



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Henderson

Respondent: Asda Stores Limited

Heard at: Manchester (by CVP)

On: 16 December 2021

Before: Employment Judge Ainscough
Mrs A Jarvis
Mr M Stemp

REPRESENTATION:

Claimant: Ms J Ferrario (Counsel)

Respondent: Mr A Johnston (Counsel)

JUDGMENT ON REMEDY

1. The respondent is ordered to pay the claimant an award for injury to feelings in the sum of **£40,000** in accordance with section 124 of the Equality Act 2010.
2. The respondent is ordered to pay the claimant interest in the sum of **£8355.06** on the award for injury to feelings in accordance with regulation 2 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.
3. The respondent is ordered to pay the claimant a basic award in the sum of **£3768.30** in accordance with section 119 of the Employment Rights Act 1996.
4. The respondent is ordered to pay the claimant a compensatory award in the sum of **£10,886.20** in accordance with section 123 of the Employment Rights Act 1996.

REASONS

Tribunal's Judgment

1. In March 2021 this Tribunal found that the claimant had been constructively unfairly dismissed from the respondent's employment and harassed on the grounds of her race during her employment. The Tribunal determined that the harassment amounted to a lengthy campaign over a period of 14 months which had a profound

effect on the claimant. The claimant was subject to harassment by two managers in positions of authority, and the majority of the harassment took place behind closed doors.

Remedy Hearing

2. At the outset of the hearing the parties agreed the basic award and compensatory award in accordance with sections 119 and 123 of the Employment Rights Act 1996.

3. As a result, it was not necessary to consider the evidence of the respondent's witness Barbra Stabler – a People Business Partner.

4. The issue of an award for injury to feelings remained outstanding and the Tribunal heard evidence from the Claimant, considered a bundle of documents prepared by the claimant and the respondent's counter schedule of loss.

Relevant Findings of Fact

5. The claimant worked for the respondent from 28 September 2003 until she resigned from her employment with the respondent on 8 May 2019.

6. During her employment, the claimant was absent from work on 23 occasions. The claimant was absent for a variety of reasons. In 2009 the claimant was absent as a result of stress after she submitted a grievance about a manager.

7. The claimant decided to terminate her employment after Mark Bates shouted at her in the chiller area. The respondent did not stop the claimant from emptying her locker and leaving the store without finishing her shift on 8 May 2019. The respondent did not call the claimant at home. The respondent sent a letter to the claimant asking her to reconsider her resignation. The claimant declined to do so.

8. The first part of the final hearing took place from 24-28 August 2020. After the completion of the first part of the hearing the claimant was prescribed anti-depressant medication by her GP.

9. The judgment was sent to the parties on 11 March 2021. On 25 March 2021 the claimant spoke to her GP because she was feeling unstable. On 30 May 2021 and 26 July 2021 the claimant was sectioned under the Mental Health Act as a result of psychotic episodes.

10. The Mental Health Tribunal concluded that the claimant was suffering from a mental health disorder.

11. The claimant is currently unable to obtain employment in light of her mental health disorder.

Relevant Legal Principles

12. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 of the Employment Rights Act 1996 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

13. The basic award is a mathematical formula determined by section 119:

- “(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by —**
- (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,**
 - (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and**
 - (c) allowing the appropriate amount for each of those years of employment.**
- (2) In subsection (1)(c) “the appropriate amount” means—**
- (a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,**
 - (b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and**
 - (c) half a week’s pay for a year of employment not within paragraph (a) or (b).**
- (3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.”**

14. The compensatory award is primarily governed by section 123 as follows:

- “(1) Subject to the provisions of this section and sections 124, 124A and 126 , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer....”**

15. Section 124 provides that the any amount awarded in accordance with section 123 shall not exceed £89,493 or 52 weeks’ gross pay, whichever is the lower.

16. If a discrimination complaint is well-founded, remedy is determined by section 124 of the Equality Act 2010, which states:

- “(1) This section applies if an Employment Tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
- (2) The Tribunal may –**
- (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters in which the proceedings relate; and**
 - (b) order the respondent to pay compensation to the complainant.”**

17. Subsection 6 states:

“The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which may be awarded by the County Court or the Sheriff under section 119.”

18. Section 119 of the Equality Act 2010 determines that:

“An award of damages can include compensation for injury to feelings.”

19. In the case of **Komeng v Creative Support Limited UKEAT/0275/18/JOJ**, the Employment Appeal Tribunal confirmed that any injury to feelings award must focus on the injury suffered by the claimant and not the Tribunal’s view of the gravity of the acts performed by the respondent.

20. In the case of **Prison Service v Johnson [1997] IRLR 162**, the Employment Appeal Tribunal set out general principles to assist Tribunals in assessing injury to feelings awards. Those principles are as follows:

- (1) Injury to feelings award should be compensatory and just to both parties. Such awards cannot punish the discriminator.
- (2) Awards should not be too low that they would diminish the respect of the antidiscrimination legislation. Equally they should be restrained so as not to be excessive.
- (3) Such awards should be similar to those awarded in personal injury cases.
- (4) Tribunals are advised to take into account the value of the sum in everyday life.
- (5) Tribunals need to consider the public respect for the level of awards made.

21. The fifteenth edition of the Judicial College guidelines for the assessment of general damages in personal injury cases describes various psychiatric injuries and the suggested parameters of awards. The guidelines set out the following factors to be taken into account when valuing awards of compensation in psychiatric injury claims:

- (i) the injured person’s ability to cope with life, education and work;
- (ii) the effect on the injured person’s relationships with family, friends and those with whom he or she comes into contact;
- (iii) the extent to which treatment would be successful;
- (iv) future vulnerability;
- (v) prognosis;
- (vi) whether medical help has been sought.

