



EMPLOYMENT TRIBUNALS

Claimant: Ms Jones

Respondent: ABM Facilities Services UK Ltd

Heard at: Croydon Employment Tribunal by Cloud Video Platform
On: 1 June 2022

Before: Employment Judge Nash
Ms A Rodney
Mr G Mann

Representation

Claimant: Ms Sole of counsel

Respondent: Mr Bronze of counsel

RESERVED REMEDY JUDGMENT

1. The respondent shall pay the claimant the sum of £12,800 as compensation for injury to feelings caused by harassment under section 26 Equality Act 2010.
2. In respect of personal injury caused by harassment under section 26 Equality Act 2010, the respondent shall pay the claimant the following: –
 - a. £19,070 for pain, suffering and loss of amenity
 - b. £2,400 in respect of treatment costs
 - c. compensation for loss of earnings from 11 November 2024 to 1 March 2023.
3. The respondent shall pay the claimant sum of £1,000 as compensation for injury to feelings caused by victimisation under section 27 Equality Act 2010.
4. The respondent shall pay to the claimant a basic award of £2,423.09 in respect of her unfair dismissal.
5. The respondent shall pay the claimant £500 for loss of statutory rights following her unfair dismissal.
6. There is no prescribed element in this award.

7. The respondent shall pay the claimant statutory interest on the sums awarded under the Equality Act 2010.

REASONS

1. As this remedy hearing the tribunal heard from the claimant as the only witness. She swore to her witness statement including a statement of truth. The respondent led no oral evidence.
2. The tribunal had sight of an agreed remedy bundle.

The claims

3. At the liability hearing the claimant had succeeded in her claims for
 - a. Unfair Dismissal under Section 98 Employment Rights Act,
 - b. disability harassment under section 26 Equality Act,
 - c. victimisation under Section 27 Equality Act
 - d. unauthorised deduction from wages under section 23 Employment Rights Act.

The issues

4. The only issue at this hearing was remedy.

Applying the law to the facts

Injury to feelings-harassment

5. The Tribunal reminded itself that an award of injury to feelings is intended to compensate a claimant for the anger, stress and upset caused by unlawful treatment. It is compensatory not punitive, and the focus is on the actual injury suffered and not the gravity of the acts.
6. In respect of the general principles, these are laid out in the *Prison Service v Johnson* [1997] IRLR 162, para 27 and they remind the Tribunal that injury to feelings awards are compensatory and must be just to both parties. Feelings of indignation at the discriminator's conduct should not inflate the award.
7. Awards on one hand must not be too low as to diminish respect for the policy of the anti-discrimination legislation. On the other hand, awards should be restrained for the same purpose.
8. Awards should bear some broad general similarity to the range of awards in personal injury cases and Tribunals should take into account the value of everyday life for the sum they have in mind. Tribunals should also bear in mind the need for the level public respect of awards made.

