EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Farrow**

Respondents: **1) Mrs N Foster**
2) Foster Clay Law Ltd

Heard at: **Leeds (by Cloud Video Platform)** **On:** **15 February 2022**

Before: **Employment Judge Bright**
Ms J Lee
Mr J Rhodes

Representation
Claimant: Mr Proffitt (Counsel)
Respondents: Mr Sellwood (Counsel)

RESERVED JUDGMENT ON REMEDY

1. The respondents shall pay to the claimant, jointly and severally, compensation for discrimination in the sum of **£23,074.29**, which comprises:

    a. £6,442.29 pecuniary loss, of which £389.90 is interest; and

    b. £16,632 injury to feelings, incorporating aggravated damages in the sum of £3,000 and interest of £1,632.88.

2. The respondents are ordered to pay, jointly and severally, the claimant's costs of **£4,867.00** (including VAT).

REASONS

1. A final hearing on liability took place on 8 to 10 February 2022 and a judgment on liability was delivered orally at the end of that hearing, in which we held that the respondents were liable for discrimination arising from disability. A remedy hearing was held on 15 February 2022, at which we heard evidence from the claimant orally and with reference to her witness

statement, regarding the injury to her feelings and aggravation of that injury. We also heard oral evidence from the first respondent about her own and the second respondent's means. We were provided with a file of documents relating to a costs application by the claimant and written skeleton arguments and authorities from both parties' counsel. The remedy hearing took place by Cloud Video Platform with the consent of the parties and there were no issues with communication or connection during the hearing.

2. Unfortunately, owing to ill-health, there was a lengthy delay before promulgation of these reasons, for which Employment Judge Bright offers her sincere apologies.

Issues

3. The issues were:

3.1. What was the likelihood that the claimant would have been recruited by the second respondent if the discrimination had not occurred? The respondents did not dispute the claimant's calculation of her pecuniary losses, only that she would have been employed in any event.

3.2. What injury to feelings should be awarded?

3.3. Should there be an award for aggravated damages and, if so, what amount?

3.4. Should there be an order that the respondent pay the claimant's costs? In particular:

3.4.1. Did the respondents or their representatives act vexatiously, abusively or otherwise unreasonably in the way that the proceedings (or part) were conducted? or

3.4.2. Did the response have no reasonable prospect of success?

3.4.3. If so, should the Tribunal exercise its discretion to make an award for costs?

3.4.4. If so, how much should the respondents be ordered to pay of the claimant's costs?

Findings of fact

4. The claimant succeeded in her complaint against both respondents that the termination of the recruitment process amounted to discrimination arising from disability. Her complaint against Mrs Foster that withholding the real reason for the decision to terminate the recruitment process was discrimination arising from disability or harassment failed.

<u>Pecuniary loss</u>

5. The respondents submitted that there was little or no likelihood of the claimant being hired because of concerns over, inter alia, the claimant's "*bad attitude*", her "*grievance not [being] disclosed*", her "*attitude to other staff*", the "*risk to the business as NQ [with] no endorsement*", and the risk that she was "*not honest*" (cited in Mrs Foster's handwritten notes at page 146 of the liability hearing file).

6. However, in our reasons for the judgment on liability, which were delivered orally at the hearing on 10 February 2022, we found that, while there were a number of reasons contributing to the respondents' decision to terminate the recruitment process with the claimant (including questions over her attitude, honesty, boundaries, relationships and accuracy), the primary reason was her sickness absence. Mrs Foster sent an email to her partner (at page 288 of the liability hearing bundle) focusing solely on concerns about the claimant's absence and timekeeping. That email was sent only one hour before she notified the claimant of her rejection. We inferred from that timing that the reason given in the email was uppermost in Mrs Foster's mind. Had any of the other reasons been foremost or equally significant, we considered that Mrs Foster would have cited them in the email at page 288 of the liability hearing file. We therefore found that the claimant's disability-related sickness absence was the defining factor.

7. We also found as a fact at the liability hearing that Mrs Foster had obtained three written references and spoken to one of the referees on the telephone. The fact that Mrs Foster had gone to those lengths to look into the claimant's suitability for the role suggested to us that further inquiry about the claimant's work history would have been straightforward and further references could easily have been sought.

8. We found that, if Mrs Foster had received the positive reference from Ms Victoria Moss (dated 17 July 2020), she would have taken it into account and it would have cleared up many of Mrs Foster's concerns about the claimant's suitability for the role. Mrs Foster told us in evidence at the liability hearing, "If we had had that [Ms Moss's reference], we wouldn't be here", and although she would not be drawn to clarify that comment any further in cross examination, we concluded that she most likely meant that it would have resulted in the claimant's employment.

9. In our determination of the issues, delivered orally at the liability hearing, we also considered the question of proportionality of the respondents' actions in pursuing their legitimate aim. We concluded that it would not have been disproportionate in the circumstances for the respondents to seek further clarification of the references received or to obtain further references, given the lengths to which Mrs Foster had already gone. Another approach, given what the claimant was saying about her medical condition, could have been to strike out anything in the existing references which was potentially related to disability or sickness absence and make a decision on what was left. That, of course, would still leave the issues around boundaries and relationships, attitude and accuracy.

