EMPLOYMENT TRIBUNALS

Claimant: Ms L Sylvester

Respondent: I-Movexpress Limited

Heard at: London Central Employment Tribunal

On: **12 & 13 March 2020 (in person)**
3 to 5 February 2021 (by video)
12 February 2021 (in chambers, by video)

Before: Employment Judge Quill; Ms J Griffiths; Dr V Weerasinghe

Appearances
For the claimant: In person
For the respondent: Ms B Grossman, counsel

LIABILITY JUDGMENT

(1) The complaint of unfair dismissal contrary to section 99 of the Employment Rights Act 1996 is not well-founded and is dismissed.

(2) The complaint of unfair dismissal contrary to section 104 of the Employment Rights Act 1996 is not well-founded and is dismissed.

(3) The complaint, under section 57B of the Employment Rights Act 1996, that the Respondent unreasonably refused to permit the Claimant, on 25 February 2019, to take time off, as permitted by section 57A, is not well-founded and is dismissed.

(4) The complaint of breach of contract was withdrawn by the Claimant and is dismissed.

(5) The complaints of direct discrimination (as defined in section 13 of the Equality Act 2010) because of sex fail and are dismissed.

(6) The complaints of direct discrimination (as defined in section 13 of the Equality Act 2010) because of race fail and are dismissed.

(7) The complaints of indirect discrimination (as defined in section 19 of the Equality Act 2010) because of sex fail and are dismissed.

(8) The complaints of indirect discrimination (as defined in section 19 of the Equality Act 2010) because of race fail and are dismissed.

(9) The complaints of harassment (as defined in section 26 of the Equality Act 2010) related to sex fail and are dismissed.

(10) The complaints of harassment (as defined in section 26 of the Equality Act 2010) related to race fail and are dismissed.

(11) The complaint of a contravention of section 39(4)(c) of the Equality Act 2010 succeeds. The dismissal was an act of victimisation.

(12) The other complaints of victimisation (as defined in section 27 of the Equality Act 2010) fail and are dismissed.

Reasons for the liability judgment having been given orally at the hearing, written reasons will not be provided unless a request is presented by either party within 14 days of the sending of this written record of the decision.

RESERVED
REMEDY JUDGMENT

The Respondent must pay the sum of £9920.09 in respect of the victimisation. The aggregate sum is made up of £7000 for injury to feelings (plus interest on that of £1103.13) and £1580.38 for financial losses (plus interest on that of £236.58).

REASONS

1. After we had given the liability decision, we heard evidence and submissions in relation to remedy. By then, it was after 5.20pm, and, due to other commitments, it was not practicable for the panel to deliberate and give the remedy decision on the day. We therefore reserved our decision. We made the remedy decision in chambers (conducted remotely via video) on the morning of 12 February 2021.

2. We took into account a document which the Claimant submitted on Day 5 (5 February 2021) and which was available during the evidence and submissions. We did not take into account further documents which the Claimant purported to submit after the hearing. The Claimant had not served these documents appropriately on the tribunal and it would not have been proportionate to reconvene to hear further evidence and submissions in relation to these documents, and nor would it have been appropriate to delay our decision further to allow for written submissions. Had the Claimant wanted to rely on them, she had plenty of opportunity to submit them: (a) before the start of the hearing in March 2020; (b) on Day 1 of the hearing in March 2020, when she submitted other late documents; (c) in the interval between Day 2 and Day 3 during which the hearing was part heard, with resumption was delayed due to the pandemic; this was especially true of the period December 2020 to January 2021, after the Notice

of Hearing for the resumed hearing had been sent out; (d) during the hearing on Days 3, 4 and 5, especially on Day 5 when a very late document was submitted and accepted by the tribunal.

3. In relation to the claimant's income, we have considered the schedule of loss on page 399 of the bundle and the updated document bearing the date 18 October 2019, commencing at page 400 of the bundle.

4. As per the liability decision, the Claimant's salary with the Respondent was £34,000 per year. Her payslip shows that the payment in lieu of one week's salary was £653.85, which we find was, indeed, her gross weekly salary (£34000 divided by 52).

