45,000 for financial losses (and interest on that of £2268.50).
 - 3.3. £71473.00 is the gross sum which – after tax – will leave the Claimant with the appropriate aggregate net amount.

REASONS

The Hearing and Evidence

1. A public hearing took place. It had been listed to take place in person, and notification was sent to the Claimant and the Respondent.
2. This was a hearing in accordance with Rule 21(2). The Respondent had failed to present a response by 16 March 2020 and nor did it make any application in response to the letter dated 13 August 2020 informing it that a rule 21 judgment might be issued. The notice of hearing (for an in person hearing) was sent 6 November 2020, and as well as giving the time and

location to the Respondent, explained the effect of Rule 21(3).

3. Because of the pandemic, an invitation to participate by video was sent to the Claimant. The Respondent would have been able to attend the hearing (and to participate to the extent permitted by me) had a representative attended the hearing centre in person or asked to join by video. Nobody attended the hearing centre on behalf of the Respondent or asked to join by video.
4. As a result of the documents supplied by the Claimant, and her witness statement, and her answers on oath to questions posed by me (and in re-examination by her own counsel), I am satisfied that I can properly make a determination on the claim.

The Claims & Issues

5. Was the claimant a disabled person in accordance with the definitions in the Equality Act 2010 (“EQA”) at all relevant times?
6. Was the Claimant subjected to less favourable treatment as described in paragraph 5 of the Grounds of Complaint? If so, was it because of race?
7. Was the Claimant subjected to less favourable treatment on 11 September 2019 when she was told that it “was a difficult place to work in”, particularly for an “outsider” such as her? If so, was that because of
 - 7.1. Race and/or
 - 7.2. Disability
8. Was the Claimant subjected to less favourable treatment on 11 September 2019 when the Respondent told her for the first time that her performance was a cause for concern? If so, was that because of
 - 8.1. Race and/or
 - 8.2. Disability
9. Was the Claimant subjected to less favourable treatment on 11 October 2019 when she was dismissed? If so, was that because of
 - 9.1. Race and/or
 - 9.2. Disability
10. Was the Claimant subjected to less favourable treatment when her appeal against dismissal was rejected? If so, was that because of
 - 10.1. Race and/or
 - 10.2. Disability
11. The Claimant’s representative confirmed that no claim for harassment was being put forward.

The Law

12. As per *Limoine v Sharma EAT 0094/19*, it is an error of law to enter judgment simply because the claim is undefended without proper consideration of the matter. Furthermore, the Presidential Guidance on the correct approach must also be taken into account.

13. Judgment should not be granted at a hearing under Rule 21 unless, taking account of the fact that the Claimant's assertion are uncontested, I am satisfied that, in law, the factual basis for doing so is made out. In doing so, I must decide, and take into account, where the burden of proof lies. I should also take into account all of the available information.
14. As per section 6 the Equality Act 2010, a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. Schedule 1 gives additional information.
15. The definition of direct discrimination is in section 13 of the Equality Act 2010: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
16. The definition in section 13(1) incorporates two elements
 - 16.1. Firstly, whether A has treated B "less favourably than" than others, ("the less favourable treatment question")
 - 16.2. Secondly, whether A has done so "because of the protected characteristic", ("the reason why question".)
17. For the first of these elements, ("the less favourable treatment question") the comparison between the treatment of the claimant and the treatment of "others" can potentially require decisions to be made about the characteristics of a hypothetical comparator.
18. The two questions are intertwined and sometimes a tribunal will approach "the reason why question" first. If a tribunal decides that the protected characteristic was not the reason (even in part) for the treatment complained of it will necessarily follow that a person whose circumstances are not materially different would have been treated the same, and there will be no need to embark on the task of constructing a hypothetical comparator.
19. Section 136 of the Equality Act regulates the burden of proof in discrimination cases. It requires a two-stage process. A claimant must first prove facts from which the tribunal "could" conclude that unlawful discrimination had occurred and if she does so the burden shifts to the respondent. That means that the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of the protected characteristic

