EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms A Mullally		**(1) Virgin Atlantic Airways Limited** **(2) Mr S Laverty**

Heard at: London South Employment Tribunal **On:** 30 July 2021

Before: Employment Judge Hyams-Parish
Members: Mr J Turley and Dr S Chacko

Representation:
For the Claimant: In Person
For the First Respondent: Mr T Brown (Counsel)
For the Second Respondent: Ms J Connolly (Counsel)

JUDGMENT ON REMEDY

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) By consent, the First Respondent shall pay the Claimant compensation for unfair dismissal in the sum of £17,976.00.

(b) The First and Second Respondents shall pay the Claimant compensation for injury to feelings in the sum of £20,000 for those four acts of harassment for which the Tribunal has found they are jointly and severally liable, plus interest of £4336.76.

(c) The First Respondent shall pay the Claimant nominal compensation in the sum of £13, namely £1 for each of 13 allegations for which the First Respondent admitted liability but which at the liability hearing the Tribunal found that the allegations did not amount, as a matter of fact and law, to acts of harassment.

(d) There shall be no ACAS uplift or award for aggravated damages.

REASONS

INTRODUCTION AND BACKGROUND

1. This hearing was listed to consider what compensation should be awarded to the Claimant in respect of claims which the Tribunal found in her favour, following a six-day liability hearing that began on 14 June 2021.

2. The Claimant had brought claims of sex related harassment, unfair dismissal, whistleblowing detriment and dismissal, and victimisation against the Respondents. She succeeded, in part, with her claims of harassment, and her claim of unfair dismissal, but not the other claims.

3. To explain the position regarding the harassment claims in more detail, this case is slightly unusual because by the time the liability hearing commenced, the First Respondent had admitted the claims of harassment (of which there were 17 separate allegations) and constructive unfair dismissal. The Second Respondent was only a respondent to the claims of harassment, and not the other claims. He resisted the claims of harassment and therefore the liability hearing was a contested hearing in so far as the allegations against the Second Respondent were concerned, and in so far as the victimisation and whistleblowing claims against the First Respondent were concerned.

4. In addition to harassment claims, the First Respondent admitted the unfair dismissal claim but contested the whistleblowing and victimisation claims. Those contested claims found to be not well founded at the liability hearing and therefore failed.

5. Having heard all of the evidence, the Tribunal found that only four of the seventeen allegations were capable of amounting, in fact and law, to acts of harassment. This is because the Tribunal found that the failed claims related to conduct that was deemed not to be in the course of employment. The unfair dismissal claim was upheld, because it was admitted, but the victimisation and whistleblowing claims failed.

6. At the remedy hearing, therefore, the Tribunal was faced with one respondent who had admitted all of the claims of harassment, and one against whom only four of the same seventeen allegations were upheld.

7. At the remedy hearing, the Tribunal heard evidence from the Claimant who had prepared a remedy witness statement, and one witness for the First

Respondent, Matthew Lee, who had also given evidence at the liability hearing.

8. By order of the Tribunal, both Respondents had provided skeleton arguments prior to the hearing, which the Tribunal found very helpful. These were used as the basis for closing submissions.

9. The Claimant had provided a schedule of loss in which she invited the Tribunal to award total compensation in the sum of £72,819.00, made up of separate awards for the following:

- Unfair dismissal (basic and compensatory awards)
- Injury to feelings
- Aggravated damages
- ACAS uplift

10. At the conclusion of the hearing, the Tribunal announced its decision with oral reasons. These written reasons are provided at the request of the First Respondent. That request was made at the conclusion of the remedy hearing.

LEGAL/FACTUAL ANALYSIS AND CONCLUSIONS

(a) Unfair dismissal

11. Little time was spent considering this award because the First Respondent had attended the hearing accepting the Claimant's calculation of the basic and compensatory award, including loss of statutory rights. By consent, therefore, the Tribunal awarded the Claimant the sum of 17,976.00. This was made up of a basic award of £5,104.00, and a compensatory award of £12,872.00.

(b) Injury to feelings

12. The first issue that the Tribunal had to decide was what to award the Claimant in respect of those thirteen allegations which the Tribunal had found were not capable of amounting to acts of harassment within the meaning of the Equality Act 2010, but which the First Respondent had admitted. The First Respondent invited the Tribunal to award nominal damages only, nominal damages being long-recognised way to provide for a "*remediable consequence*" in the absence of any "*right to any real damages at all*": ***The Mediana [1900] AC 113 and 116 per Lord Halsbury.*** The Tribunal agreed this was the correct approach to take in this case and awarded the Claimant nominal damages of £1 for each of the thirteen complaints.

