EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was V – Video by Cloud Video Platform or CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant		**Respondent**
Mr T King	**v**	**Tesco Stores Ltd**

Heard at: Watford **On**: 17 September 2021

Before: Employment Judge George
Members: Mrs J Hancock; Ms K Turquoise

Appearances

For the Claimant: Mr M Blackburn, friend
For the Respondent: Ms J Ferrario, counsel

JUDGMENT having been sent to the parties on 13 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Our reserved liability judgment in the present case , by which the claimant succeeded in some of his claims, was sent to the parties on 4 August 2021. We have references to the full findings and conclusions in that judgment but do not repeat all of them here. Case management orders were made, and a remedy hearing held on 17 September 2021. On that occasion, judgment was given orally with oral reasons. The written record of judgment was sent to the parties on 13 October 2021. Written reasons were requested by the respondent on 27 October 2021.

2. We had available to us, in addition to the evidence adduced at the liability hearing, a bundle of documents running to 343 pages containing the documents listed in the index. Page numbers in that bundle are referred to as RB page 1 to 343 or as the case may be in these reasons. The bundle included a revised

schedule of loss from the claimant (RB page 37) prepared in compliance with the case management orders. This was supplemented by calculations which had been revised three times: the four versions were at RB pages 308 to 320. The respondent's counter schedule of loss was at RB page 322.

3. Unfortunately, there was a delay to the start of the hearing due to technical issues, including that the parties had been sent a PIN number to access the hearing room which was inaccurate. As well as the documentary evidence, we heard oral evidence from Mr King who confirmed the truth of the evidence in his revised schedule of loss and was cross-examined.

The issues for the remedy hearing

4. The Tribunal found that there were three incidents which amounted to direct sex discrimination or harassment related to sex contrary to the Equality Act 2010 (hereafter the EQA).

   4.1 The incident on 19 December 2018 (para.1 of the judgment);
   4.2 The failure to investigate the claimant's grievance properly (para.2 of the judgment);
   4.3 Dismissing the claimant with effect on 2 March 2019 (paras.3 and 4 of the judgment – which was found to be harassment related to sex or direct sex discrimination in the alternative).

5. In terms of the financial losses the questions for the Tribunal were
   5.1 Did any financial loss from the 19 December 2018 incident and, if so, what?
   5.2 What financial losses flow from the dismissal?

6. The claimant in his revised schedule of loss (RB page 37) claimed heads at (a) through to (g) as financial loss.

   6.1 Claim (a): Hearings five day gross: by this the claimant was complaining essentially of the lost opportunity to earn during the Tribunal hearing days. It does not seem to us that this loss flows directly from the dismissal. The claimant has not proved that the loss is sufficiently connected with the dismissal that he is entitled to claim under this head. We dismissed this head of claim.

   6.2 Claim (b): Past loss of earnings from Aylesbury Fire Systems: (hereafter referred to as AFS) Here the question for the Tribunal is whether the discriminatory act caused the claimant to lose his employment or self-employment with AFS such that he should be compensated for that loss as a loss flowing from the discriminatory acts of the respondent. If we find that the causation is proven we then need to consider what was the claimant earning with AFS, when did he obtain alternative work to his work for AFS and has he mitigated his loss.

6.3 Claim (c): loss of earnings from Tesco to date of hearing and future loss: this is loss which on the face of it flows directly from the dismissal so the issues for us to consider are:

6.3.1 What was the claimant earning per week?

6.3.2 When did he obtain alternative work?

6.3.3 Has he sufficiently mitigated his loss?

6.3.4 What is the length of the period of his loss less the income he has obtained from alternative employment?

6.4 Claim (d): He claims days sickness since the incident which he alleges to be a claim for the lost opportunity to work on days that he has been sick and unable to work due to he says the exacerbation of his mental health condition caused by the respondent's acts.

6.5 Claim (e): The claimant claims time for Mr Blackburn's time in assistance with the case: this is the type of loss which is properly claimed by means of an application for a Preparation Time Order. We explained to the claimant that this type of alleged loss is something that the Tribunal has the power to order in appropriate cases under r.75 & 76 of the Employment Tribunal Rules of Procedure 2013. An application has to be made under r.77 within 28 days of the date on which the judgment finally determining the proceedings was sent to the parties. We do not treat this as an application having already been made because the claimant has not set out the basis on which it is said that the power to make such an award arises in this instance.