9. It is settled law that an award of injury to feelings is awarded in line with the band set out in *Vento v Chief Constable of West Yorkshire 2003 [IRLR102]*. This divided the compensation into three bands, the top band, the middle band and the lower band.
10. The Tribunal must concentrate on the injury to the claimant rather than the respondent's act and the Tribunal reminded itself that different individuals react in very different ways to what may be a very similar act or acts. However, a one-off act is, all things being equal, likely to result commonly in injury to a person's feelings than a long catalogue of mistreatment, and vice versa. He
11. It is for the claimant to prove the nature and extent of the injury to feelings.
12. The Tribunal considered what injury had been caused by the harassment Harassment relating to her disability, contrary to section 26 of the Equality Act 2010 ("EqA") as follows: –
 - i. aggressively calling the Claimant back to the reception desk on a daily basis whilst she was on her lunch break.
 - ii. On 14th June 2019, telling the Claimant, under his breath but nevertheless aggressively, "Can you take you lunch break, now".
 - iii. On 15th June 2019, storming through the management suite door and aggressively asking where the Claimant was.
 - iv. On 21st June 2019 holding a meeting with the Claimant described by Mr Ford at the outset as "a little chat about commitment" at which unjustified and unfair issues were raised and it was suggested that the Claimant struggled with computer skills and "had been here for a year and still can't work a computer". The Claimant felt that the meeting had been set up as a means for Mr Ford to threaten her continued employment.
 - v. On 22nd August 2019 Mr Ford initiating a meeting with the Claimant by appearing with a notice in his hand which read "Guest Services Closed Today", pointing and stating to the Claimant "conference room".
 - vi. During the discussion on 22nd August 2019, when the Claimant became visibly upset and hyperventilated upon responding to why she had not gone for lunch, placing his hands on the desk and continuing to talk aggressively to the Claimant saying, "who is the Centre manager today, I am-I take full responsibility for managing the centre". When asked by the claimant why he was bullying her, Mr Ford responded "wrong word".
13. In submissions the claimant clarified that she was not seeking compensation for constructive dismissal, only for the harassment found in the liability judgement. The tribunal also reminded itself that as the claimant sought damages for injury to her health, it should guard against the risk of double recovery. In effect, there would be a reduction to the amount awarded for injury to feelings to reflect this.
14. The tribunal accepted the claimant's evidence, which was not challenged, that her work for the respondent was particularly congenial employment. The claimant in her witness statement and before the tribunal spoke of how she had enjoyed her work, in particular working the public and helping them. She had received a national award for customer services employee of the year in 2019. She was name

checked in online reviews of the shopping centre, in particular for helping vulnerable people.

15. The tribunal accepted her evidence that she had considerable difficulties in her personal life, for instance her son's cancer had recently returned. She lived alone and was living with a number of traumatic life experiences such as extremely serious sexual assault and that mental health diagnosis. She accordingly lacked some of the sources of support for instance in her immediate household that others might enjoy. In the circumstances the tribunal accepted that her work meant a very great deal to her, and she was perhaps unusually reliant on it as a source of self-worth and a sense of identity. The tribunal nevertheless bore in mind that she found the computer elements of the job considerably less congenial and that she was far less well suited to this part of her job.
16. In these circumstances the tribunal accepted that the comment about commitment was especially hurtful. The tribunal noted that the claimant's evidence on other matters often harked back to the question of her commitment. In the view of the tribunal this was something that was very much on her mind and reflected a particular injury to her feelings.
17. The Tribunal bore in mind that there was evidence of hurt to feelings at the time of the unlawful harassment. She had hyperventilated during the meeting with Mr Ford in June and suffered a panic attack.
18. In addition, the tribunal had found that Mr Ford had in effect used her mental health against. As the medical evidence was that her mental health condition was ongoing this meant the claimant has to live with the knowledge that she might be targeted again in future.
19. The tribunal once again reminded itself that it is not the level of conduct or the level of culpability which is relevant to an award, but the effect on the claimant. Nevertheless, the type of conduct is of some assistance to a tribunal in indicating what might be the level of injury. In view of the Tribunal what actually happened was harsh but not highly abusive management. What was particularly objectionable was that the claimant was targeted because of her mental health.
20. The tribunal sought to differentiate injury to feelings from the harassment from injury to feelings from the loss of employment. According to the claimant's evidence before the tribunal, the impact of the loss of employment was significant. The tribunal found this evidence plausible. The Tribunal took into account the fact that the claimant was signed off sick well before her constructive dismissal and therefore there was evidence that the harassment in and of itself had a very significant impact.
21. In the circumstances the Tribunal took the view that there should be a 20% reduction in the award of injury to feelings to reflect injury to feelings flowing from the loss of the job and the potential overlap with personal injury compensation.
22. The Tribunal determined that the middle band was appropriate under the *Vento* scale. This was not a one-off act of harassment with a relatively short-term impact

on the claimant. The unlawful harassment continued over several weeks and had a significant impact on the claimant who was vulnerable.

