EMPLOYMENT TRIBUNALS

Claimant: Mrs O Aina

Respondent: Advanced Training Academy (UK) Ltd (1)
Mr S Islam (2)

Heard: Via CVP On: 28 April 2021

Before: Employment Judge Tuck QC
Mr P English
Ms A Moriarty

Appearances
For the claimant: Mr Nwaike, solicitor
For the respondents: Mr McCracken, counsel

Judgment on Remedy

1. The claimant is awarded £4500 for injury to feelings for the single act of harassment found by the tribunal, in addition to which she is awarded £930 by way of interest which has accrued on that sum.
2. The claimant is awarded 4 week's pay for failure to provide her with written terms and conditions of employment; £322.50 x 4 = £1290.
3. The claimant's claim for holiday pay has been satisfied by the Respondent paying to her the sum of £132.07. No further order is made therefore relating to holiday pay.

Total financial award: **£6720**

Reasons

1. The ET having sent its judgment to the parties on 12 November 2020, a remedy hearing was listed; this had to be adjourned once due to the availability of a tribunal member, and a second time as Mr Nwaike was self - isolating in a hotel without internet connection after travelling abroad.

2. Today Mr Nwaike joined the CVP hearing at 10am as did Mr McCracken. The Claimant did not attend – and no witness statement has been prepared for her. Mr Nwaike said that the claimant had suffered a bereavement as her sister had died. He said that he told her this on "Monday 25th April" (Monday was the 26th), and that the funeral was tomorrow. He explained that he had thought the claimant would attend today's hearing, but that she had telephoned him at 9am today saying she could not face it. Mr Nwaike submitted that the claimant could either go on to determine remedy, or else adjourn.

3. Mr McCracken submitted that as no witness statement had been prepared for the claimant, it appeared that there had been a proposal for this hearing to proceed on the basis of the evidence given at the liability hearing, and further submissions today. He urged that course of action onto us. Mr Nwaike was happy to agree to this. The tribunal adjourned for 30 minutes and required Mr Nwaike to telephone the claimant to take her express instructions as to whether she was content for today's hearing to proceed, or whether she wanted him to make an application to adjourn. Mr McCracken said that if there was to be an adjournment, he would request documentary evidence of when the claimant's sister had died.

4. After a short adjournment Mr Nwaike confirmed that he had spoken to the claimant by telephone, and that she had expressly stated that her preference was for today's hearing to go ahead today. He said that she had sent him an email expressly giving him permission to represent her interests, and confirming her preference for today's hearing to continue in her absence.

5. The tribunal, in the face of both parties urging it to make its determination on the basis of evidence presented in the liability hearing, and with further submissions today, consented to that course of action, albeit it was disappointed not to have at least a further statement prepared by Mr Nwaike for the claimant - prior to her suffering the bereavement of her sister within the last week or so.

6. The tribunal re-read the claimant's witness statement and in particular paragraphs 84-90 dealing with the issue of harassment. It also of course re-read its judgment, and the 11 page remedy bundle provided to it by the parties. It heard submissions from both representatives.

Submissions from Mr McCracken:

7. Mr McCracken stated that the starting point must be the liability judgment at para 7.9 where we found:

> "As to harassment related to race, we do accept that Mr Islam, when irritated that the claimant had come in late on her return from a dental appointment on 27 September 2018, made the comment to her "which is your area – Mgbati, Mgbati yeaah? You people are fraudsters". He objected to paying the claimant a full day's pay for a dental

> "appointment", telling us in evidence that if it was an appointment it was not unavoidable. We have no doubt that this comment was unwanted by the claimant, that it related to her race, and that it created an adverse environment for her. We uphold this claim".

8. Mr McCracken submitted that this was a single incident of harassment, when irritated. Other claims of race discrimination were rejected, and it is therefore a fairly limited position. The claimant, on the finding of the ET, has fabricated much of the claim, having not in fact made a disclosure to HMRC. She did this to damage the Respondents, and gone so far as to involve a witness who is now a trainee solicitor, to give evidence on her behalf.

9. Mr McCracken went on to highlight that this was a fairly insignificant incident after the period when the relationship was deteriorating for reasons unconnected to race. She did not include this claim in her original claim, only by way of amendment; her initial claim focused on whistleblowing. He reminded us that the claimant's witness statement deals with this incident at paragraphs 84-90. In particular at paragraph 86 she said of this event:

> "I felt humiliated, offended, degraded before them because of the hostile way the Second Respondent was shouting at me, calling me names, violating my dignity before other members of staff because of my race of Yoruba Origin / Tribe from Nigeria."

She goes on in the next paragraph to say that she was "disturbed for the rest of the day".