6.6 Paragraph (f): List of amounts paid to bank. These were not a separate head of claim but the means by which the claimant sought to demonstrate the impact of his dismissal on his earnings not just from the respondent but also from AFS.

7. The claimant also claims interest on financial losses. His paragraph (g) was evidence potentially relevant to the decision on Claim (d) rather than an additional head in its own right.

8. In addition to the financial losses the claimant claims general damages for injury to feelings and sets out the impact upon him at pages 37-38 of the bundle. There we need to assess what the impact has been on the claimant of the actions which we have found to be unlawful taking into account that there were some matters that he complained about that we have not found to be unlawful. This also requires us to evaluate what the psychological impact has been on the claimant.

The Law

9. The law in relation to injury to feelings can be stated fairly briefly. In HM Prison Service v Johnson [1997] ICR 275 EAT it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

10. We also remind ourselves of the cases of MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved.

11. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

12. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. Based upon the date on which the present claim was presented, the applicable bands are

    12.1 Between £26,300 and £44,000 for the most serious cases;

    12.2 Between £8,800 and £26,300 for serious cases not meriting an award in the highest band;

    12.3 Between £900 and £8,800 for less serious cases, such as an isolated or one-off act of discrimination.

13. Where the victim of unlawful discrimination or harassment can show that psychiatric or physical injury can be attributed to the unlawful act the employment tribunal has jurisdiction to award compensation: Sheriff v Klyne Tugs (Lowestoft)

Ltd [1999] IRLR 481, CA. The question is whether a direct causal link between the unlawful act and the loss can be made out. That compensation could, in an appropriate case, include financial losses where a direct causal link between the psychiatric or physical injury and the alleged financial loss can be shown.

14. Interest at 8% would be calculated on any award.

Findings and conclusions

15. The claimant does not seem to us to be arguing that the actions of the respondent caused specific psychological harm but rather that they have exacerbated an existing condition. We then need to make findings based on the evidence before us of how long it can be said that the psychological effects caused by the incident have continued or are likely to continue. At what point, if at all, will the current sickness that the claimant says he is periodically experiencing be due to the pre-existing condition and not to the discriminatory acts of the respondent?

16. The claimant was formerly a prison officer who had been diagnosed with PTSD following an incident in which he had been taken hostage by a prisoner in the way that he describes at the top of page 38 of the remedy bundle. This incident happened on 18 March 2015 and led to a medical discharge.

17. His oral evidence was that his PTSD took time to develop and was diagnosed about 18 months after the incident that had taken place in the prison. He was treated with cognitive behavioural therapy. At that time he had been prescribed anti-depressants and was taking them for about 18 months. He had successfully been able to cease taking medication for about 8-10 months prior to the 19 December 2018 incident in-store which we found to be direct sex discrimination.

18. In February 2019 the impact of the incident involving JF had developed to a point where the claimant was unfit for work as we set out in paragraph 49 of the Liability Judgment.

19. However, the details in paragraph 17 above of the claimant's recollection of the extent of his treatment and the length of the period for which he was not taking medication is not consistent with the GP records in the remedy bundle. We see that he was prescribed Sertraline on 6 February 2019 by telephone (see RB page 303). His GP notes for that day show that the claimant clearly linked the store incident on 19 December 2019 with his current ill health because of the similarities with the prison incident. However, it also appears from the narrative on RB page 303 that he had been prescribed Sertraline before the store incident; he had had the dose increased to 100mg in November 2018. He did say in oral evidence that prior to February it had been a different medication: he said that Sertraline is stronger but he may have meant an increased doseage.

20. Page 304 of the bundle records an appointment on 12 February 2019 where it is noted that the claimant's epilepsy may be a problem for a short time - although

there is no further evidence before us concerning that. It is clear that the claimant's mental health was worse than in the 6 February 2019 consultation, to judge by his description of how he feels and thoughts of self-harm which he discloses to the GP. This led to a referral to the mental health team and the claimant does respond initially although there are no details of what happens thereafter in the remedy bundle which only contains these selected records. It is fair to record that the GP notes other potential causes of stress other than the incident with JF on 19 December 2018 but the recorded history again sets out the claimant's account that the struggles with his mood and thoughts stems back to the incident in the prison but his PTSD has been triggered by the 19 December 2018 incident.

21. On 28 February 2019 the claimant came into the store to give the respondent his fit notes. At that point he was experiencing symptoms of PTSD including a fear of leaving home. He was also unable to open the door, even to accept the Recorded Delivery post from the respondent. He did not open his emails or respond to texts. He was then dismissed on 2 March 2019.