5. Her payslip shows gross payments for February of £2550.01 and deductions for PAYE of £533.96. Thus, the deductions were 20.94%. From that, our finding is that the Claimant's net weekly salary was £653.85 less 20.94% deductions, so £516.94 per week (rounded up).

6. The Claimant's account was that she had been looking for work throughout the period from 25 February 2019 to Day 5 of this hearing, 5 February 2021. According to the document starting on page 147 of the bundle, the Claimant had a job interview on 11 April 2019, and two more in May 2019, before starting an assignment in June 2019.

7. The claimant's CV in the bundle shows that from 1995 until October 2018, the claimant had a series of periods of work with some gaps in between. For example, the gaps November 2008 to July 2009, and January 2010 to March 2010 and August 2010 to September 2010 were described as job seeking. Some other gaps (for example: February 2011 to July 2011, February to March 2015, January to February 2016, September to October 2016) did not have specific explanations.

8. When giving oral evidence, the claimant said that she only had one period of work since leaving the employment of the respondent. She said that, other than that, her income was solely from Universal Credit. She said that one period of work began on 25 February 2020 and finished immediately before the Day 1 of this hearing in March 2020. She stated that her total remuneration from that work, which was an agency assignment, was around £1400.

9. It was pointed out to the claimant that the schedule of loss in the bundle referred to a period of work in June 2019 (and, in fact, this period is also referred to in the further and better particulars of victimisation, starting on page 147 of the bundle). The Claimant told us that she had forgotten about that. She was asked whether there were other periods of work which she might have forgotten about and she did not give a direct answer to the question. Her answer was that she was sure that the most recent period of work was the one that she had mentioned, namely the one which ended immediately before Day 1 of this hearing. Her witness statement at paragraph 100, refers to a third period of employment, between 20 November 2019 and 14 January 2020.

10. Documents relating to Universal Credit appear in the bundle. The amount awarded

fluctuates depending on variations in her own income and that of her husband. We make the following findings in relation to Universal Credit:

a. While the Claimant was working for the Respondent, the Claimant (and her household) had no entitlement to Universal Credit.

b. No (successful) application was made until 30 March 2019. The delay between 26 February 2019 and 30 March 2019 was not a failure to mitigate her losses and it would not be just and equitable to give the Respondent credit for any notional amount of Universal Credit that the Claimant or her household might have received had an earlier application been made. In any event, in the absence of evidence of the income of the Claimant's husband for the period, we cannot determine what the notional entitlement (if any) would have been.

c. For the period 30 March 2019 to 29 April 2019, the amount of Universal Credit awarded was £548. This is a daily amount of £17.68. This is compared to an entitlement of zero had the Claimant been in the employment of the Respondent for that period.

11. In relation to injury to feelings at paragraph 99 of the claimant's witness statement. She stated.

I would also like an award for injury to feelings. The dismissal has been very distressful to me and has also had an impact on my child. The Respondent's conduct in tampering with job opportunities prior to the Preliminary Hearing impacted prevented me from mitigating my loss. It is clear had it not been for the directions of the tribunal the Respondent would not have provided a reference for me. Please refer to further and better particulars on pages 147 to 149 of the bundle

12. The tribunal's decision on liability rejected the Claimant's allegations that the Respondent had failed to respond to reference requests, or that it had given unfair references. The Respondent only received one request, and it answered it in a manner which was not a contravention of Equality Act 2010.

13. The Claimant asked us to take into account a prescription dated 5 February 2021. In other words, the prescription date was Day 5 of this hearing. The Claimant had told us at the end of Day 4 that she was feeling unwell and needed an adjournment until the following day to make her closing submissions. She told us that the prescription was given to her by her GP and that her GP told her that she was potentially feeling stressed as a result of the proceedings and that the medication might assist.

14. There was no medical evidence to support that contention. Since the end of her employment with the respondent, the claimant visited her GP twice: first in June 2020 and again in December 2020. She has also spoken to the GP by phone on other occasions. We do not accept the Claimant's assertion that she will now have to take this medication for the rest of her life. There was no evidence to support that. Even on the Claimant's own account, this was her own suggestion, not that of her GP.