22. Moderately severe psychiatric injury is described as follows:

“Moderately severe £17,900 to £51,400

In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving

psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or longstanding disability preventing a return to comparable employment would appear to come within this category.”

23. The case of **Vento v The Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102** in the Court of Appeal determined that:

“Injury to feelings awards can compensate for feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.”

24. The Court of Appeal also gave guidance on the bands of compensation that can be awarded for such injury to feelings as follows:

- (a) A top band for the most serious cases where there has been a lengthy campaign of harassment on the ground of sex or race;
- (b) The middle band, to be used for serious cases which do not merit an award in the highest band; and
- (c) The lowest band for less serious cases where there has been a one-off act of discrimination.

25. Following subsequent case law the President of the Employment Tribunal has issued Presidential Guidance on the applicable values to each band which at the time the claimant issued her claim were as follows:

- Upper band - £26,300 to £44,000
- Middle band - £8,800 to £26,300
- Lower band - £900 to £8,800

26. The value of any award in a particular banding will be calculated in accordance with the date on which the claim form was issued.

27. Interest can be awarded on compensation for discrimination, including injury to feelings. Regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides that interest accrues from the date of the discrimination and ends on the date the Tribunal calculates compensation.

28. Where a past financial loss is awarded as part of that discriminatory compensation, the interest will accrue from a mid point between the date of discrimination and the date of calculation.

Submissions

Respondent's submissions

29. The respondent submitted that the claimant's current state of health has been caused by the termination of her employment. The respondent reminded the

Tribunal that it had not determined that the claimant's termination of employment amounted to a discriminatory act.

30. It was the respondent's position that the injury to feelings award should reflect single acts of discrimination over an 18 month period. The respondent conceded that any injury to feelings award would not be in the lower band but rather the middle band but at the lower end.

31. The respondent accepted the cumulative affect of the acts upon the claimant. However, the respondent asserted that the claimant's current state of health was as a result of the impact of giving evidence during the final hearing and this should not be equated with the acts of discrimination.

32. The respondent reminded the Tribunal of the principles in **Johnson**.

Claimant's submissions

33. The claimant submitted that any injury to feelings award should be in the upper band.

34. The claimant accepted that she didn't have medical evidence about her current state of health but invited the Tribunal to reach decision on the evidence it did have.

35. The claimant submitted that prior to the discriminatory acts she did not suffer from mental health illness.

36. The claimant submitted that she received the judgment in March 2021 but as English is not her first language, she did not realise the impact of what had happened until July 2021 when she was sectioned following a psychotic episode.

37. The claimant submitted that she was subject to a lengthy campaign of harassment that has had a lasting effect. The claimant hopes to work again in the future when she has regained her confidence.

Discussion and Conclusion

Injury to feelings award

38. The Tribunal concluded that the claimant has lost her confidence and is now in a vulnerable position. The claimant had worked for the respondent for a period of 15 and a half years in a role which she saw as a job for life. The claimant wanted to fully embrace her role and take part in all activities associated with that role. The actions of her managers denied her that opportunity.

39. The impact of the unlawful treatment upon the claimant has only recently manifested itself on receipt of our judgment. The claimant has realised the true extent of what has happened to her. This has unfortunately led to a significant decline in the claimant's health, for which she now receives medication and is awaiting treatment. As a result of the claimant's ill health she is unable to work.

40. The claimant's current mental state arises directly and naturally from the unlawful acts of discrimination. From the evidence we have seen and heard, there

is no suggestion that the claimant was already suffering in this way or that other factors have led to her mental state. The claimant is currently focussing on getting through each day and is unable to work.

41. This was a campaign of lengthy harassment, the impact of which has been profound. The award for injury to feelings is in the upper band. At the time the claimant lodged her claim in August 2019 the upper band bracket was £26,300 to £44,000.

42. In accordance with the guidance set out in the case of **Vento**, this is a most serious case and justifies an award in the upper band but stops short of being exceptional.

43. In accordance with the case of **Johnson**, the Tribunal was conscious that an award should be compensatory and just for both parties.

44. The Tribunal had regard to the 15th edition of the Judicial College Guidelines and noted the guidance for compensation for severe psychiatric injury. In such cases a person will have significant problems with the ability to cope with life and work, personal relationships, with the extent to which medical treatment will be successful and future vulnerability. The bracket for this type of award is £17,900 to £51,460.

45. The guidance states that the majority of cases such as those of work related stress resulting in permanent or longstanding disability preventing a return to comparable employment, are usually at the mid point. The mid point of this bracket is £34,680.

46. The Tribunal determines that the facts of this case justify an award of £40,000 in light of the fact that it was a most serious and lengthy campaign of harassment.

Interest

47. The Tribunal determines that the claimant is entitled to interest on the award for injury to feelings in accordance with regulation 6(1)(a) of the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

48. Interest has been worked out from 8 May 2019 to 16 December 2021. The award for interest equates to £8355.06 based on 953 days at a rate of 8%.

Employment Judge Ainscough
Date: 22 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 April 2022

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.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410550/2019**

Name of case: **Mrs S Henderson** v **Asda Stores Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 26 April 2022

"the calculation day" is: 27 April 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".
3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.
4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).
5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.
6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.