



EMPLOYMENT TRIBUNALS

Claimant: Mr A Hay

Respondent: ERM CERTIFICATION AND VERIFICATION SERVICES LTD

Heard at: London Central
and in chambers 25 May 2021

On: 8 & 9 December 2020

Before Judge: Mrs A Isaacson
Members : Mr T Robinson & Ms P Keating

Representation

Claimant: In person

Respondent: Ms T Balding, HR representative

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows:

1. The claimant is awarded compensation for the detriment he suffered under regulation 17 of the Agency Workers Regulations 2010 (AWR) of £1680 for the loss of earnings for three weeks between 25 March 2020 and 15 April 2020 plus £8,500 injury to feelings award.
2. The claimant is awarded £1120 for compensation for breach of regulation 13 AWR.
3. The total amount the respondent is ordered to pay to the claimant is £11,300.
4. The relevant judgment date for the purposes of calculating interest on all awards will be the date this final remedy judgment has been promulgated.

REASONS

Background

1. A final hearing by video took place on the 8th and 9th December 2020. Neither party was legally represented at the hearing.
2. The Tribunal reserved its decision and a Reserved Judgment and Reasons dated 18 December was sent to the parties on 15 January 2021.
3. At the hearing the Tribunal indicated that it did not think the Tribunal could award injury to feelings as part of any compensation award. Following the hearing and after further deliberations the Tribunal was of the opinion that regulation 18 of the Agency Workers Regulations 2010 (AWR) provides for an injury to feelings award as part of compensation for a detriment suffered under regulation 17.
4. In December the Tribunal decided that:

“The unanimous judgment of the Tribunal is that:

- 1) *The respondent breached their duty as a hirer under regulation 13 of the Agency Workers Regulations 2010 to inform the claimant, an agency worker, during his assignment of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer. The respondent is ordered to pay to the claimant £1120 compensation for that breach. This is calculated based on a 35 hours per week at £16 per hour.*
- 2) *The claimant suffered a detriment when the respondent ended his assignment because he raised an allegation that the respondent had breached the Agency Workers Regulations 2010. The respondent is ordered to pay to the claimant £1680 compensation for the detriment suffered, subject to any injury to feelings award.*
- 3) *The total amount of compensation the respondent is ordered to pay to the claimant, subject to any injury to feelings award is £2800.*
- 4) *The Tribunal will determine whether an injury to feelings award should also be awarded as part of the compensation for the detriment suffered under regulation 17 after further representations from the parties. A separate case management order has been made.”*
5. The parties did not have an opportunity to give submissions on an injury to feelings award at the final hearing. A case management order

was made to allow both parties to send in written representations regarding an injury to feelings award and if either party felt they were unfairly prejudiced they could request a remedy hearing.

6. Both parties sent in written representations and the claimant sent in an updated schedule of loss.

Claimant's submissions and evidence regarding injury to feelings

7. The claimant sent in three emails dated 22, 23 and 25 February 2021 that were taken together as his written submissions with his updated schedule of loss. The Tribunal also took account of his previous evidence and a letter from his GP dated 19 November 2020 and a letter from his sister dated 16 November 2020.
8. The Tribunal accepted the evidence set out in the GP's letter that the claimant in November 2020 was suffering from anxiety and depression since March 2020, and the main trigger was his recent job loss. The claimant did not provide any further medical evidence regarding his mental health with his submissions.
9. The GP's letter confirmed the claimant's depression affected his day-to-day activities and led to a diminished quality of life. He felt isolated and irritable, which are consistent with depression and anxiety. He also had suicidal ideas.
10. The claimant's sister stated in her letter that the claimant also suffered from lack of self-esteem which affected his relationship with family members.
11. The claimant stated in his emails to the Tribunal:

“

Similar to the *Prison Service v Johnson* [1997] claim, when I made my complaint in writing, the complaint was not investigated as it should have been done. It was not impartial and a full investigation had not taken place, instead the person I complained about was in fact party to dealing with the complaint which clearly shows they did not take my complaint seriously nor was I treated fairly from the outset.

I was humiliated during the discussion of the complaint, and they manipulated the situation without having any independent third party to the complaint being present. They tried to intimidate and bully me into dropping the allegation of the breach using their seniority and executive powers. This instilled fear and anxiety which caused me to refuse to attend the follow up online teams meeting the next day without having consulted legal advice first. They belittled me.

Upon complaining via email to the senior members of management my grievance was not further investigated impartially and I felt the matter was not dealt with seriously. This caused me self-doubt and low confidence.

The individual who was allocated to respond to my grievance made me feel belittled as he made a mockery of my grounds of grievance further causing detriment to my confidence.