22. The claimant has found alternative daily paid work in the construction industry. We were told that the onset of the Covid 19 pandemic in March 2020 adversely affected the claimant's ability to find work. However our understanding is that the impact on that industry was not as profound as on many other industries and that construction was able to continue to operate for much of 2020 when other industries were unable to have people at work and were much more seriously affected.

23. We were told by Mr Blackburn, on behalf of the claimant, that he made a suicide attempt in April 2021. The most recent assessments of his mental health were done on 26 and 18 August 2021. They show that depressions scores of PHQ9 of 25, meaning severe; anxiety score is GAD7 Level 19, which is again severe. In September 2021 his PTSD was evaluated as 59/8 and again this is at a severe level of impact. The claimant gave oral evidence in which he described receiving complaints from his colleagues in his new work caused by the problems that he is experiencing in concentrating with forgetfulness and with motivation.

24. Overall we found the claimant to be trying to do his best to assist the Tribunal with evidence in which was as accurate as he could be. We consider that it is likely that, although some weeks are better and some weeks are worse as he seemed to accept, the impact upon him of his revived symptoms of PTSD combined with depression and anxiety essentially remain the same since they have been since about March 2019. He had access to a crisis centre in Aylesbury which he would attend for a period of time. He described things improving and levelling out and then dipping down again to the particular low point in April 2020 when he attempted suicide. He is now under the care of the Oxfordshire Mental Health Trust and has been accepted for a new course of CBT.

25. The best evidence we have about how long from the start of treatment to a diminution of the symptoms of PTSD so that it can be said that the unlawful actions of the respondent are no longer the dominant cause in the context of his background of mental health problems comes from past experience in responding to treatment and time. We find that the probable length of time from start of treatment until the point when the unlawful acts of the respondent no longer impact on his mental health is 18 months. That is approximately the length of time of the pharmacological intervention he received on the earlier occasion in order to achieve a more stable mood. We consider that it is probably right to consider that to be 18 months from the start of treatment. Taking into account an estimate that it is likely to be 6 months before the CBT starts that would be 24 months from the date of the hearing.

26. This would amount to a four and a half year period overall from the date of the 19 December 2018 incident. Our assessment might be pessimistic because that would mean that he had been ill against the background of existing conditions for a long time. However, it might be optimistic. There are unknowns such as the date at which treatment will become available and the length of time it will take for treatment to have an impact. Doing the best we can, that we find is the length of time that the claimant's mental health will have been exacerbated as a result of the incidents that we have found were unlawful. We are not able to divide the psychological impact or injury to feelings suffered into the discrete effects of different incidents.

27. The claimant has taken up employment at some level very quickly. We accept that there is a financial imperative on him to do so. The mental health problems otherwise have a significant effect on his socialising.

28. The actions on the part of management in reacting to the claimant telling them about the incident with JF when they knew of the background of his illness was an additional humiliation for him. It was humiliating for him not to have his complaint taken seriously and that contributed to the injury to feelings and to the ill health that he suffered.

29. The respondent also dismissed him by applying the absence policy rather than the sickness policy when they should have been caring for him and investigating his complaints. These aggravating features of the unlawful action have had an impact upon the emotions that he felt of anger, humiliation and upset. We are not punishing the respondent for this but compensating the claimant for the impact upon him.

30. We think that exacerbation of an established mental health problem which provokes the depth of deterioration the claimant has experienced over the length of time we have found it is likely to last order is sufficiently serious that the award should be at the top end of the middle bracket of awards for injury to feelings. So taking into account not just the psychiatric injury but also the emotions that were attendant upon the respondent's actions we consider that an award of £26,300 is appropriate. The impact on the claimant was not so serious as to put it in the top

bracket but the impact of the three acts which we have found to be unlawful make this a very serious case of its kind.

31. When calculating interest, the incident took place on 19 December 2018 and the dismissal was on 2 March 2019, that is a period of 73 days. The mid-point between those is 24 January 2019. From then to today's date is a period of 968 days. The *per diem* interest rate @ 8% per annum is £5.76 meaning total interest payable on the award of £5,579.93.

32. We next need to consider whether we accept that the claimant stopped working for AFS because of the health impact of the respondent's unlawful acts such that he can claim loss of earnings from that employment as flowing directly from the unlawful acts as well as the loss of earnings with the respondent.