13. The second issue which the Tribunal addressed was whether, in respect of the four allegations, the First and Second Respondents should be jointly

liable. The Second Respondent attempted to argue that as the Claimant's real complaint was against the First Respondent and its failure to effectively deal with the problem created by the Second Respondent, that the First Respondent should bear the greater burden. The Tribunal found that option unpalatable given that the Second Respondent had been the instigator of the acts of harassment. The Tribunal concluded that the apportionment of damage was indivisible and therefore both the First and Second Respondent should be jointly and severally liable for the injury to feelings award.

14. The Tribunal then had to embark on the more difficult process of assessing the correct injury to feelings award for the four allegations, taking into account that the Claimant's feelings were most probably injured, to some extent, by all of the allegations, including those acts of harassment for which the Second Respondent was not liable. Taking these factors into account, the First Respondent suggested that an award of not more than £15000 was appropriate, whereas the Second Respondent submitted that an award of £5,000 was more appropriate.

15. The Tribunal was reminded of some general principles for awarding injury to feelings as set out in a case known as ***Prison Service and ors v Johnson 1997 ICR 275, EAT***, namely, that:

- Awards for injury to feelings are designed to compensate the injured party, and not to punish the guilty party.
- An award should not be inflated by any feelings of indignation at the guilty party's conduct.
- Awards should not be so low as to diminish respect for the policy of discrimination legislation, but not so excessive that they are regarded as untaxed riches.
- There is a need for public respect for the level of awards made.
- Awards should be broadly similar to the range of awards in PI cases.

16. The Tribunal approached its task in two ways. The first was to consider a global figure for injury to feelings, taking into account all 17 allegations, and then taking 4/17ths of that figure to reflect the fact that only four allegations succeeded. However, the Tribunal quickly came to the realization that this approach was a rather blunt instrument, leaving a figure that in the Tribunal's view was too low. The Tribunal also concluded that injury to feelings was not easily divisible in this way.

17. It then looked at the successful allegations of harassment to decide upon an appropriate injury feelings award for them alone. It was only upon

looking again at the facts that the Tribunal was reminded that they were serious allegations. It was plain from looking at and observing the Claimant that she had been deeply affected by the conduct of the Respondents. The allegation relating to the flight to Los Angeles was one of the more serious allegations in the Tribunal's view. The Tribunal settled on a figure of £20,000. It believed this reflected the seriousness of the four allegations found in the Claimant's favour, whilst making a suitable adjustment to ensure that the Claimant was not receiving damages for allegations for which she had not been successful. The Tribunal was satisfied that had the Claimant been successful in all of the claims, she would certainly have received an award at the top end of the mid-*Vento* band, but quite possibly the lower end of the top band. The Tribunal was therefore satisfied that an award of £20,000 was appropriate and made this award with interest of £4,336.76, which was calculated and agreed by the Respondents.

(c) Aggravated damages

18. The classic statement of when aggravated damages are available was made by the Court of Appeal in ***Alexander v Home Office 1988 ICR 685, CA***, where it held that aggravated damages can be awarded in a discrimination case where the defendants have behaved "*in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination"*. That quotation has been cited and applied by courts and tribunals ever since, and remains a sound statement of general principle. However, Mr Justice Underhill, then President of the EAT, gave a more detailed exposition in **Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT**, identifying three broad categories of where an award of aggravated damages may be appropriate:

- where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in ***Alexander*** meant when referring to acts done in a "*high-handed, malicious, insulting or oppressive manner*".

- where there was a discriminatory motive - i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity. However, this will only be the case if the claimant was aware of the motive in question - an unknown motive could not cause aggravation of the injury to feelings.

- where subsequent conduct adds to the injury - for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or "*rubs salt in the wound*" by plainly showing that it does not take the claimant's complaint of discrimination seriously.

19. When the Tribunal asked the Claimant to explain what she believed warranted an award for aggravated damages, she concentrated on the First Respondent's handling of her grievance, and the delay in eventually taking action against the Second Respondent.

20. The Tribunal concluded that there wasn't any particular feature of the case that warranted an award of aggravated damages. The Tribunal commented on the seriousness of the acts of harassment but compensated the Claimant for this by settling on the level of the injury to feelings compensation which it decided to award. There was nothing over and above that, which the Tribunal considered warranted a separate aggravated damages award.

(d) ACAS Uplift

21. The Tribunal looked first at whether there had been a failure to comply with the ACAS code and concluded that there was not. When invited to direct the Tribunal to the failures relied on by the Claimant, it became clear that her complaint focused on the quality of the First Respondent's investigation rather than requirements contained in the ACAS code which the First Respondent failed to follow. The Claimant raised her grievance on 22 March 2019, and she left her employment on 29 May 2019. Given the complexity of the grievance and the number of people that were interviewed, the Tribunal concluded that there was not an unreasonable delay in dealing with it. For the above reasons, the Tribunal concluded that there was no failure to follow the ACAS code and therefore no uplift was appropriate.

……
Employment Judge Hyams-Parish
5 August 2021

SENT TO THE PARTIES ON
6 August 2021

……

……
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.