I felt harassed before dismissal by the way of the grievance procedure; causing me a great amount of stress and anxiety.

BS and DO further abused their position of power and aggressively disconnected me from their internal platforms. I felt humiliated for being dismissed in an uncivilised manner for no excusable ground within the jurisdiction of employment tribunals.

Loosing my job at the start of the pandemic was devastating, my mental health deteriorated rapidly. I felt low mood, easily frustrated, and easily angered.

The long term effect of unfair dismissal has led me to be affected psychologically for the foreseeable future.

I was vulnerable and constantly worried about how I would pay my bills. For the first time ever I was unable to pay my bills, I had no option but to take payment holidays not knowing what the future holds for me. This worry kept me up with a lack of sleep during the nights.

Any correspondence from the respondent caused and is still causing distress, anxiety with a rapid heartbeat.

My loved ones saw my behaviour change as I was sleeping excessively to overcome my emotions. I have become sensitive to criticism.

I became isolated and took very little care of myself further causing periods of feeling hopeless.

Battling hopelessness, stress, anxiety and low mood I turned to my GP who prescribed me Sertraline which is an antidepressant.

The side effects of sertraline have caused me headaches, nausea and a faster heart rate.

Being a male it has been incredibly difficult for me to talk and express my emotions to family. Mental health is a taboo in the south Asian culture and I felt being the main breadwinner I could not support my mother financially causing further feelings of failure.

As a result of discrimination which caused me a deterioration of mental health I was not able to seek alternative employment.

Having taken the antidepressants, enabled me to have the courage to apply for state benefit in July 2020. I received universal credit at a basic rate which made me feel inadequate to work given my qualifications and skills set.

After battling with myself and my mental wellbeing I found a new job on the 2nd November 2020. It is not a job that I wish to be in, but I had little choice but to take it. It is not in the financial services sector which is the career I have always pursued. It is in the customer services sector. I feel that my career prospects have been severely limited.

I still have not regained my confidence. I am in constant fear that I might lose my job again.

The discrimination has impacted my relationships with new work colleagues. At times I get paranoid with the littlest things.”

12. It is important for the Tribunal to remind itself that the Tribunal cannot award injury to feelings to the claimant for the respondent's breach of regulation 13. Regulation 18(15) specifically excludes compensation for injury to feelings for a breach of regulation 13. Therefore, any of the incidents prior to the claimant sending his email complaint to the respondent on 13 March 2020 cannot be considered in relation to assessing the amount of an injury to feelings award. For example, the Tribunal cannot award injury to feelings for the hurt the claimant felt when his application was not acknowledged or when he saw people being interviewed for what he viewed as his current role.

13. The Tribunal finds that it can award the claimant for injury to feelings resulting from the detriment he suffered after he raised an allegation on 13 March 2020 that the respondent had breached the AWR.
14. The Tribunal in December set out in paragraphs 59 to 89 of its Reserved Judgment and Reasons the incidents which took place between 13 March and 18 March 2020, resulting in the claimant's assignment being ended. In summary, after raising a grievance under AWR, the respondent decided that the claimant's grievance did not warrant an investigation by an independent person and that one of the people considering the grievance could be someone against whom the claimant alleged had breached the regulations.

15. The Tribunal found that:

“the claimant felt intimidated by the way a senior HR professional had conducted himself. It was clear to the Tribunal, from hearing BS's evidence that, he was not happy that the claimant had raised an allegation that the respondent had breached the AWR and expected the claimant to be satisfied by BS asking DO for an explanation and then to drop his allegation. It was also clear to the Tribunal that BS was irritated by the fact that the claimant had emailed senior members of the respondent with his complaint.

The impression the Tribunal got from both BS and DO's witness statements and their answers to questions was that both men had prejudged that the claimant's complaint had no merit and were angry that he continued to raise the issue of a breach of AWR rather than just accepting the respondent's position. The claimant came across as litigious and said he needed time to take legal advice before meeting them again. This annoyed the respondent, and the Tribunal accepts the claimant's evidence that BS told the claimant that he needed to think carefully about what he wanted to do if he wished to work with them: “You need to give us a decision, you either work with us or we give you notice”.

The Tribunal finds that the claimant felt intimidated and bullied. “

16. The claimant was sent a threatening email at 9pm on 17 March 2020:

“The unhelpful attitude you displayed on our call today has raised questions about your approach and commitment to continuing to work in the ERM CVS Finance team. I will invite you to another three-way Skype call with Dan and I for tomorrow afternoon. Dan and I will review how that meeting goes and then make a decision on whether it is in the business's interests to have you continue in your current capacity. I ask that you give careful consideration to the content of this email in advance of that meeting.”