10. The claimant's representative has included in the remedy bundle a single page of a GP entry (also before us at the liability hearing) This reports the claimant registered with the GP surgery on 25 June 2019, and on 22 July 2019 she consulted her GP saying "stress at work since October 2018. Very hard to relax. Issues to round in her head all the time. Children worried about her. Unable to get another job. If falls asleep, wakes easily so tired in the day. Sleeps maybe 3-4 hours at night. Tribunal this week and has no lawyer –has to do all her own preparation. Plan – counselling info given. A few sleeping tablets. Review after tribunal".

11. Mr McCracken drew the attention of the ET to a number of case summaries from Harvey on Employment Law and Industrial Relations, division L, showing examples of when lower band awards had been made:

> *Isaaq v AMS Security (Northern) Ltd* (Sheffield) (Case No 2802396/2008) (*4 March 2010, unreported*) — ITF £1,000
> The claimant, who was born in Somalia, was employed by the respondent as a security guard. He was involved in an altercation with a colleague during which he was called a 'fucking black bastard'. This racist comment was a single event and the claimant did not complain of

it independently other than to mention it in an incident report that he was required to write about the altercation.

Pitman v Harlequin Valet (Cullompton) Ltd (Exeter) (Case No 1700965/11) (*9 February 2012, unreported*) — ITF £2,000
The claimant was a joint supervisor at a laundry and dry cleaners. She was subjected to consistent and unwarranted verbally abusive treatment by the owner of the respondent business who was consistently foulmouthed and whose behaviour was a disgrace. He said that the claimant, being English worked inadequately by comparison to her Polish colleagues. The claimant justifiably resigned after she was subjected to a foul-mouthed tirade during which she was screamed at and had obscenities shouted at her.

Doshoki v Draeger Ltd [2002] IRLR 340, EAT — ITF £4,000
The claimant was an Iranian sales manager. He was subject to occasional racial comments and taunts in public over a period of four months by other members of the sales team, such as 'shut up Ayatollah' and 'this solution could only come from an Arab'. He was also called a 'eunuch' although an apology was given for that. The remarks were insulting and humiliating. The EAT found that the tribunal's award of £750 was inadequate to a degree where it was wrong in law.

12. Mr McCracken said the Doshoki case today would be around £6400, and that this shows that after a number of racial comments and taunts over a period of four months by several people, is still not at the top of the lower band.

13. Mr McCracken said that an appropriate level of injury to feelings in this case is in the region of £1500 to £2500, and certainly is not beyond £3000.

14. As to section 38 of the Employment Act 2002; the ET must award two weeks, and may award four weeks; he urged that we could exercise our discretion to award three weeks if that was considered to be just and equitable.

Submission from Mr Nwaike.

15. Mr Nwaike reminded the ET that it had found an act of racial harassment. The fact is that the claimant suffered a loss in the hands of the respondent. He said that the statement “Mgbati, Mgbati – You people are fraudsters”. This is more serious than referring to an Arabic employee as “Ayatollah”.

16. Mr Nwaike submitted that this was not a one off incident of harassment as there were also complaints of being referred to as the brother /sister of black students. He denied that any claims were “made up”, rather some claims were not upheld by the tribunal. He pointed to the respondent’s failure to provide a contract of employment and to the false crime report being made by the Second Respondent. He also submitted that the Respondent made up

signatures to try and mislead the tribunal – on holiday forms. All this he says caused her much stress. He said that she was on medication to this date.

17. Mr Nwaike urged the ET to award the claimant £9100, at the top of the lower Vento band, as the claimant suffered a lot at the hand of the Respondent.

18. Furthermore, he sought four weeks' pay for the failure to provide written terms of employment which she asked for frequently. In the schedule of loss he identified a week's pay in the sum of £322.50, but he said that because she was treated badly and not always paid sums she was entitled to, we should take the statutory week's minimum of £544.

19. Mr Nwaike sought a 25% uplift on the compensatory award. He was taken by the EJ to section 207A TULRCA 1992 and asked what "relevant code of practice" was relied upon. His answer was that it related to her dismissal. He sought a total sum of £17,558.36.

Law:

Injury to feelings

20. The Tribunal is guided by principles set out in *Prison Service v Johnson [1997] IRLR* 162 in relation to assessing injury to feeling awards. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable. Awards that are too low would diminish respect for the policy underlying anti discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong.

21. Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power. It is helpful to consider the band into which the injury falls, see *Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102.* The EAT increased the *Vento* bands for injury to feelings to allow for inflation in *Da'Bell v NSPCC [2010] IRLR 19.* Joint Presidential Guidance on Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury following *Da Vinci Construction (UK) Limited* [2017] EWCA Civ 879 was issued on 4 September 2017. It reviewed the effect of recent case law and inflation on the Vento Bands and said that, when awards are made by Tribunals, the Vento bands should have the appropriate inflation index applied to them, followed by a 10% uplift on account of *Simmons v Castle* [2012] EWCA Civ 1039.