The Facts

20. For the purposes of this claim, the Claimant regards her race as black African.
21. The Claimant started work for the Respondent on 3 June 2019 and was dismissed on 11 October 2019. The reason that was offered by the Respondent was that she had not passed probation.
22. Prior to being offered the job, the Claimant had been interviewed by Mr N Patel by phone. She then had an in person interview with a panel of Mr Patel and Ms S Dibbens and a third employee of the Respondent. The latter two are both Scrum Masters. Mr Patel and Ms Dibbens both knew the race of the Claimant before she was employed.

23. The evidence satisfied me that the Claimant meets the definition of a disabled person, and has met the definition since long before she started work for the Respondent. I took into account the details of the diagnosis, the treatment and medication that she has received, and the effects that the condition has on her, both generally, and on some specific, recurring occasions.
24. The Claimant did not tell the Respondent about her condition before the start of her employment. She did not tell the Respondent about her condition until 10 September 2019.
25. For whatever reason, when the Respondent issued the contract to the Claimant the job title was different to the job which she had thought she was being interviewed for (Scrum Master) and also different to the job that the Respondent later told her she had been given (Junior Scrum Master). The Claimant was content for me to proceed on the basis that the job was actually Junior Scrum Master. I have seen payslips and the salary information for the job, as per the contract was correct, notwithstanding the error in job title. The salary was £50,000 per year gross.
26. The Claimant's contract said that she was subject to a 3 month probation period. On approximately the same day that the Claimant started, another employee of a different race to the Claimant and someone who does not - as far as the Claimant is aware - have a disability also started. On or around 15 August 2019, the Respondent told the Claimant and the other employee that each of their probation periods had been extended. They were each told that this was because the Respondent wanted longer to decide if they had passed probation. Neither of them was told that their performance was a cause for concern. The Claimant's extended probation period was due to end on 3 December 2019.
27. During her employment, the Claimant met Ms Dibbens approximately once per week for feedback and Mr Patel also attended these meetings approximately once every two weeks. It was summer and so the pattern was disrupted when any of them was on leave. The Claimant disagreed with some of the instructions given to her by Ms Dibbens. In August, Mr Patel and Ms Dibbens set some goals for the Claimant to achieve.
28. Prior to 11 September 2019, the Claimant was not told that the Respondent was dissatisfied with her performance or that she was in danger of failing to pass the probation.
29. On 10 September 2019, the Claimant told Ms Dibbens about her medical condition (which I have judged to meet the definition of a disability under the Equality Act 2010). The Claimant mentioned that she would potentially need some time off for medical appointments, because of the disability, in the coming weeks.
30. On 11 September 2019, the Claimant was told for the first time that her performance had to improve. She was told that Vocalink could be a difficult place to work for an "outsider". She was also told that the people she worked with were a "community"; in the context, the implication was that she was an "outsider" to that community. The Claimant's inference was that she was

being told that her colleagues were all from a particular racial group (she says that she believes that her former colleagues on the team all have South Asian heritage) and that was what was meant by “community”, whereas she was an “outsider” because she was the only member of staff (on the BACS UK Engineering team, consisting of approximately 40 people) who was black African. [Although the reference to “community” is not contained in the claim form, it does appear in the Claimant’s appeal letter and I am satisfied, based on her uncontested evidence, that the remark was made.]