15. The claimant was asked a number of questions on the interconnected issues of what distress she had experienced in 2019 and about whether any such distress might have been as a result of the alleged treatment by Barnes and Partners, and/or the litigation against that organisation, rather than a result of the 25 February 2019 dismissal by the Respondent.

16. The claimant's answers to questions about her stress and anxiety in 2019 were confusing and contradictory. At one point she told us that she had not suffered from stress and anxiety at all during 2019. At another point, she told us that she had suffered such stress or injury to feelings in 2019, but it was not at all due to the Barnes and Partners claim or litigation and was entirely due to the Respondent.

17. The Barnes and Partners claim was dealt with at a full hearing in around November 2019. The claimant gave evidence during that hearing. As part of her claim against Barnes and Partners, the Claimant alleged that their actions had caused injury to feelings. (The allegation being of wrongful conduct by them in October 2018, and the claim being dismissed after the full hearing in November 2019.)

18. The claimant made the allegations in her 11:01am email on 25 February 2019 in good faith. She did genuinely believe that files and electronic documents were being tampered with in order to set her up, and this belief did upset her. However, we found that that was not the case; none of the Respondent's employees were tampering with documents or attempting to frame her. Therefore, it was necessary for us to ignore any potential injury to feelings as a result of the claimant's erroneous belief that she had been set up in that way.

19. We also rejected the claimant's argument that Ms Kyriacou's criticisms of her work and Ms Kyriacou's tone of voice and volume of speech were breaches of the Equality Act. We rejected the Claimant's argument that the fact that the contract of employment was issued to begin 1 February 2019 rather than some earlier date (for example, 1 December 2018) was a breach of the Equality Act. Therefore, any injury to feelings as a result of the claimant's perception of "delay" in issuing the contract due to sex or race was something else which we had to ignore when assessing injury to feelings.

20. Similarly, we rejected the claimant's argument that the fact that the claimant has a dependent child was the reason for termination of her employment and we rejected an argument that the fact that the respondent's refusal to allow her to finish work at 3pm two days per week was because of her sex, or because of her race.

21. We also rejected the claimant's argument that the respondent had victimised her after the termination of her employment by failing to reply to reference requests or else by supplying references or other information about her to dissuade potential employers from taking her on.

22. Therefore, to the extent that the claimant's hurt feelings related to those particular allegations that was something which we needed to ignore.

23. In other words, when assessing the injury to feelings components we had to focus specifically on the effects on the claimant of receiving the 25 February 2019

dismissal letter and the things that flowed directly from that act of victimisation which included the knowledge that the dismissal meant that she became unemployed and had to go through an appeal process if she wanted to try to be reinstated.

24. The dismissal led to a period of unemployment and the need to apply for state benefits. We are satisfied that this caused upset and distress. We are also satisfied that the Claimant recovered reasonably quickly. She was able to participate fully in the appeal process and was able to attend interviews for new jobs by April 2019 and commence work in June 2019.

25. When the Claimant attended her GP in June 2020, our finding is that this was not something caused by the Respondent's victimisation in February 2019. By that time, the Claimant had had 3 periods of employment, brought claims against Barnes and Partners, and others, finished the full claim against Barnes and Partners (some 7 months earlier), and had the first two days of this hearing (some 3 months previously). By June 2020, the UK was about 3 months into the pandemic and associated lockdown.

The law

26. The purpose of compensation is to provide proper compensation for the wrong which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

27. For financial losses, we must identify the financial losses which actually flow from the victimisation on 25 February 2019 in which the Claimant was dismissed with immediate effect (and a payment in lieu of notice) on that date. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way.

28. For injury to feelings, we must not simply assume that injury to feelings inevitably flows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether the loss has been sustained. Some persons who are victimised may feel deeply hurt and others may consider it a matter of little consequence and suffer little, if any, distress.

29. When 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 taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:
    a. The top band was (at the time) between £15,000 and £25,000. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
    b. The middle band was, initially, £5,000 and £15,000. It is to be used for serious cases, which do not merit an award in the highest band.
    c. The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

30. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated 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 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.

