



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Eleanor Stevenson

v

Edenbeck Ltd

Heard at: Watford by Cloud Video Platform

On: 8 March 2021

Before: Employment Judge Stephen Bedeau
Ms Jane Weaver
Mr Adarsh Kapur

Appearances

For the Claimant: Mr J Davis, Solicitor

For the Respondent: Mr J Munro, Employment Consultant

RESERVED JUDGMENT ON REMEDY AND COSTS

1. The parties agree that the claimant's financial losses in respect of the constructive unfair dismissal claim is £4,506.10.
2. In respect of the discrimination claims, the respondent is ordered to pay the claimant the sum of £28,800 together with interest at the rate of 8% from 19 August 2016 to 8 March 2021, which is £2,304 interest a year or £44.31 each week. Over 145 weeks, the interest is £6,424.95.
3. The total sum in compensation to be paid to the claimant is **£39,731.05** made up of £4,506.10, plus £28,800, and £6,424.95.
4. Under rule 78(1)(b) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended, the claimant's costs shall be paid by the respondent but not the costs incurred in pursuing her harassment claims, and costs shall be by way of detailed assessment by the County Court in accordance with the Civil Procedure Rules.

REASONS

1. Following a liability hearing on 25 to 27 November 2020 and chambers discussion on 21 December 2020, the tribunal reserved its judgment which was promulgated on 8 February 2021. In the judgment we held that the claimant was a disabled person suffering from Post-Traumatic Stress Disorder; that her claims of: direct sex discrimination; discrimination arising in consequence of disability; and constructive unfair dismissal, were well-founded. Her claims of harassment related to sex, and disability were not well-founded. This hearing is held for the tribunal to consider remedy and the claimant's application for her costs to be paid by the respondent in the sum of £82,008.60, to be assessed, or alternatively, the tribunal's jurisdictional limit of £20,000.

The issues

2. As the claimant's financial losses, including loss of statutory rights, were agreed between the parties, the only issue is the appropriate award in respect of injury to feelings and whether the tribunal should award a sum for aggravated damages.
3. In relation to the claimant's costs application, the issues are: whether she has established that the respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way proceedings have been conducted, rule 76(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended; and whether the respondent's responses to the claims had no reasonable prospect of success, rule 76(1)(a)?

The evidence

4. The tribunal heard evidence from the claimant. On behalf of the respondent evidence was given by Mr Stuart Mayall, director/shareholder.
5. In addition to the oral evidence Mr Mayall adduced, in evidence, a Certificate of Training, purporting to certify that the claimant had attended an Asbestos Manager Refresher Course on Tuesday 17 July 2018, organised by Mr Chris Bishop of the Asbestos Training and Consultancy, on behalf of the United Kingdom Asbestos Training Association. The certificate has a photographic image of a woman purporting to be that of the claimant. We shall return to this shortly.

Findings of fact

6. The claimant told the tribunal and we do find as fact, that for over three years she had been subjected to verbal and physical abuse, bullying and physical assaults by her male work colleagues and managers. It was her first major employment and had no standards by which she could judge the appropriateness or otherwise of the conduct meted out on her. When she first joined the respondent, she was 21 years of age, comparatively young.

The sexual discriminatory treatment became so institutionalised, she thought it was normal behaviour.

7. She suffered anxiety attacks even before the unprovoked assault on 16 December 2018 by strangers outside of work. She said that she was frightened to go into work on occasions because of her male work colleagues' offensive and demeaning conduct towards her but tried to do her best under the circumstances. She became very upset when the collective complaint by her and her two female colleagues was not properly investigated, and action taken.
8. Contrary to what was put to her in cross-examination, namely that she did not complain about the incident recorded on video on 19 August 2016 because it was either not serious or she went along with it, she said that although she did not complain immediately she did raise complaints to Mr Stuart and Chris Mayall but no action was taken. This was a reference to the unsolicited wrestling match with Mr James Day. She felt that some male employees believed that they could do anything with or to her and this put her in constant fear of their behaviour being repeated or worse.
9. Further anguish and anxiety were caused when her car keys were hidden, and her car moved without her knowledge.
10. At the time she felt trapped, unable to move on and believed that she was totally incapable of finding other employment after having so often been vilified and told that she "worthless" and "useless". Her self-esteem was at its lowest.
11. She still suffers from panic attacks and flashbacks after what had happened to her which have affected her confidence as she is reluctant to speak out, challenge ideas, or put herself in a conflict or debate situation. She exemplified this by saying that in her current employment, during meetings, she would generally keep herself quiet purely out of fear of expecting either a colleague or a manager to be unpleasant and belittle her. In order not to disappoint her work colleagues, she would constantly question her abilities, check every piece of work many times over, as she was fearful of an adverse reaction to a simple mistake, or a miscommunication.
12. In her personal life he struggles socially. She used to be a confident and outgoing person but would now second-guess and assume that there is an ulterior motive behind most communications she receives. She would replay conversations and exchanges she had in her head, convinced that she must have said or done something wrong. She finds it difficult to relax when meeting new people and would panic believing that she was not coming across well when communicating with them or might feel that she had offended someone.
13. She finds it hard to build relationships with men because of the sexual discrimination and abuse she suffered while working for the respondent, as

she expects men whom she meets, to make offensive and vulgar comments about her, and she struggles to build trust with them.