31. On 11 October 2019, the Claimant’s employment was terminated with immediate effect. The dismissal letter contained some inaccuracies. It wrongly stated that the Claimant had daily meetings with Ms Dibbens and falsely implied that Ms Dibbens and Mr Patel had told the Claimant on a number of occasions that her performance was viewed by the organisation as unsatisfactory. The letter also implied that the Claimant had been told that the 11 October meeting was to discuss unsatisfactory performance; however, she had not been told that and she thought it was the ordinary fortnightly catch up with Mr Patel.
32. By letter dated 18 October 2019, the Claimant appealed. An appeal hearing took place on 6 November 2019, and, in January 2020, the Claimant was told that the appeal was rejected.
33. The Claimant was very upset about the dismissal in particular, and the length of time it took to deal with the appeal, despite her chasing. She was also upset about the criticisms of her performance and to be told that she was an “outsider”. Every time the Claimant thinks about her employment with the Respondent she weeps. She has suffered from loss of confidence and has been prescribed antidepressant and has undergone counselling.
34. I accept what the Claimant says about her physical illness in November and December 2019, but I am not persuaded that the Claimant has shown that was caused by the Respondent.
35. The Claimant commenced early conciliation on 11 December 2019. The certificate was issued on 9 January 2020 and the Claimant presented her claim on 4 February 2020. Therefore complaints about acts or omissions on or after 12 September 2019 were in time, but complaints about acts or omissions on or before 11 September 2019 were out of time (subject to the tribunal’s discretion to extend time).

Analysis and conclusions

36. I do not uphold the allegations of race discrimination based on the alleged events described in paragraph 5 of the Grounds of Complaint. Although the Claimant’s assertions are uncontested, I am not satisfied by the evidence that the line manager was doing anything other than giving guidance to a new employee during probation. No facts have been proved that any other actual comparable person (being a new employee of a different race) was being treated differently, or that a hypothetical comparator would have been. I am not satisfied that the alleged treatment was because of race.
37. In relation to the allegations about being told that she was an outsider, and

the references to her colleagues' being a community, there are potential explanations that do not relate to race. Eg "outsider" could refer to her being a new employee, and the reference to "community" could simply refer to a collegiate atmosphere at work. However, the evidence did satisfy me that the burden of proof (as per section 136 of the Equality Act 2010) had shifted to the Respondent. I accept the Claimant's uncontradicted evidence that she was told on 11 September 2019 that she was an "outsider" and that the people she worked with were a "community". The Claimant is not aware that the same comments were made to the other new employees; she was treated less favourably. The remarks are such that they could be a reference (directly or indirectly) to the fact that the Claimant was a different race to her colleagues. I am, therefore, obliged to uphold the complaint unless the Respondent satisfies me that the comments were not less favourable treatment because of race. The Respondent has not participated in the proceedings, and has not discharged that burden.

38. In relation to those same remarks allegedly being because of disability, the Claimant has not persuaded me. She has not caused the burden to shift. I find it implausible that "community" and "outsider" were a reference (no matter how indirect or subconscious) to the Claimant having a disability and her colleagues not sharing that disability.
39. In relation to the Claimant's being told, on 11 September 2019, her performance was a cause for concern, I do uphold the allegation of direct disability discrimination. The timing of the remarks made to the Claimant (coming more than 3 months after start of employment, but one day after informing the Respondent about her disability) is suspicious. The circumstances are such that I could infer that the treatment of the Claimant on 11 September (informing her for the first time that her performance needed to improve) was because of her disability. The burden of proof has shifted to the Respondent and the Respondent has not satisfied me that the Claimant's treatment on 11 September 2019 was in no sense connected to her disability.
40. In relation to the Claimant's being told, on 11 September 2019, her performance was a cause for concern, I also uphold the allegation of direct race discrimination. My finding is that the principal reason that these remarks were made is that, the previous day, the Claimant informed the Respondent that she had a disability (and one which might require time off work). However that does not, of course, mean that it is a logical impossibility for her race to have played some part (consciously or unconsciously) in the Respondent's remarks. At the same meeting, comments were made to the Claimant which I have found were acts of discrimination (that she was an "outsider" and her colleagues formed a "community"). Those remarks were seemingly tied into the Respondent's comments about performance (as the Respondent was stating that it was a difficult place to work *for her*). The burden of proof has therefore shifted to the Respondent and the Respondent has not satisfied me that the Claimant's treatment on 11 September 2019 was in no sense connected to her race.
41. I am satisfied that the Claimant's subsequent dismissal one month later should be treated as part of an act which started on 11 September 2019 and continued until the date of the dismissal. For that reason, the acts and omissions on 11 September 2019 are in time.

