**Case No: 2205632/18**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr. P. McQueen**
**Respondents:** **General Optical Council**

**London Central Remote Hearing (CVP)** **On: 1 April 2021**

**Before:** **Employment Judge Goodman**
**Mr. D. Carter**
**Mr. G. Bishop**

**Representation**
**Claimant:** did not attend
**Respondents**: Mr. J. Boyd, counsel

# REMEDY JUDGMENT

1. **Compensation for injury to feelings caused by victimisation in the sum of £15,000.**
2. **The award is increased by 20% (£3,000) for breach of the ACAS Code on Discipline and Grievance.**
3. **Interest on the award at 8% from 1.1.18 to today, £4,680.**
4. **The total of 1-3 is £ 22,680.**

# REASONS

1. In a decision sent to the parties in July 2020, the tribunal upheld a claim of victimisation and dismissed other claims of discrimination for race , sex and disability. Today was listed to decide remedy for victimisation.

The issues identified in paragraph 172 of the earlier decision are injury to feelings and whether there should be an uplift of award for failure to follow the ACAS code

**Application to postpone hearing**

2. The claimant had previously applied to postpone the hearing, and he did not did not attend.
3. A remedy hearing had been set for 9 October 2020, but was adjourned for a number of reasons, including practical difficulties relating to Covid restrictions, and a postponement request by the respondent given its proximity to the hearing of two subsequent cases in November 2020 (judgement of E J Spencer promulgated 17 December 2020, reconsideration judgment 9 March 2021). On 9 February 2021 the parties were given a number of dates when the panel of three could reassemble between then and today. The claimant replied that he expected to be working into March, and could not take leave unless unpaid, and that in April he might no longer have internet access, and would also have childcare difficulty for the first two weeks in April so it was unlikely to be available until 26 April at the earliest. The tribunal asked him to state the exact dates of his current contract, and replied with practical suggestions about joining a remote hearing, including that the respondent's solicitors could make a room available, or failing that a room be found for him in another central London HMCTS building. It was assumed that for a half day hearing childcare could be covered. He did not reply about his contract dates and the hearing was fixed for 1 April 2020, to accommodate the claimant saying he was working most of March. The claimant then replied on 16 February that his contract had been extended and he would not be available during the 'reception planned admission process', without saying what that was or when it ended. He was asked if it was not possible to take a morning off for the hearing and provide evidence of the contract extension. On 25 February he said that he would "most likely submit a full written case, although it is not clear from this whether he intended to submit representations for this hearing, or write a commentary on it afterwards. He was told in terms on 17 March that the application postponement would be considered when provided some evidence of why he is not available from 10am to 1 pm on 1 April. Yesterday the judge was sent an email from the claimant dated 17 March saying that DFE national offer day was 16 April; there is nothing about the terms of his contract or the extension or why he cannot take time off; from the email it might be deduced that 'offer day' might be about his own children but more likely that his current employment has something to do with schools admissions.

4. The tribunal decided not to postpone the remedy hearing. The changing reasons, some of them weak, for the claimant not wanting a hearing in February or March or April, reinforced by the failure to provide any evidence, when a simple scan of some document from his employer would have sufficed, carried some strong suggestion that he did not want the hearing. Measured against the delays that had already occurred, and the difficulty of finding a date when all three members of the panel and the respondent were all available, the interests of justice

favoured holding the hearing as listed.

5. In the claimant's absence, we have reread the decision of July 2020, paying particular attention to passages about the grievance handling, and the claimant's 236 page witness statement. In the event he has not sent any written representations or any witness statement that elaborates on his injury to feelings

**6.** Mr Boyd made a short submission, advocating an award for injury to feelings at the higher end of the lowest band of Vento. We adjourned to discuss. Judgment was reserved, to ensure the claimant would have the reasons in writing.

**7. Compensation for Injury to Feelings**

8. In assessing compensation for discrimination the tribunal must identify the act complained of for which the award is being made. The delay in handing the grievance over a period extending to 18 months is victimisation for which there should be compensation.

9. In assessing the injurious effect of that on the claimant's feelings, we note his particular difficult personality, his autistic spectrum disorder, and the fact that he was already aggrieved for what we have found to be non-discriminatory reasons, or, in respect of some adjustments for disability, matters out of time.

10. As we have already held (July 2020 judgement paragraphs 157, 166) the prolonged delay stoked the claimant's resentment and caused anxiety, and put him under great strain. In assessing remedy we identify more precisely the particular harm caused by (1) the lack of action following Lauren Campling's meeting in March 2018, which seemed to shut the process down without heed to what he complained of, especially when immediately followed by a disciplinary investigation given that one of the things he complained of unfair discipline, so it looked as if this was the real reason why his complaint was only now being addressed (2) the actions of Teresa Copplestone between

receiving the independent investigation report and Lesley Longstone's decision to hold a grievance meeting; this included withholding the report, and the correspondence disputing whether there needed to be a meeting and at what stage, so aggravating and prolonging the dispute, and (3) the claimant's breakdown after reading the notes of the investigation interviews in December 2018, followed by an inability to return to work - he may have disputed the views expressed ,which are not of themselves discriminatory, but we found it hard to envisage as extreme and disabling a reaction if these interviews have been conducted 12-15 months earlier. The delays were the background to the disputes once we had the outcome letter in January. The content may never have been welcome, but the response would not have been as disabling if there had been timely handling of the grievance.

11. We have regard to the guidelines in Vento v Chief Constable of West Yorkshire (2002) EWCA Civ 1871, and to the guidance issued from time to time by the president of employment tribunals. For a claim presented after 6 April 2018, the relevant span of the lower band is £900-£8,600, and the middle band, £8,600 to £25,700.

