



EMPLOYMENT TRIBUNALS

Claimant

Mrs. J. Madeley

v

Respondent

Cambian Childcare Ltd

Heard at: Birmingham On: 20 April 2022

Before: Employment Judge Wedderspoon

**Members Mrs. K. Ahmad
Mr. A.A. Moosa**

Representation:

Claimant: In Person

Respondents: Mr. C. Crow, Counsel

REMEDY JUDGMENT

1. The claimant is awarded an injury to feelings award in the sum of £22,500.
2. Interest is awarded of £3,600.
3. The total award is £26,100.

REASONS

1. Following the liability hearing at the end of 2021, the Tribunal made a number of case management orders including the disclosure of any relevant medical material from April 2020 to date concerning the claimant's contention that her mental health was affected by the respondent's discriminatory treatment.
2. The Tribunal was provided with an agreed bundle of 103 pages. The claimant confirmed in her evidence that her latest schedule of loss at pages 92 to 95 represented her losses and this stood as her evidence in chief. The respondent had the opportunity to cross examine the claimant. The claimant also called her mother as a witness but the respondent did not seek to cross examine her. Both parties made oral submissions. The respondent also provided the Tribunal with a detailed written submission.

The Law

3. Pursuant to section 124 of the Equality Act 2010 a tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the complainant; (c) make an appropriate recommendation.

4. An injury to feelings award is available where the Tribunal upholds a discrimination claim and compensates for non-pecuniary loss. The award is not punitive but compensatory intended to compensate for anger, distress and upset caused by the unlawful treatment. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent. The EAT in the case of **Prison Service v Johnson (1997) IRLR 162** set out the general principles to be applied when making an injury to feelings award are as follows (a) 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 (b) awards should not be too low that would diminish respect for the policy of anti-discrimination legislation. Society has condemned discrimination and wards must endure 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. (c) Awards should bear some broad general similarity to the range of award in personal injury cases not to any particular type of personal injury but to the whole range of such awards (d) 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 (e) Tribunal should bear in mind the need for public respect for the level of awards made.
5. In the case of **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings; this had been updated by the Presidential Guidance so that where claims are brought on or after 6 April 2020, the three bands are now lower band £900 to £9,000; middle band £9,000 to £27,000 for cases that do not merit an award in the upper band; and an upper band of £27,000 to £45,000 with the most exceptional cases capable of exceeding £45,000. Lower band discrimination typically concerns one off incidences of discrimination such as a single discriminatory insult or slur. Middle band discrimination cases include more serious acts of discrimination; the upper band is limited to very serious acts of discrimination.
6. The onus is upon the claimant to establish the nature and the extent of the injury following the case of **Murray v Powertech Scotland (1992) IRLR 257**.
7. The EAT stated in the case of **Base Childrenswear Limited v Otshudi (UKEAT/0267/18/505)** that the Vento bands are not prescriptive and cases are fact sensitive; the question for the Tribunal must always be what was the particular effect on this individual complainant.
8. In the EAT case of **Thaine v London School of Economics (2010) ICR 1422** a psychiatric ill health case, although a reduction of compensation was made across all awards, there were a number of concurrent causes for the claimant's psychiatric condition; including unlawful discrimination, her mother's ill health and the break-up of a relationship. The EAT determined that the test of causation when more than one event had caused her suffered by the claimant was whether the defendant's breach of duty had materially contributed to the harm but the extent of the defendant's liability was limited to that contribution. The tribunal had found that the discrimination suffered by the claimant at work had materially contributed to her ill-health and quantified its contribution at 40%. It found that there was no reason why the employer should have to

compensate the claimant for her ill health and its consequences in its entirety when the unlawful discrimination for which it was responsible was just one of the many contributory cases.