31. There is presidential guidance which takes account of the above, and which is updated from time to time. This claim is one which was issued in May 2019. The relevant guidance applicable to this claim 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

Analysis and Conclusions

32. The Claimant was on a trial period from 1 February 2019 to 30 April 2019.

33. We are satisfied that - in the absence of any contravention of the Equality Act (or of section 99 of the Employment Rights Act 1996) by the Respondent - there is a 100% likelihood that the Claimant's employment would have terminated within the trial period, and would have ended by no later than 29 April 2019.

34. We do not think that there is any likelihood that the Claimant would have voluntarily resigned to take up other employment, or for other personal reasons. There is, perhaps, a small finite possibility that the Claimant might have resigned and sought to allege constructive dismissal. The Claimant was not asked about whether she was contemplating this and so we do not take it into account.

35. We rejected the Respondent's arguments that the 25 February 2019 dismissal was solely for reasons that were separable from the protected act. However, had the Respondent (acting through Ms Kyriacou) not unlawfully dismissed the Claimant on 25 February 2019, the 11.01am email would have had to be addressed in a manner which did not breach Equality Act 2010. There is a significant likelihood that a fair-minded person could have investigated the Claimant's allegation and reached the conclusion that termination of the Claimant's employment was the appropriate outcome, for a reason that was indeed separable from the protected act: namely that the Claimant had made allegations about tampering with documents to frame her which (while the Claimant believed them) had no basis in fact and which meant that the working relationship between the Claimant and the Respondent had irretrievably broken down. It would have taken a minimum period of a few days to reach such a decision, perhaps longer.

36. There is a very strong likelihood that – even had the Claimant not performed any

protected acts – her employment would have been terminated in the near future due to the Respondent's perceptions about her capability. The Respondent had not been particularly impressed with her performance in November 2018 to January 2019 and had actively explored other options. As made clear to the Claimant in January 2019, the employment contract was offered to her on the basis that she needed to show improvement during the trial period, including doing the full range of what was required by Ms Kyriacou and – as had always been the expectation – doing work for Mr Lesser too. However, by 22 February 2019, the Respondent's perception was that, rather than improving, the Claimant was making mistakes, such as sending the wrong email to Mr Fordham and failing to carry out instructions, such as not making bookings for the Amsterdam event, even after having all the necessary information and despite being told several times that it was important and urgent.

37. As we noted in the liability decision, as of Friday 22 February 2019, the Respondent was not planning immediate termination. However, irrespective of the observation (made above) that the tampering allegations in the email of 25 February 2019 might have led to a decision that there had been a breakdown in trust and confidence, the fact that the Claimant made the tampering allegations (and believed them to be true) would have been perceived as unwillingness on her part to acknowledge that her performance needed to improve and to learn from her mistakes. (That was, in fact, Ms Kyriacou's opinion and a fair-minded employee of the Respondent, not being at all influenced by the protected act, was likely to reach the same conclusion.) Instead, the email suggested that the Claimant believed that her performance was adequate and that the criticisms made of her were not merely unjustified, but were – in fact – invented, and were made in circumstances in which Ms Kyriacou knew that the Claimant had performed her duties to an acceptable standard, but had created a false evidence trail to seek to trick others into believing that the Claimant was making mistakes. In such circumstances, it is very likely that the termination of the Claimant's contract for non-discriminatory capability reasons was likely to be sooner rather than later.

38. We would like to add that in saying this, we are not making our own assessment of the Claimant's general competence as a Legal Secretary. Our assessment of the likelihood of the Claimant's employment terminating – in the absence of a contravention of the Equality Act 2010 – after 25 February 2019 is our assessment of what this Respondent would have been likely to do, and not an assessment of whether we think that such decisions would have been fair or reasonable.

39. For financial loss, the Claimant had a payment in lieu of notice, and so no loss for the week Tuesday 26 February to Monday 4 March 2019.

40. For the week 5 March to 11 March 2019, her loss is of one week's net salary, namely £516.94. We award 100% of this sum, because the chance of a termination of employment that was not a contravention of Equality Act (and not a breach of section 99 of the Employment Rights Act 1996) before 11 March 2019 is low.