12. We considered where to place the facts of this claim on the various Vento bands by looking at some earlier decided cases, all decided after Vento outlined three bands. We also took account of the 10% increase following the ruling in de Souza in 2017, to get a broad feel for where to place historic awards. For guidance we considered Okolo v Community Matters 2202624/12, £8000 was awarded for a period of "several weeks" of refusing to consider part-time working as an alternative to dismissal. That is now worth in the order £9,500. The distress must have been severe when the alternative was dismissal. In **Newton v DuPont Teijni Film UK Ltd, UKEAT/033/07**, £10,000 was awarded for "several years" of monthly reviews as a form of victimisation. That is now worth in the order of 13,500. In **St Andrew's School v Blundell, UKEAT0/330/09**, the EAT awarded £14,000, reducing an earlier tribunal award, to reflect a teacher's stress-related symptoms and panic attacks over a period of four months caused by bullying and undermining. That is now worth around £18,000. In **de Souza v Vinci Construction UK Ltd (2015) IRLR 531,** an employment tribunal had awarded £9,000 for injury to feelings for a period of 18 months of "low-level" discrimination involving some bullying and harassment, working in isolation, unheard grievances, and inaccurate salary. That would now be around £10,500. These cases place the current case in the middle band.

13. Failure to deal with the grievance was not a one-off matter, but

something that caused distress for over a year, and not just from a passive failure to do anything, but on two occasions by active mishandling causing distress, and, by December 2018, causing the claimant to become too upset to work at all. His reaction was by most standards extreme, but in assessing damages, the respondent has to take him as they found him. No one case is on all fours: somewhat shorter but more severe, others lasted much longer, but we placed the award for injury to feelings in this case at £15,000, between Blundell and de Souza.

**Failure to follow the ACAS code**

14. By section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992:

> If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
> (b) the employer has failed to comply with that Code in relation to that matter, and
> (c) that failure was unreasonable,
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

15. We identified specific breaches of the Code in the earlier decision at paragraph 156. As discussed there was delay in handling this grievance at several stages. There was an inexplicable failure to do anything for five months, until the claimant chased it up. A letter was written but not sent. Three months later there was an informal meeting, and a month later an attempt to dispose of the grievance but only in part. In the claimant's vehement protest an outside investigator was brought in. He was delayed because he could not get documents sent to him. There was alert to lay one month and acting in his investigation report, and then another two months of wrangling over whether there should be a formal meeting, then two months of investigations and a further month to write a formal outcome. Sometimes grievances are slow to progress but this was exceptional. There has been no good explanation, and in our view the delay generally and refusals to call meetings in particular were unreasonable. The harm caused to the individual - and the organisation - would have been far less if it had been handled promptly in accordance with the Code. The respondent is an organised operation with an HR Department. We considered there should be some award.

16. In deciding what award to make we considered whether there was an element of double recovery, when the same behaviour on the part of the respondent had also resulted in an award for injury to feelings. However, the award of injury to feelings is intended as compensation for injury caused by the respondents discrimination, unrelated to the size or blameworthiness of their actions, while the uplift of awards is intended to encourage employer compliance with the Code, and so promote relations at work and save cases entering the tribunal system. It is not to reward claimants, even if it could also be viewed as a bonus for the trouble of having to get redress from the tribunal rather than in an internal procedure. So we decided the award should be uplifted for breach of the Code. Having regard to the range of up to 25%, we award 20%. This takes account of the size and experience of the respondent's resources, and that this was not a one off breach, but a series of failures at several levels over a long period.

**Interest on Award**

17. By the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, the tribunal may award interest, and must consider whether to do so. It has taken some time for this case to reach this point, and we could see no reason not to award interest. Where a tribunal makes an award, regulation 3(2) provides:

> (a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;

18. By regulation 3(3) there is some latitude to adjust the period if otherwise "serious injustice would be caused".
19. As to the rate of interest, by regulation 3, "the rate of interest to be applied shall be, in England and Wales, the rate from time to time prescribed for the Special Investment Account under rule 27(1) of the Court Funds Rules 1987". By the employment tribunals (interests) (Amendment) regulations 2013, the rate was changed from the special investment account rate to the judgement at 1838 rate, which is 8%.

20. As to the period, it is not easy to say of an 18 months period when the act of discrimination occurred. For a grievance started on 13 July 2017, we would have expected a meeting to have been called within the month for a simple matter. It did not take place 17 months.

21. This was more complex, of course. Some steps were being taken (change of line management, disability awareness training) but none that addressed the grievance. The claimant was patient enough in waiting until 13 December 2017 to chase it up. We propose to treat 1 January 2018 as the date of the contravention. By then the respondent had drafted a letter but left it unsent.

22. From then until today, a period of 39 months interest runs at 8% per annum. We considered whether the delays attributable to Covid restrictions and the difficulty relisting the remedy hearing that would have taken place in June 2020 mean there is a risk of serious injustice to the respondent here, which was not responsible for these delays at a time when market rates generally are very low, and the special account rate itself decreased from 0.5 to 0.1% in June 2020. We concluded there was injustice, but when taking account of all the factors that can hold up hearings (and increase interest awards), and the fact that when the 2013 regulations came into force bank rate was then 0.5% and the judgment rate 8%, Parliament must have contemplated some results as these, and that the 9 months delay has not, in the overall difficulties of listing hearings, caused serious injustice.

Employment Judge Goodman

Date: 01/04/2021

JUDGMENT and REASONS SENT to the PARTIES ON

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.06/04/2021

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FOR THE TRIBUNAL OFFICE