17. The claimant declined a further meeting the following day and thirty minutes later the claimant was disconnected from the respondent's system. At 4.30pm the claimant received an email from BS (p83) confirming that the claimant's agency had been notified of the respondent's decision to end his current temporary assignment. The email stated:

“It became apparent to us over the past week that your attitude to working in the ERM CVS Finance team had become concerning and that our concerted efforts yesterday to reach out and address your concerns had not been well received by you. Your refusal to attend the call today confirmed for us that this working relationship was untenable.”

18. The Tribunal found that the claimant's assignment was ended, and the claimant suffered a detriment, because he alleged that the respondent had breached the AWR. The respondent witnesses tried to separate their decision to end the assignment from the claimant's complaint by narrowing it down to a breakdown in trust and confidence. However, the respondent witnesses' own evidence confirmed that it was the claimant's litigious approach and the way he did not just accept their view that they had not breached the AWR that caused the breakdown in the relationship. They were not happy that the claimant had made a complaint in which a breach of the AWR was at the very heart of it and believed they had complied with the regulations. They expected him to accept their view- point and were annoyed when he insisted on having time to take legal advice.
19. The Tribunal accepted the claimant's evidence that they warned the claimant that he should drop the allegation of the breach of the AWR or they would end his working relationship with them. The last paragraph in the respondent's email dated 17 March 2020 was clearly a threat to the claimant that continuing his assignment was contingent on the way he conducted himself at the meeting the next day.
20. If the claimant had not raised a complaint of the breach of the AWR his assignment would not have ended. The respondent could not divorce the breakdown in their relationship with the claimant from his complaint. The claimant's litigious attitude and refusal to attend the third meeting because he wanted time to get legal advice had an influence on the respondent's decision to end the assignment.
21. In summary the Tribunal found that the respondent did threaten and bully the claimant in their email exchanges and what was said in the various meetings and telephone calls over a period of five days.
22. The Tribunal now finds that as a result of this behaviour the claimant felt belittled and intimidated and this caused him anxiety and self-doubt and low confidence, as evidenced by the letters from his GP and sister.
23. The Tribunal accept the claimant's submission that losing a job at the start of a pandemic was very difficult and caused a deterioration to his mental health. His sleep has been affected, he is sensitive to criticism, feels isolated and hopeless. He has been prescribed sertraline which has given him side effects.
24. Fortunately, he was able to apply for universal credit in July and found a job in November 2020. He fears he may lose his new job because of his lack of confidence. All these factors are relevant to the Tribunal's consideration of the amount to award for injury to feelings.
25. The Tribunal does not have any medical evidence since November 2020. The Tribunal does not have enough evidence to conclude that the impact of his treatment by the respondent had a longer-term effect on him past

November 2020 other than the claimant does say he is still fearful of losing his job because of his lack of confidence.

26. The fact that his job requires him to travel further to work is not a factor the Tribunal takes into account when considering the amount of an injury to feelings award, nor the extra travel costs he incurs.
27. Although the Tribunal finds that the respondent did bully and intimidate the claimant, the Tribunal does not find that the respondent acted with malice or lied and tried to cover up facts. There is no evidence of that before the Tribunal.

Respondent's submissions

28. The Tribunal refers to the respondent's submissions dated 24 February 2021 and their email of 25 February 2021.
29. The Tribunal agrees with the respondent that the Tribunal has not found that the claimant was discriminated against. The Tribunal is considering an injury to feelings award in relation to the detriment he suffered under regulation 17 of AWR.
30. The Tribunal confirms that the ACAS code of practice is irrelevant to the assessment of an injury to feelings award under AWR. Any injury to feelings award does have an uplift for inflation and this uplift is included in the presidential guidance figures for the vento bands.
31. The amount of earnings the claimant was on is not a relevant factor for the Tribunal. The Tribunal does, however, take account of the fact that the claimant was only engaged with the respondent for a relatively short period of four months.
32. As stated above, the Tribunal cannot award injury to feelings for the way the claimant felt about the breach of regulation 13 AWR. This includes the anxiety he felt when a colleague was approached for a role, finding out that his role was advertised, and seeing people being interviewed for it or that his application was initially ignored due to an administrative oversight.
33. The Tribunal also notes that the claimant was not willing to give his bank details to the respondent so they could pay him the amount of compensation set out in the reserved judgment and reasons. The relevant judgment date for the purposes of calculating interest on all awards will be the date this final remedy judgment has been promulgated.
34. The respondent argues that the Tribunal should not make any injury to feelings award or alternatively, that if the Tribunal is minded to make an injury to feelings award, it should be no more than £900 being the very bottom end of the vento lower band on the basis it was an isolated occurrence that was not motivated by any malice towards the claimant and that it has not been established that there has been a strong, negative impact upon the claimant's career or personal life.
35. The claimant argues that he should be awarded £15,000 to £20,000 with an ACAS uplift plus 7.5 months loss of earnings.