41. For the 4 weeks 12 March 2019 to 8 April 2019, the Claimant did not receive 4 weeks net salary, so £516.94 x 4 = £2067.76. She received 10 days of Universal

Credit, so £17.68 x 10 = £176.80. Therefore, she was £1890.96 worse off than if she had remained in employment for those 4 weeks. However, we think that there is a high chance that, in the absence of any victimisation, she would have been dismissed towards the beginning of that period, and so we award her 50% of that £1890.96 as attributable to the Respondent's contravention of the Equality Act.

42. For the 3 weeks 9 April 2019 to 29 April 2019, the Claimant did not receive 3 weeks net salary, so £516.94 x 3 = £1550.82. She did receive Universal Credit of £371.20 for that period. Therefore, she was £1179.62 worse off than if she had remained in employment for those 3 weeks. However, we think that there is only a very low chance that, in the absence of any victimisation, she would still have been employed by the start of this period. Therefore, we award her 10% of that £1179.62 as attributable to the Respondent's contravention of the Equality Act.

43. We do not think that - in the absence of any victimisation or any other contravention of the Equality Act, or of section 99 the Employment Rights Act 1996 - there is any realistic likelihood of the Claimant still being employed by 30 April 2019, and therefore we do not award any financial loss for the period 30 April 2019 or later.

44. Therefore, the financial loss which we award is £[516.94 + (0.5 x 1890.96) + (0.1 x 1179.62)], which is £1580.38.

45. We have decided that this is an appropriate case for us to exercise our discretion to award interest. The appropriate statutory rate is 8% and we must make the award from the mid-point of period in which the loss accrued. The midpoint of 5 March 2019 and 29 April 2019 is 2 April 2019. The period 2 April 2019 to 12 February 2021 is 683 days. The daily rate of interest is £1580.38 multiplied by 0.08 divided by 365.

46. Multiplying that daily rate by 683 results in £236.58 as the appropriate amount for interest on the financial loss.

47. In assessing the award for injury to feelings, we have taken into account that all contraventions of the Equality Act are serious. Victimisation, and especially dismissing an employee as an act of victimisation, can potentially have very serious consequences as it can create an environment in which employees believe that they have no choice other than to put up with discrimination as they will be treated even more badly if they ask that it stop. Furthermore, the dismissal of one employee can have a chilling effect on the willingness of other employees to address concerns that either they, or a colleague, might be being treated in a manner which is a breach of the law.

48. All that being said, our focus in making an award must be on the effects of the victimisation on this specific employee, and it is not appropriate to use the injury to feelings award as a means of expressing disapproval of the Respondent's conduct or to encourage the Respondent to improve their responses to any other hypothetical protected acts by other persons.

49. Based on our liability findings, there was no other breach of the Equality Act, other than the dismissal at 17:20 on 25 February 2019. This was a one off act, albeit

one which had continuing consequences for the Claimant, in that she became unemployed and did not start work elsewhere until June 2019. She tried to appeal against the dismissal and was unsuccessful.

50. We accepted that this dismissal caused genuine distress to the Claimant, specifically as she had been keen to commence long-term employment, after many years of short-term assignments (punctuated by gaps in which she did not work at all). However, she recovered reasonably quickly and we were not satisfied that the victimisation caused her to require any medical treatment. We also had to attempt to strip out any effects on her feelings that were caused by the Claimant's belief that the Respondent had breached Equality Act 2010 in the various complaints which were rejected by us.

51. This is an appropriate case for us to make an award in the lower band of Vento, because it was a one-off act which had comparatively short-term effects on the Claimant's feelings.

52. However, our decision is that the award should be towards the upper end of the lower Vento band, taking into account that the Claimant was significantly upset by the dismissal and by the knowledge that she was unemployed as a result of it.

53. Our decision is that £7000 is the appropriate sum to award, and that this is an appropriate case for us to exercise our discretion to award interest on that sum.

54. The period from 25 February 2019 to 12 February 2021 is 719 days. The daily rate is £7000 multiplied by 0.08 divided by 365.

55. Therefore, the appropriate amount for interest on the injury to feelings award is £1103.13.

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Employment Judge Quill

Date: 12 February 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

16 February 2021

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FOR EMPLOYMENT TRIBUNALS