14. She would constantly ask herself the question, “Why me?”
15. She felt personally attacked when Mr Stuart Mayall, during the liability hearing, suggested that she had brought these proceedings for financial gain and she became distressed when he accused her of either manufacturing the training certificates or having stolen them from the respondent. To her, this revealed that the respondent had not changed its attitude towards her, that it could make unsubstantiated allegations and fabricate evidence.
16. She stated in paragraph 22 of her witness statement, the following: –

“Overall I believe what I have experienced with the respondent will affect me for the rest of my life, both professionally and personally. I have to put myself out of my comfort zone socially on an almost daily basis and even basic social interactions or simple professional tasks can be emotionally distressing for me. I continue to challenge myself to not believe what I was told for so long that I was worthless, useless, ugly and deserving of verbal and physical abuse which causes me to confront my resulting insecurities and to hopefully overcome the past and build a successful career and positive relationships with colleagues and friends.”
17. In relation to her treatment while working for the respondent the effects on her are to question her confidence and belief in herself.
18. Her new job is that of a Regional Accounts Manager, which she said she loves as she is able to relate to male site managers and other male work colleagues on a one-to-one level as they respect her. She would be waiting for or expecting them to speak down to her or insult her intelligence and is shocked and surprised when these things do not happen. Their positive attitude towards her has brought into sharp focus, how “terrible” the respondent’s employees’ behaviour had been. She finds herself feeling grateful for being treated with respect and politeness.
19. In relation to paragraph 22 of her witness statement in which she stated that what she experienced when working for the respondent would affect her for the rest of her life, it is what she believes rather than reliance on any psychological or psychiatric reports. We, however, accept that the effects of her experiences will last for some time but are likely to diminish over time as she establishes new relationships and friendships.
20. We further find that the effect of the assault on her in December 2018, which was outside of work, makes her fearful sometimes of people when they are walking towards her, as she believes that they are about to attack her.
21. Mr Mayall said that following the tribunal’s judgment, several remedial steps have been taken, such as, the separation of operational staff from administration staff; that it is now a disciplinary offence to open a secret

WhatsApp group using the respondent's property and information without the prior approval of one of the directors; no member of staff will be paid unless they sign their offer letter and contract of employment; all staff are to be subject to regular appraisals; loans to staff will cease if it is to deceive the mortgage company; the respondent will cease to provide and pay for Christmas events; staff reward trips abroad would cease to be funded by the respondent; diversity and awareness training will be implemented; and there would be control over the passwords on the respondent's computer to prevent the misuse of information.

22. Diversity and awareness training is expected to start in September of this year.
23. As stated above, Mr Mayall produced in evidence during this hearing, a Certificate of Training purporting to be that of the claimant and showing a picture of her face. When it was put to the claimant whether she attended the training as stated on the certificate on 17 July 2018, and whether it was her picture is on it, she strenuously denied both. She was clear that she did not attend the training as she was in Corfu at the time and recognised the picture as that of a well-known model, Ms Adriana Lima, who works for Victoria Secrets.
24. Mr Mayall said that the certificate was handed to him by Mr Chris Bishop, who is said to have organised the training. At the time, he, Mr Mayall, did not look at the picture on the certificate and assumed it was genuine. In evidence he candidly admitted that the picture is not that of the claimant.
25. Mr Bishop did not attend this remedy hearing to give evidence on how the certificate came into being; why it bears Ms Lima's face; and why it has the claimant's name on it.
26. The tribunal finds that the certificate was produced in evidence to persuade the tribunal that the claimant did attend that training and that what she had said during the earlier hearing that she did not attend the training on the various dates, put into question her credibility as a witness. We have come to the conclusion that the production of the certificate was an attempt by the respondent to try to mislead the tribunal which we take very seriously, and which should be deprecated.
27. We accept that Mr Mayall was not aware of the fraudulent nature of the certificate until he gave evidence and was cross-examined.
28. Mr Mayall said that in relation to the viability of the company, that despite the problems in having to cope with the pandemic, it is still able to provide employment for 35 people. He did not say that the respondent would be in severe financial difficulties in having to pay compensation as well as costs.
29. In relation to the claimant's compensation schedule, it was agreed that her gross weekly earnings were £656.30 per month. Her monthly net pay was £509.30. The basic award in respect of the constructive unfair dismissal claim, is £1968.90, which is three weeks' gross pay. Loss of statutory rights

of £500, is agreed. The wrongful dismissal claim amounted to 4 weeks' pay of £2037.20 and not one calendar month's pay. The total award under the above heads is £4506.10. This figure is agreed.