42. I am satisfied that the burden of proof in relation to whether the dismissal was because of disability has shifted to the Respondent. The Claimant was dismissed for the alleged reason of poor performance, but poor performance was only mentioned for the first time the day after the Claimant told the Respondent about her disability. The Respondent has not satisfied me that the Claimant's dismissal was in no sense connected to her disability.
43. I do not uphold the complaint that the dismissal was less favourable treatment because of race. As I have found above, the way in which comments about her performance were expressed on 11 September 2019 were discrimination because of race. However, given that the Claimant has persuaded me that the reason that she was dismissed was because her disability, I have not found that the burden has shifted such that the Respondent is required to demonstrate that race played no part in the Respondent's motivation to dismiss. The Claimant has not persuaded me that the Respondent dismissed her because of her race or because of any conscious or unconscious thought process connected to race.
44. Based on the evidence presented of the notes of the appeal hearing, the appeal officer seems to have been of the opinion (or of the purported opinion) that the sequence of events was (a) first, the Respondent told the Claimant about performance concerns and (b) second, the Claimant told the Respondent about disability. I do not have evidence about why that comment was made by the appeal officer, or whether he later changed his mind and accepted the Claimant's case. The Claimant remained dismissed (ie she was not reinstated) and it took a long time to give her that outcome. As mentioned above, the dismissal was discriminatory, and compensation for dismissal can take account of the fact that she was subjected to a period of uncertainty while waiting to see if the Respondent would reverse its discriminatory decision to dismiss. However, I am not persuaded that the failure to uphold the appeal was a new act of discrimination, separate from the dismissal.

Remedy

45. I must take care to only compensate the Claimant in relation to the complaints that I have upheld, which means that I must strive to identify any adverse effects on the Claimant of the treatment alleged in paragraph of the Grounds of Complaint, which I did not find to be a breach of the Equality Act 2010.
46. If making an award for injury to feeling, the tribunal should have regard to the guidance issued in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318, CA, and the changes and updates to that guidance to take account of inflation, and other matters.
47. There are 3 broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury):
 - 47.1. The top band. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
 - 47.2. The middle band should be used for serious cases, which do not merit an award in the highest band.

- 47.3. The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.
48. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and updated them for inflation. In a separate development in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239 the Court of Appeal in England & Wales declared that with effect from 1 April 2013 the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 the Court of Appeal ruled that the 10% uplift provided for in *Simmons v Castle* should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury
49. On 5 September 2017, the Presidents of the Employment Tribunals issued guidance, and the addendum applicable to this case was published in March 2019. In so far as relevant, it states:
- In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.*
50. In this case, the discrimination was not a one off event. There were comments related both to being an outsider and to performance on 11 September 2019, and there was the subsequent dismissal one month later. That is part of the reason that an award in the lowest band is not appropriate.
51. The effect on the Claimant was significant. She has been required to take medication and undergo counselling and she weeps whenever she thinks about working for the Respondent. Even though I must discount some of that as being partially caused by events which I have decided were not a breach of the Equality Act 2010, the serious consequences for the Claimant mean that an award in the lowest band is not appropriate.
52. My decision is that an award in the upper band is not merited. All discrimination is serious and causes a degree of injury to feeling. However, the upper band is reserved for the most serious cases of all. The short durations of the acts of discrimination (one month from 11 September 2019) and the comparatively small number of separate incidents mean that this case does not cross the threshold into being at the most serious end of the range, in comparison to other cases.
53. Taking account of the fact that (on the one hand) there was discrimination in relation to two different characteristics, and the effects on the Claimant (including medication and counselling) and the fact that it took around 3 months to deal with her appeal, but (on the other hand) there were a comparatively small number of incidents over a one month period, my decision is that the award should be slightly lower than the mid-point of the middle band and the sum which I award is £16,000 (sixteen thousand pounds).