Conclusion

36. The Tribunal does not find the respondent's argument that the claimant should not be made an award of injury to feelings persuasive. The AWR provide for an injury to feelings award by specifically not excluding such an award for a breach of regulation 17. The respondent belittled, intimidated, bullied and humiliated the claimant instilling fear and anxiety in him and terminated his assignment earlier than they would have done if he had not made a complaint under the AWR. They did this over a period of a few days.
37. The Tribunal accepted the claimant's evidence and his GP's evidence that his anxiety and depression were linked to his job loss and have been since March until at least November 2020. The Tribunal notes that the claimant still feels anxious about losing his job but did manage to obtain work in November 2020. The Tribunal also notes that the claimant came across during his final hearing as very able, competent and composed throughout the hearing.
38. The Tribunal agrees with the respondent that the amount of compensation for actual loss of earnings has already been decided by the Tribunal. Having heard all the evidence the Tribunal concluded in December that the claimant's assignment would have ended on 15 April in any event. Therefore, the Tribunal is not persuaded by the claimant to award compensation for loss of earnings up to 7.5 months from his termination to the date he found work of equivalent value. The Tribunal only awards three weeks gross pay for the period from 25 March 2020 to 15 April 2020.
39. The general principles that should be considered by a Tribunal when making an injury to feelings award are set out in the law section of the reserved Judgment and Reasons at paragraphs 21 to 29. The level of an injury to feelings award depends on the facts of each case and requires evidence of the injury. Given the fact sensitive nature of injury to feelings awards caution needs to be exercised when looking at comparable cases.
40. Guidance on the amount of an injury to feelings award was provided in the case of *Vento* and the *vento* bands are updated regularly and were updated by the joint presidential guidance in March 2020 and are the relevant bands for this case as the claimant's detriment occurred in March 2020. The guidelines include an inflationary uplift and provide:
- Upper Band: £27,000 to £45,000 (the most serious cases);
 - Middle Band: £9,000 to £27,000 (cases that do not merit an award in the upper band); and
 - Lower Band: £900 to £9,000 (less serious cases).
- The 'most exceptional cases' are capable of exceeding the maximum of £45,000.
41. The principles set out by the EAT in *Prison Service v Johnson* [1997] IRLR 162 are considered relevant to all injury to feelings awards and were taken into account by this Tribunal when reaching its decision:

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

- Awards should not be too low, as that would diminish respect for the policy of the antidiscrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

- Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

- Tribunals should bear in mind the need for public respect for the level of awards made.

42. The Tribunal has also considered a number of injury to feelings awards cases that have been cited in Harvey on Industrial Relations and Employment Law in a chapter on calculating non pecuniary loss. The Tribunal has reminded itself that each case must be considered on its own facts and therefore it is difficult to compare with other cases and awards have changed over the years. However, looking at a number of previous awards helps the Tribunal to stand back and consider a global sum which is proportionate.

43. The Tribunal has decided that £8,500 is a proportionate amount to be awarded to the claimant for injury to feelings in this case. This amount includes damages for injury to feelings including any personal injury. In reaching this decision the Tribunal have considered that the amount is compensatory and should not be punitive. The claimant should be compensated for the bullying and intimidation he felt over the period of 13 March 2020 to 18 March 2020 plus for the hurt he has continued to suffer as a consequence of the actions of the respondent over that period. Although it was a relatively short period of time the claimant has suffered anxiety and depression as a result. However, the claimant has managed to go back to work in November 2020 and therefore the Tribunal have considered that the lasting consequences are relatively short term.

44. The amount falls within the upper limit of the lower band of the vento/presidential guidance bands. The detriment occurred over a relatively short period of time, and the claimant had only been engaged for four months in a temporary assignment, so long-term relationships had not been established and the claimant was never given any guarantees about the duration of the work, other than it was a rolling contract.

45. The amount of the award is significant enough to demonstrate that the Tribunal condemns breaches of the AWR but without punishing the respondent and has considered what could be purchased by the claimant with the award.
46. In conclusion, the claimant is awarded compensation for the detriment he suffered under regulation 17 of the Agency Workers Regulations 2010 (AWR) of £1680 for the loss of earnings for three weeks between 25 March 2020 and 15 April 2020 plus £8,500 injury to feelings award.
47. The claimant is awarded £1120 for compensation for breach of regulation 13 AWR.
48. The total amount the respondent is ordered to pay to the claimant is £11,300.

EJ Isaacson

Employment Judge A Isaacson

Date 28 May 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
28/05/2021..

FOR THE TRIBUNAL OFFICE