23. According to the material addendum to the Presidential Guidance, the middle band should be within the range of £8800 - £26300. This includes the 10% uplift according to *Simmons v Castle* [2012] EWCA Civ 1288.
24. Taking into account the factors set out above the Tribunal determined that the appropriate award should be just shy of the midpoint of the middle band, being £16,000. Applying a reduction of 20% this resulted in reward for injury to feelings harassment of £12,800.

Injury to feelings-victimisation

25. the Tribunal determined that the award for injury to feelings in respect of victimisation fell within the lower band. This was a one-off act and in the context of other matters the tribunal found that it had a relatively limited effect on the claimant. In addition, the tribunal was mindful of the risk of double recovery, taking into account the award of injury to feelings for harassment. Accordingly, the award fell at the lower end of the lower band.
26. According to the material addendum to the Presidential guidance, the lower band was from £900 to £8800, including the 10% uplift. The Tribunal took the view that the award should be just below the bottom of the band and awarded £1000. The tribunal accepted that there was a separable and identifiable injury to feelings flowing from the failure to pay holiday pay. The tribunal accepted the claimant's evidence that she felt betrayed, and, in addition, she believed that the respondent took advantage of her because it believed she would not challenge the shortfall due to her vulnerability.

Injury to health-harassment

27. The Tribunal reminded itself that following the decision in *Essa v Laing Ltd* [2004] IRLR 313, the question was not whether any injury was foreseeable; the tribunal should focus on the question of causation.
28. The claimant confirmed that she was not arguing that the tribunal should apply the so-called eggshell skull principle to personal injury damages. She did not argue that the discriminator should, in effect, with damage take the victim as they find, in that the discriminator would be liable for the full extent of the damage, loss or injury as long as it can be shown that it flows from the act of discrimination.
29. The claimant's case was that the discrimination exacerbated or accelerated the effect of a pre-existing condition. Therefore, the award for personal injury should reflect only the exacerbation or acceleration to the claimant's pre-existing mental health condition. According to the claimant's unchallenged statement, she had a history of mental health conditions and was diagnosed with depression anxiety in 1989. In January 2016 she was diagnosed with an adjustment disorder.

30. The claimant relied on a medico legal report dated 17 May 2022 from a chartered psychologist, Dr Robb, who met with the claimant on 5 May. The tribunal had sight of the letter of instruction and enclosures. The letter referred to Civil Procedure Rule 35 but did not provide a copy of the 2014 Guidance for the Instruction of Experts in Civil Claims from the Civil Justice Council. The expert report stated in terms that the expert's duty was to the tribunal and not to any party. The expert was provided with the tribunal liability judgement, the claimant's GP records, the claimant's impact statement and the text of the claimant's witness statement for the hearing.
31. Whilst litigation in the employment Tribunal is not subject to the civil procedure rules, broad compliance with the civil procedure rules permits a tribunal to have confidence in an expert report.
32. Prior to this remedy hearing the respondent had unsuccessfully applied to postpone the hearing on the basis that the medical evidence was not yet ready. In the event the medical report was served on the respondent on 18 May, 2 weeks before the hearing. The respondent did not ask any questions of the expert, nor did it seek an adjournment to clarify medical evidence, for instance by instructing a different expert. There was no suggestion before the tribunal from the respondent that it had been denied the opportunity to do so.
33. According to Dr Robb's summary, "based on her self-reports and GP records it is my opinion that due to the respondent's behaviour she has experienced symptoms of low mood, self-harm, anxiety, hallucinations, increased alcohol intake and social withdrawal... Her significant psychological symptoms in my opinion met the clinical criteria for recognised psychological disorders specifically adjustment disorder 309.28 (F4 3.23) with mixed anxiety and depressed mood, [with reference to the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders] ...Her mood significantly deteriorated in May 2019 due to the respondent's behaviour. Her mood remained at its worst from 2 years and subsequently gradually improved."
34. The report also stated that the claimant claimant's "sense of self identity, self-worth and trust others has been eroded. She felt ashamed unable to cope with the situation. She adopted unhelpful strategies such as self-harm and increased alcohol intake in an attempt to manage and stress".
35. The medicolegal report stated that the claimant's self-reports were consistent with the GP records. The report was consistent with the account of her symptoms in the claimant's witness statement. The claimant stated that for about 2 years she found herself on occasion unable to leave the house. She "felt like my world was over". At time she found it impossible to get out of bed or walk her dog. Her social interactions decreased including missing noteworthy events such as grandchildren's birthdays. She was at times unable to watch television, read books or have baths. To illustrate, she was unaware of the onset of the Covid 19 pandemic until her son telephoned her in March 2020. She struggled with self-care, for instance one tube of toothpaste lasted for 6 months. She was distressed because Mr Ford lived only about 400 m away, and she would at times see him in supermarket which significantly increased her distress.