54. As per the Claimant's schedule of loss, her loss of earnings from dismissal (11 October 2019) to the anticipated start date of her new job in March 2021 (the exact date is not fixed) is £50,735.58.
55. I am satisfied that the Claimant has done her best to mitigate her losses, and has made a reasonable attempt to find work. Due to her partner's income, she has not been eligible for benefits.
56. The Respondent was not in attendance and— therefore – I heard no argument, and have no evidence, about whether the Respondent's employees' remuneration was due to the pandemic. I will therefore not make a specific reduction for that possibility.
57. The Respondent was not in attendance and has – therefore – not put forward arguments as to whether – for lawful and non-discriminatory reasons – the Claimant's employment might have come to an end prior to March 2021. However, even in the absence of argument from the Respondent, it is appropriate for me to make some reduction. Based on her uncontested evidence, there were no performance concerns, and so I proceed on the assumption that she would have passed probation. However, possible reasons for leaving include the fact that – even before 10 September 2019 – according to the Claimant, there were things she did not like about the way she was given instructions by her line manager, and businesses sometimes reorganise and make redundancies. I therefore make a reduction of just over 10% to her net losses to reflect that, and I think the award should be to compensate the Claimant for a net loss of £45,000. This adjustment also takes account of the fact that some of the period of loss is after the date of this judgment and therefore, if paid promptly, would be a slightly accelerated payment.
58. The Claimant's representative requested interest. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give me the discretion to award interest on awards made in discrimination cases and in this case, interest is appropriate.
- 58.1. For the injury to feelings award, I am going to treat the entire injury as occurring on 11 October 2019, even though there were events on 11 September 2019 which formed part of a continuing act. The appropriate rate is 8% per year. The period from 11 October 2019 to today is 1 year plus 94 days. So the calculation is:
- | | | | |
|--|-----------------------|---|----------|
| 58.1.1. First year: | 8% of £16000 | = | £1280 |
| 58.1.2. Part Year: | 94/365 x 8% of £16000 | = | £329.65 |
| 58.1.3. Total Simple interest on injury to feelings award: | | | £1609.65 |
- 58.2. For the financial loss, I take the mid-point of the start of the period of loss (12 October 2019) and today's date (13 January 2021), which is 29 May 2020. The appropriate rate is 8% per year. The period from 29 May 2020 to today is 230 days. So the calculation is: $230/365 \times 8\%$ of £45000, which is £2268.50.
- 58.3. Therefore the total sum awarded for interest is £3878.15.
59. Therefore the award is:
- | | | |
|-------|---------------------|-----------|
| 59.1. | Injury to Feelings: | £16000.00 |
| 59.2. | Interest on that: | £1609.65 |

59.3.	Financial Loss:	£45000.00
59.4.	Interest on that:	£2268.50
59.5.	Aggregate net award:	£64878.15

60. This needs to be grossed up to reflect the fact that the award made will be taxable once the Claimant receives the sum.

61. I have to estimate how much of the Claimant's taxable allowance will be used in the year 20/21. As submitted by the Claimant, and as assumed above, she is likely to start work at the start of March, approximately, on a salary no less than at the Respondent. I am therefore going to estimate that approximately £4000 of her tax free allowance will have been used by 5 April 2021.

62. The first £30000 of the award falls into the exemption for termination payments and £8500 (£12500 personal allowance less £4000) of the award will fall into the Claimant's allowance and will not be taxed. The next £37500 of the award will be taxed at 20%. The part of the award which is above £76000 (£30000 plus £8500 plus £37500) will be taxed at 40%.

63. If I award the gross sum of £71473 then that will be taxed as follows:

63.1.	First £38500, tax is	£0
63.2.	Next £32973, tax (at 20%) is	£6594.60
63.3.	Therefore, net sum = £71473- £6594.60	= £64878.40

64. Therefore the grossed up award which I make is £71473.00.

Employment Judge Quill

Date: 13.01.21

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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