33. We accept the claimant's case that he did. The payments from AFS and Tesco into his bank account analysed in RB page 316 to 320 show no earnings for particular weeks. This supports his evidence that he was signed off from his work at AFS in the same way as he was signed off from Tesco for the three weeks from 8 February 2019 to 22 February 2019. He worked another six weeks for AFS before the payments by them to him stopped altogether. He was self-employed for them but unable to work due to ill health caused by the actions of Tesco. The income which he would have earned had he not been unfit to work due to the actions of the respondent in subjecting him to harassment related to sex on 19 December 2018 is a loss which is recoverable as flowing directly from that unlawful act.

34. He applied to Baytec on 25 April 2019 and started being paid by them on 28 June 2019. The claimant argued that he would have taken on the Baytec work at the same time as he was working for Tesco and AFS and that it should not be set off against his lost income. We therefore needed to consider whether the earnings from Baytec were earnings which mitigated his loss for which credit should be given.

35. He started work for Baytec on 6 May 2019 on a self-employed basis. The net weekly sums he was paid by AFS were £333.72, net weekly sums paid by Tesco were £147.71 making a total wage at the time of his dismissal of £481.43 per week. The claimant earns more in employment now with Baytec. He works longer hours than he did in the combined work for AFS and Tesco. He is not at college during the day which was occupying much of his time. We understand the argument he makes, but we find that the claimant is not out of pocket as a result of the change in employment that he has made following his dismissal. With the other commitments he had prior to his ill health in February 2019, we think it unlikely that he would have taken on the work for Baytect while retaining his work for the respondent and AFS at the same level.

36. We have concluded that the claimant should be awarded three weeks' lost income at £333.72 for the period from week commencing 8 February to the week commencing 22 February by reason of being unable to work for AFS together

with the lost income due to sickness absence from the respondent because the sickness absence was due to the exacerbation of his PTSD which was caused by the actions of JF on 19 December 2018. In total, he then should be awarded three weeks @ £481.43 less the £160.05 that he received in sick pay for the period . This is £1,444.29 less £160.05 making £1,284.24.

37. The loss of earnings from 2 March 2019 (when he was dismissed by the respondent) to 21 June 2019 (when his earnings with Baytec extinguished his losses) are for 18 weeks @ £481.43 less the income received from AFS in that period (£1,059.90). This makes a loss of earnings post dismissal of £7,605.84. The total loss of earnings before interest is therefore £8,890.08. The interest has been calculated @ 8% per annum as set out in the written record of judgment to be £1,726.38.

38. Separately to his argument that his earnings with Baytec should not be set against his losses (which we have rejected), the claimant argues (see para.6.4 above) that he has been unable to work for Baytec due to sickness caused by the actions of the respondent. We have to decide whether the claimant was in fact sick on the days that he claims that he was unable to work and whether that was due to sickness caused by the respondent's actions.

39. The respondent argues that there is no evidence from Baytec to confirm that the claimant was unavailable on those dates and we are simply asked to infer from the diminution of sums paid into the claimant's bank that he was unable to work. They argue that one particular pair of dates, 24 and 25 March 2020, were immediately after the National lockdown and query whether he would have found work on those dates and whether the absence of payment is in fact due to sickness – let alone a sickness caused by an action for which they are responsible. They also point to a lack of medical evidence to corroborate that the claimant had been ill on the particular dates.

40. With the exception of one period we are not persuaded that these were sickness absences when work was available, that the claimant would otherwise have been able to obtain, and that therefore the claimant has suffered a loss of remuneration due to sickness caused by the respondent's actions. We know that the claimant made a suicide attempt in April and we infer that the dates in March and April 2021 were caused by deteriorating ill health and/or sickness caused by the mental health, specifically PTSD. We consider that there is sufficient evidence to conclude, on the balance of probabilities that on those days claimed in March and April 2021, the claimant was unable to work because of continuing ill health flowing from the discriminatory act and therefore we award 16 days at £120 or £1,920 loss as a result of that. We accept that that was the claimant's standard rate of remuneration with Baytec. The interest has been calculated on that as set out in the written judgment.

41. After we announced our decision on the above it was apparent that the total award would be more than £30,000 and that the claimant would therefore be subjected to income tax on the balance of the award. The grossing up

calculation was carried out with the input of Mr Blackburn based upon what he, on behalf of the claimant, said were reasonable pre-estimates of the claimant's income in the relevant tax year.

I confirm that these are our written reasons in case number 3315945-2019 and that I have approved the reason for promulgation.

_____
Employment Judge George

Date: …9 January 2022 ……..

Sent to the parties on:

1 February 2022

For the Tribunal Office