36. She started to suffer from hallucinations in March 2020, including of her mother who had died a decade earlier. At times the hallucinations became more frightening, for instance black water running down the walls or a black room. She started self-harming, including extinguishing cigarettes on her arm.
37. The respondent sought to argue that some of the claimant symptoms were attributable to the claimant's pre-existing condition rather than the exacerbation caused by the unlawful harassment. However, the respondent had not taken advantage of the opportunity to ask questions of the medical expert going to this. The tribunal was not convinced by the respondent's submissions further, because the medical expert set out in some detail the claimant's social and medical background. When the claimant had suffered serious symptoms for instance in 2017 to 2018 she was prescribed antidepressant medication. The medical expert stated that there was a material deterioration in May 2019, at the time of the start of the unlawful harassment. Accordingly, the Tribunal accepted that the medical expert had set out the effects of the unlawful harassment on the claimant in the context of her pre-existing medical condition.
38. The tribunal noted that the expert was asked to report on "the impact and effect of the respondent's behaviour which has been held to take place" on the claimant. In the view of the tribunal this was less than ideal wording as it did not expressly distinguish between the unlawful harassment and the termination of the claimant's employment. However, Dr Robb's report did not refer in any material sense to the loss of the claimant's employment. Rather, the report concentrated on the effects of the unlawful harassment. In light of this and the fact that the respondent had not sought to ask questions of the medical expert going to apportionment between the harassment and the dismissal, the tribunal accepted that the medical report related to the effects of the harassment rather than the dismissal.
39. The medical report did not suggest which category (for instance moderately severe or moderate) was appropriate for the claimant symptoms. The claimant relied on the Judicial College Guidelines 16th edition 4 (a) (C) psychiatric damage and 4 (a) (B) as follows: –
- the factors be taken into account in valuing claims of this nature are as follows:
- (i) the injured person's ability to cope with life, education work:
 - (ii) the effect of 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) mutual vulnerability
 - (v) prognosis:
 - (vi) whether medical help has been sought.
40. The tribunal was referred to the guidelines bands the psychiatric damage as follows: -

(b) Moderately Severe

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 long-standing disability preventing a return to comparable employment would appear to come within this category. £19,070 to £54,830

...

(c) Moderate

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good. Cases work-related stress may fall within this category if symptoms are not prolonged. £5,860 to £19,070.

41. The tribunal sought to determine into which category the exacerbation of the claimant's symptoms fell. There was a very significant impact on the claimant's ability to cope with life and work. The claimant's relationships with family and friends and those with whom she came to contact were materially affected and at times very significantly affected. The prognosis was that with treatment the claimant would recover enough to work but would remain vulnerable because of her underlying mental health condition. The claimant had sought medical treatment. When after a significant delay she was offered counselling she felt unable to take up the offer.
42. In view of the tribunal the correct level was between the moderate and moderately severe categories. Whilst there had been some improvement by the time of the hearing in the view of the tribunal this could not be legitimately described as "marked". Subject to treatment, the prognosis was good. This was a case of work-related stress although the symptoms had been prolonged and significant. Taking into account the factors set out in the Judicial College Guidelines the tribunal, awarded £19,070 for injury to health, being the top end of moderate or the bottom end of moderately severe.
43. The claimant sought the costs of her treatment being twenty sessions at a cost of £140 a session. The tribunal awarded the sum as the medical expert had predicated the claimant's likely recovery in 9 months on this course of treatment (see below). The tribunal accordingly awarded £2,800 for costs of treatment.