30. Mr Davis, solicitor on behalf of the claimant, withdrew the claim of failure to provide initial written employment particulars as that was not pleaded in the claim form or in the list of issues.

Submissions

31. We have considered the oral and written submissions by Mr Davis and by Mr Munro, employment consultant on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. In addition, we have taken into account the Joint Presidential Guidance on the award of injury to feelings, as well as the cases referred to us.

The law

32. In relation to compensation for unfair dismissal, we have taken into account sections 118 to 124 Employment Rights Act 1996. The claimant has elected to be compensated and does not seek either a reinstatement or a re-engagement order.
33. The basic award calculations are contained in sections 119 to 122 ERA 1996.
34. We have taken into account section 124 Equality Act 2010, on remedies in discrimination cases, and the case law. The award of compensation in discrimination cases should not be punitive but compensatory, Her Majesty's Prison Service v Johnson [1997] IRLR 162, paragraph 7.
35. We have also taken into account the cases of Vento v Chief Constable of West Yorkshire Police (No:2) [2003] IRLR 102 on the injury to feeling bands of award; De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, updating the bands referred to below.
36. In the case of Vento, Lord Justice Mummery, giving the judgment of the Court of Appeal, gave guidance on the award for injury to feelings. He held that there should be three categories defined as the: lower; middle; and upper bands. Awards within the lower band are for less serious cases, such as where the act of discrimination is an isolated one or a one-off occurrence. Awards in the middle band are appropriate for serious cases which do not merit an award in the upper band. Awards in the upper band are for the most serious cases, "such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race." His Lordship further held that only in the most exceptional cases should an award exceed the range in the upper band.

37. The Joint Presidential Guidance on the Injury to Feelings Awards, increases the bands every year to take account of inflation. In the context of this case, the relevant Guidance covers claims presented on or after 6 April 2019, which are: the lower band £900 - £8,800; middle band £8,800 – £26,300; and the upper band £26,300 – £44,000. In exceptional cases an award can exceed £44,000, Second Addendum.
38. In relation to aggravated damages, in the case of the Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT, Underhill P, as he then was, held that it is open to a tribunal to consider aggravating features as part of the injury to feelings award instead of a separate award of aggravated damages. In that, the tribunal can take into account the manner of the claimant's treatment; the motive; and the respondent subsequent conduct.
39. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).
40. The provisions in relation to making a costs order are contained in rule 76. Rule 76(1) provides,

"A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

 - (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
 - (b) any claim or response had no reasonable prospect of success."
41. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.
42. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment held:

"The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to

determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances....

52 In my judgment, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

43. The tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.
44. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

"The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.

That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

45. We have also taken into account the cases of AQ Ltd v Holden [2012] IRLR 648, a judgment of the Employment Appeal Tribunal, E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.
46. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that

"If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

47. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.
48. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.
49. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:
- “The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means.”
- “If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential.”
50. Under section 13 Employment Rights Act 1996, a worker has the right not to suffer unauthorised deductions from wages. Wages include, “any fee, bonus, commission, holiday pay or other emolument preferable to his employment, whether payable under his contract or otherwise.”

Conclusions

Unauthorised deduction from wages

51. In our liability judgment we held that the claimant was entitled to keep the £4,000 as a bonus. The respondent was proposing to deny her this payment which would have amounted to an unauthorised deduction from her wages,

section 13, Employment Rights Act 1996. She is entitled to this payment outright and it should not be set-off against any other financial awards. This was not part of her discrimination claims.