22. The first Addendum to the Joint Presidential Guidance dated 23 March 2018 makes it clear that it is necessary to look at the relevant Vento band on the date on which the claim was presented; in December 2018 when Ms Aina presented her claim, the relevant bands were a lower band of £900 to £8600 for less serious cases, a middle band of £8600 to £25,700 for cases that do

not merit an award in the upper band, and an upper band of £25,700 to £42,900 for the most serious cases.

23. Both parties in this case agreed that the lower band of Vento was appropriate.

24. In addition to the cases cited by Mr McCracken the ET also had regard to a further authority cited in Harvey:

> *Amer v Greggs Plc* (London Central) (Case No 2202006/2008) (*25 June 2009, unreported*) — ITF £5,500 (and Uplift at para [1274]) The claimant was an Egyptian bakery store manager. He was caused hurt and distress by a remark made by another member of staff. It was an isolated incident of racial harassment albeit with some aggravating features as it took place in front of 150 of his colleagues, including junior ones and everyone laughed so he felt particularly humiliated. The impact of the remark was somewhat eclipsed by the claimant's dismissal which was not discriminatory but which led to depression. The appropriate figure was the very top of the lower *Vento* band adjusted for inflation.

25. Provision is made for the award of interest on compensation for discrimination in the Employment Tribunals (Interest on Awards in Discrimination cases) Regulations 1996. Reg 6(1) provides that for non-pecuniary losses, the award is for the entire period from the act complained of to the date of calculation.

Failure to provide written statement of particulars of employment.

26. Section 38(3) of the Employment Act 2002 provides that in cases to which the section applies (agreed to include this case), if the ET finds in favour of the worker, and when the proceedings began the employer was in breach of the duty under section 1(1) or 4(1) of the Employment Rights Act 1996, the tribunal must increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount. The lower amount is two weeks' pay, and higher amount is 4 weeks' pay.

Uplifts for failure to abide by applicable ACAS Codes of Practice.

27. Section 207A TULRCA 1992 provides that if, in a case of proceedings to which this section applies, it appears to the ET that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, and the employer has failed to comply with that Code in relation to that matter, and that failure was unreasonable, any compensation may be increased by up to 25%.

Findings on the issues:

Injury to Feelings

28. The tribunal, taking into account the uplift of 10% provided for in *Castle*, awards for injury to feelings the sum of £4,500. In reaching this amount, the tribunal have had particular regard to the following factors:
    a. The claimant's claim for harassment related to the single act, on 27 September 2018, as set out in para 7 above.
    b. These comments related to the claimant's race, and were insulting and offensive.
    c. The claimant's statement said that she felt disturbed for the "rest of the day".
    d. We note that when she consulted her new GP in summer 2019, the claimant said that she had suffered "stress at work since October 2018" – she did not date the stress from September 2018 when this comment was made. Taking the GP entry as a whole, it appears that the claimant was not sleeping well and felt stressed because of losing her job (in October 2018) and pursuing a tribunal claim – at that time, without representation. There is nothing to link her stress specifically to the act of racial harassment we have concluded occurred.
    e. We do however accept that the claimant felt "humiliated and offended", and that the comment was targeted at her and others of her Yoruba race / tribe, making remarks that all were "fraudsters".
    f. The claimant genuinely felt that the Second Respondent, who is married to a Nigerian (apparently from the Igbo tribe), was fully aware of tribal stereotypes and knew his comment would cause upset.

29. Whilst the comment was a one off, it caused genuine upset and we consider that upset was probably longer lived than the day mentioned in her statement. Considering the comparison cases above, and viewing matters in the round, we considered £4500 to be an appropriate award to compensate the claimant.

30. Many of the additional factors set out by Mr Nwaike in his submissions pertained to either dismissal, or other allegations which were not upheld by the tribunal. We accordingly did not consider it appropriate to weigh such factors into the balance.

31. The ET has calculated interest due on the injury to feelings award in the sum of £930: interest at for the period of 27/9/18 until today, 28/4/21, 2 years 7 months (at a rate of £360 per annum/ £30 per month) = £930

Failure to provide written contract of employment.

32. As to the respondent's failure to provide written reasons, the tribunal is entirely satisfied that the higher award is appropriate. We have considered the fact that there was a complete failure here to provide a contract, despite the fact that the claimant made frequent requests for a contract. We also set out in our liability judgment the exchanges between the claimant and the second respondent when she sought holiday leave, demonstrating the difficulties created and encountered by the failure to provide written terms of employment.

Uplift.

33. Finally, Mr Nwaike sought a 25% uplift on all awards made. However, the code of practice he said had been breached related to dismissal. The claimant did not have a claim for ordinary unfair dismissal, and her claim of automatically unfair dismissal was dismissed. She did not raise a grievance about the harassment comment, and therefore no relevant code of practice was applicable. We have therefore declined to award the uplift sought.

Employment Judge Tuck QC
28 April 2021.

Sent to the parties:

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