Personal injury-Loss of earnings-harassment

44. According to her skeleton argument, the claimant sought compensation for loss of earnings under her Equality Act claim from 11 November 2019. The tribunal rejected the respondent's admission that in effect the claimant's loss of wages flowed in significant part from the constructive dismissal rather than harassment for the following reasons. The medical report stated that the harassment had resulted in the claimant's inability to work. The claimant stated that it was the effect of the harassment which made her sick and unable to work. Finally, the

claimant had been signed off sick during her employment following the unlawful harassment, prior to the constructive dismissal.

45. Accordingly, the Tribunal found that the claimant's inability to work which led to her loss of earnings flowed from the unlawful harassment. The tribunal rejected the respondent's admission that the quantum of loss of earnings should be based on her entitlement to sick pay. The tribunal found that, had the claimant not been subject to the unlawful harassment, she would have been able to work because she had worked until the unlawful harassment began. Although there had been times when her medical condition had been serious, she had still in effect held down her job. Damages under the Equality Act should seek to put a claimant in the position in which they would have found themselves absent the unlawful discrimination. Had the claimant not been subjected to harassment, she would have been able to continue to work and would have continued to earn her normal salary.
46. Dr Robb stated that the claimant was not fit for work from August 2019 and had since remained unfit for work due to psychological issues. "In order to be able to return to employment she should benefit from psychological treatment to address her ongoing psychological symptoms...I would recommend a course of weekly cognitive behavioural therapy... with a clinical or counselling psychologist. I anticipate she will require a minimum of twenty sessions. Psychological symptoms should improve within 9 months from commencement of therapy with the recommended approach. I would expect for the 9 months commencing therapy that she will be to return to work with the recommended treatment."
47. The tribunal accepted the medical expert evidence as to prognosis. Accordingly, the Tribunal awarded loss of earnings (including pension contributions) from 11 November 2019 to 9 months after the date of this hearing, being 1 March 2023.

Unauthorised deduction from wages

48. It was recorded in the liability judgement that it was agreed that the respondent will pay the claimant 5 days' pay. This sum is therefore not included in this judgement.

Unfair dismissal

49. The parties agreed that the basic award was £2423.09.
50. The tribunal accepted the claimant's argument that compensation for of statutory rights should be £500. This was the equivalent of just under 2 weeks' pay. The tribunal accepted the respondent's contention that this reflected the need to be employed at a new employer for 2 years before obtaining unfair dismissal rights.

ACAS uplift

51. The claimant's skeleton argument did not include a claim for uplift to her award by reason of a failure to comply with the ACAS Code under 207(A) TULRC(A) 1992.

She however contended for it at the hearing. The respondent submitted that no such uplift should be applied.

52. According to 207(A),

‘If, in the case of proceedings to which this section applies, it appears to the employment tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.’

53. The tribunal accepted that the ACAS Code of Practice on Disciplinary and Grievance Procedures applied to all the complaints. The tribunal had found that the respondent had failed to action the grievance sent on 7 October 2019. After the claimant resigned on 11 November, and there was then no question that the respondent was aware of the claimant’s grievance, it promptly wrote to the claimant’s solicitors on 13 November. Having received no response, it wrote again asking if the claimant sought to pursue the grievance. It again received no reply. The respondent duly concluded the claimant did not wish to pursue the grievance and took no further action. The claimant had told the tribunal that she was too ill to engage with the grievance procedure.

54. In view of the tribunal, the respondent had failed to comply with the Code in that it had not dealt with the grievance timeously. However, once it became aware of the grievance, it promptly acted to engage with the grievance. It offered in terms to hear the grievance. However, the claimant’s solicitors failed to reply. Even if the claimant was too ill to engage with the grievance, there was no reason not to ask the respondent to deal with the grievance on the papers. In circumstances where, despite delay, the respondent sought to engage with the grievance and the claimant failed to take advantage of this, it would not be just and equitable to increase the award.

Employment Judge Nash
Date 8 June 2022