Injury to feelings

52. We have taken into account our findings in relation to the evidence given by the claimant. During the period of her employment with the respondent she had been the victim of sexually discriminatory treatment leading up to her dismissal. This has had a deleterious effect on her as her confidence has been affected. She felt isolated and humiliated. The conduct began on 19 August 2016, within two months after she started employment and ended with her resignation in June 2019, nearly three years. Currently, in a group setting, she rarely contributes to the discussions and in social settings she questions what has been said to her and would try to analyse whether there was an ulterior motive behind certain statements.
53. Treating her in a disparaging and disrespectful way continued during this hearing in relation to the certificate of training as that evidence was manufactured to discredit her.
54. Although she stated in paragraph 22 of the witness statement, that her experience is likely to affect her for the rest of her life, as we have already stated, we bear in mind that she is in a new job in which she is respected and valued. She is learning that in a social setting not all men approaching her intend to insult or assault her. She also has the tribunal judgment in her favour and should, to some extent, feel vindicated that she did the right thing in standing up for herself in pursuing most of her claims to a successful conclusion. In the absence of medical evidence, we find, having observed her in evidence, that, over time, the impact of her treatment is likely to lessen in severity.
55. We have come to the conclusion, having regard to the upgraded Vento guidelines in the Joint Presidential Guidance, that the claimant's treatment falls within the middle band and at the upper end of it. This is the sum of £24,000.
56. In addition, we have taken into account the manner of her treatment, in that it was sustained, degrading, and humiliating. She was the only female to have been treated by the male employees in the ways we have described in the liability judgment. The motive was her sex. She was singled out because of her sex, she was physically weaker than her male colleagues, and did not have the support of management as demonstrated by the way in which the joint complaint was dealt. The respondent subsequently sought to discredit her by asserting, falsely, that she had attended several training courses without calling the person who conducted the alleged training as a witness to be cross-examined. Matters were compounded when the respondent further attempted to discredit her by producing the Certificate of Training in this remedy hearing in another attempt to discredit her and mislead the tribunal. These in our view, are aggravating features increasing the injury to feeling award following the judgment in Shaw, by 20% of

£24,000, namely £4,800, giving a total of £28,800. We add interest at 8% from the date of the first discriminatory treatment, namely from the date Mr James Day was wrestling with her which was on 19 August 2016.

57. Interest is calculated from 19 August 2016 to 4 June 2019, when the claimant resigned during the currency of the disciplinary process, which is 145 weeks. £28,800 at 8% is £2,304 interest a year, or £44.31 each week. Over 145 weeks, the interest is £6,424.95.
58. The total sum to be paid to the claimant is, therefore, £39,731.05.
59. As the various heads are straightforward and not complicated, we do not set out the figures in a schedule.

Costs

60. In relation to the issue of costs, we have concluded that the respondent did not act either vexatiously, disruptively, or abusively in the way in which proceedings have been conducted. It did, however, acted unreasonably in its conduct of proceedings. It had spent a considerable amount of time going through the various certificates to establish that the claimant did attend training courses and was not treated any differently compared with her male colleagues. We found, in our liability judgement, that the certificates were produced to discredit the claimant. The respondent also asserted that the claimant had produce the certificates in anticipation of legal proceedings. There was not a shred of evidence as to when the claimant might have engaged in such a practice. Furthermore, she must have had the foresight when she was in employment with the respondent in knowing that there was going to be employment tribunal proceedings. We rejected that contention by the respondent.
61. Matters were compounded by the fact that Mr Bishop had given Mr Stuart Mayall another certificate purporting to show that the claimant had attended training on 17 July 2018. However, on that day the claimant was in Corfu. Mr Mayall produced the certificate to show that she had lied when she gave evidence during the liability hearing, that she did not attend training courses. It was another attempt to discredit her. The certificate coming from Mr Bishop, is a forgery and was an attempt to mislead the tribunal. Such conduct we take seriously.
62. During the claimant's cross-examination much time was spent on trying to show that she had acquiesced in the discriminatory treatment meted out to her which she repeatedly denied. Our findings supported her account save for the harassment claims.
63. Another matter of concern was the attempt on the part of the respondent to produce a witness statement for Ms Lauren Fox for the liability hearing, purporting to challenge the evidence given by the claimant. Ms Fox had not drafted that witness statement but was asked to sign it which she refused.

- 64. We have come to the conclusion that the claimant has satisfied rule 76(1)(b) of the Employment Tribunals Rules of Procedure.
- 65. There was no evidence adduced to show that the respondent would be unable to pay any sum in a costs order.
- 66. The respondent was entitled to challenge the harassment claims and did so successfully.
- 67. The claimant's costs are in the sum of £82,008.60. Mr Davies asked that the tribunal should order that costs should be assessed and, if that is not acceded to, costs should be in the sum of the limit of the tribunal's jurisdiction, that being £20,000.
- 68. We have concluded, having regard rule 78(1)(b) Employment Tribunals Rules of Procedure, that the claimant's costs should be the subject of detailed assessment by the County Court under the Civil Procedure Rules but not her costs in pursuing her harassment claims.

Employment Judge Bedeau
13 April 2021
Date:

Sent to the parties on: ..21 April 2021
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For the Tribunal Office