9. In the Court of Appeal case of **Dickins v O2 PLC (2009) IRLR 58** it was held that there was no rule that the Tribunal should apportion damages across the board merely because one non-tortious cause has been in play.
10. Awards may be made for personal injury (see **Sheriff v Klyne Tuggs 1999 IRLR 481**). Where an individual is awarded sums both for injury to feelings and personal injury (such as depression) caused by the discrimination, the injury to feelings and personal injury awards must compensate for different injuries and not overlap.
11. Awards for aggravated damages may be awarded where the respondents have acted in a high handed, malicious, insulting or oppressive manner in committing the act of discrimination (**Alexander v The Home Office (1988) ICR 685**). In the case of **Commissioner of Police of the Metropolis v Shaw EAT 0125/11** three broad categories were identified :-
 - (1) where the manner in which the wrong was committed was particularly upsetting namely high handed, malicious, insulting or oppressive manner;
 - (2) 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;
 - (3) where subsequent conduct adds to the injury for example where the employer conducts Tribunal proceedings in an unnecessarily offensive manner or rubs salt into the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously.

The evidence of the claimant

9. The claimant's evidence to the Tribunal was that she resigned her employment with the respondent in October 2020. She secured another job with Bethpage on 13 October 2020 and commenced that role on about 16 November 2020.

10. The claimant's evidence is that her mental health deteriorated to the extent that she suffered a mental breakdown in about February 2021. There is a G.P. consultation note referring to "stress related problem" on 25 February 2021. She was prescribed anti-depressants and has remained on medication of about 50mg since then (there have been some variations to her medication and dosage over time). She took time off in March 2021 on the advice of her G.P. She underwent some intense trauma counselling. She described a lack of confidence of doing her job. By August 2021 GP consultation notes refer to depression.

12. During lockdown the claimant stated she tried to obtain assistance but struggled to find any available support. The claimant handed her notice in with Bethpage and found alternative work with Crystal Cave on or about 16 June 2021. She worked therefore for about 4 to 5 months but resigned and has not worked since the end of 2021. The claimant felt no longer able to work in that care environment. In fact, she doesn't go anywhere anymore in the absence of her

mother to accompany her. The claimant's mother in her evidence to the Tribunal at the liability hearing noted a significant difference in her claimant's personality and that she was no longer the bubbly personality that she had been. She underwent pretrial stabilization therapy from December 2021 to March 2022. In March of this year the claimant was awaiting trauma focused counselling.

Injury to Feelings Award

12. The Tribunal has reminded itself of its liability findings and notes it found one act of victimisation occurring in about November 2020 and 9 acts of sexual harassment spanning the period of early April to towards the end of May 2020 when Mr. Burns was suspended. The Tribunal notes that there was some physical touching involved in the unnecessarily brushing past the claimant touching her arms, legs and body during this period and a number of sexually motivated comments by Mr. Burns.
13. The Tribunal is grateful to the respondent in providing a number of different injury to feelings award cases to consider. However, the Tribunal is mindful of the fact sensitive nature of such cases. Further the effect upon one claimant from acts of discrimination over a short period may have a more substantial effect than on another claimant subject to a longer period of discrimination. To that extent the respondent must take a claimant as they find them.
14. The claimant places her claim in the top band of Vento, seeks a career loss claim, personal injury award and aggravated damages award. The respondent places the claimant's award in Vento mid band, submits a deduction should be made as some acts complained of were not unlawful or discriminatory and says there is no evidence to support a financial loss, personal injury or aggravated damages award.

Conclusions

15. The Tribunal having heard the claimant's evidence and noted the limited amount of medical material in the bundle concludes that the discriminatory treatment did have a significant and profound effect upon the claimant. The Tribunal accepts that the claimant did seek time off work whilst still employed by the respondent. Further it is accepted that the claimant did seek help from her G.P. for her mental health and takes judicial notice that psychiatric services were and are stretched and more so in the time of lockdown. The claimant did attend pretrial stabilisation therapy counselling from December 2021 to March 2022. She awaits trauma focused counselling.
16. The Tribunal does not seek to demean the claimant's suffering endured as a consequence of the discriminatory treatment. However, it has determined to place the injury to feelings award in the mid band of Vento and considers that it should fall somewhere just above the mid band of this bracket. The discrimination was not a one-off act of discrimination but continued over a period of months. Unwanted inappropriate comments and physical touching took place. However, it was not of the worst type of discrimination over a prolonged period that can feature in extreme and very serious cases. The

Tribunal recognised nevertheless that the treatment had an effect on the claimant not only in her professional career but in her everyday living. It considers an appropriate award would be £22,500.

17. The case of Thaine can be distinguished from the present case. There were a number of concurrent causes for the claimant's ill health in that particular case namely her mother's ill health and breakdown in her personal relationship. Adopting the words in the case of Dickins, the discrimination found had a material contribution to the claimant's injury. Here the material and significant cause of the claimant's injury to feelings is the discriminatory conduct of the respondents. There is no rule following the Dickins case that the Tribunal should apportion damages across the board merely because a non-tortious cause has been in play. A substantial amount of the claimant's pleaded case has been found in her favour and the Tribunal finds that there has been a material impact on the claimant's injury to feelings by reason of the allegations held to be well founded before this Tribunal. The fact that the claimant has not established all of her case does not detract from the impact of the discriminatory treatment upon her. In the circumstances the Tribunal declines to make any suggested deduction and awards £22,500.

Personal injury award/career loss

18. The starting point is that the claimant has the burden of establishing the nature and extent of the injury (following **Murray**). Despite the Tribunal's case management order, limited medical material has been provided by the claimant to establish a recognised psychiatric condition which has been caused by the discriminatory treatment so to impact on her long term health and long term career; there is no report from the claimant's GP or other medical professional which substantiates this contention. For such a significant loss claimed, there is a reasonable expectation by the Tribunal that medical evidence would support this; there is insufficient medical material provided by the claimant to support her personal injury claim over and above her injury to feelings award. The Tribunal also applies this analysis to a career loss claim. The Tribunal has heard the claimant's oral evidence and has taken that into account to assess the appropriate injury to feelings award. It does not however find that this is an appropriate case to make a personal injury award or a career loss claim because the supportive medical evidence is simply not there to base it on.

Aggravated Damages

19. The Tribunal rejects the claim for aggravated damages. It relies upon its findings of fact in the liability judgment. This was not a case where it could be said that the respondent acted in a high handed, malicious, insulting or oppressive manner. In these circumstances a claim under this heading is not sustainable and is rejected.

Increase in award for failure to comply with ACAS Code of Practice

20. The Tribunal is not satisfied that such an uplift is merited.
21. Section 207 A (2) TULRC 1992 provides that if a relevant code of practice applied and the employer has failed to comply with the code and the failure was unreasonable the Tribunal may if it considers it just and equitable to do so in all the circumstances increase any award by up to 25%.

22. The relevant ACAS Code is the ACAS Guide : Discipline and Grievance at Work (2017). The code sets out the bare minimum of steps which an employer should comply with procedurally in terms of a grievance. Although the Tribunal expressed in its liability judgment its concerns as to the adequacy of the respondent's interrogation of the evidence in particular by Ms. Duckett in the grievance process; the respondent did as a minimum invite the claimant to an investigation meeting with Mr. Sam Probert and provide her with an appeal which she exercised. The claimant has not identified which part of the code she considers has been breached by the respondent. In all of the circumstances, the Tribunal determines an increase in award is not appropriate.

Interest

23. The Tribunal awards interest at a rate of 8%. The relevant period is the Tribunal finds two years. An award of interest is calculated for 2 years namely the sum of £3,600.

Total award

24. The total award payable by the respondent is £26,100 which should be paid forthwith. No tax is deductible because it is an injury to feelings award and is not connected to the termination of her employment.

Employment Judge Wedderspoon

17 May 2022

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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