10. Mrs Foster told us at the liability hearing that she was disappointed that the claimant's references were not more positive, as she had wanted to employ her. In our judgment, had Mrs Foster not terminated the recruitment process with the claimant on 7 July 2020 but instead continued her enquiries, we concluded she would have received Ms Moss's reference dated 17 July 2020 and, given its positive contents, that she would probably have employed the claimant on that recommendation.

<u>Injury to feelings</u>

11. We accepted the claimant's evidence at paragraph 37 to 41 of her witness

statement regarding the injury to her feelings. She had suffered from mental ill-health in the past in connection with previous employment at a another firm, and it was a reference from and contact with that firm by Mrs Foster which led in part to the act of discrimination in this claim. However, we accepted the claimant's evidence that, at the time of applying to the respondents and therefore at the time of the act of discrimination, she was fully recovered and it was the respondents' actions which caused her injury.

12. We accepted that the discrimination by the respondents caused the claimant to suffer extremely low mood and become anxious and she still had lasting effects of anxiety and depression at the time of the remedy hearing. She referred herself to and received support from the NHS funded Improving Access to Psychological Therapies ('IAPT') service. We were particularly struck by her evidence that she was made to feel that her body had failed her and she felt embarrassed about her condition. It was not disputed that this was her first potential role post-qualification as a solicitor and we accepted that she experienced feelings of loss and grief over her career aspirations, as a result of the discrimination. We also accepted her evidence that she suffered a lack of confidence, which was picked up in a subsequent interview, and that she had to work with an IAPT employment advisor for many months to improve her confidence and self-esteem around job interviews and work. We accepted that she still suffered anxiety attacks when her health was raised at work or when she required sick leave, as at the time of the remedy hearing.

13. While this was not a case where the claimant had been employed by the respondents and was dismissed, she lost out on likely employment with the second respondent because of the act of discrimination. She was able to get a job within 6 months, with the help of her IAPT support worker and retained that position which was subsequently made permanent. She was not so injured that she was completely unable to work or unable to seek work for an extended period.

Aggravated damages/costs

14. The respondents initially disputed disability, which they were entitled to do and which is not unusual in the course of proceedings such as these. The respondents submitted that, when it became apparent that disability was not an argument which could be run, it was dropped. However, we agreed with Mr Proffitt that it appeared from the history of the proceedings that the respondent had only conceded disability after Employment Judge Maidment took the unusual step of issuing a costs warning of his own initiative in relation to that point. Prior to that intervention, the respondents had been seeking permission to instruct a medical expert and questioned the veracity of the claimant's GP records. We also noted, as submitted by Mr Proffitt, that, even after disability was conceded, the respondents continued to accuse the claimant of exaggerating the impact of her condition. The claimant submitted, and we accepted, that since this could not advance the respondent's case (it having already conceded disability) it must therefore have been intended as a slur on her character.

15. The costs bundle evidenced an ongoing denial by the respondents that the termination of the recruitment process with the claimant had anything to do

with the mention of her sickness absences in her references. Mrs Foster told us in cross examination that it "certainly had nothing to do with sickness absence". However, as we found at the liability hearing, the email from Mrs Foster to Mr Clay dated 7 July 2020 (page 288 of the final hearing bundle) clearly identified the references' mention of sickness absence and time keeping as the reason for the termination of the recruitment process. The claimant's solicitor was at pains, as evidenced in the costs bundle (pages 6 – 10, 14 – 18, 54 – 55 of the costs bundle) to point out to the respondents that the wording of the email at page 288 and the timing of that email strongly suggested that the claimant's disability-related sickness absence was a factor in the decision. Even when the respondents had conceded prior to the start of the evidence that the decision to terminate the recruitment process with the claimant was in part because of the claimant's disability related sickness absence, Mrs Foster continued to argue the opposite, contrary to her own concession and the evidence.

16. It was agreed that in April 2021 the respondent disclosed to the claimant in the course of these proceedings 24 personal photographs obtained from the claimant's Facebook page, showing the claimant at her honeymoon, her hen party, a wedding, her 21st birthday party and at her mother's house. The claimant felt compelled to explain to the respondents, via her representative, intimate details of how her health had affected or had not affected her on each of those occasions (page 43 of the costs bundle). Her solicitor noted in a prior email (page 45) that "*I am concerned that the inclusion of the above mentioned Facebook entries in disclosure, in light of what the Tribunal has already said, is a desperate attempt by the first and second respondents and is now verging on vexatious".*

17. We accepted the claimant's evidence that the respondents' disclosure of these personal Facebook entries and their wish to include them in the file of documents for the hearing on disability made her feel undermined. We accepted that she felt they were trying to portray her as a liar who was picking and choosing how her symptoms affected her and exaggerating her symptoms. We accepted her evidence that she had not previously felt that people disbelieved her about her symptoms or their effect on her life, but the respondents' actions caused her to start becoming anxious about not being believed and that this was a "whole new level of anxiety". We accepted her evidence that she found it "strange and really upsetting that they had trawled through" numerous photos, profile pictures and statuses on Facebook, some of which were up to 10 years old, and that this felt like an unexpected personal attack.

18. The respondents conceded by email dated 4 May 2021 that the claimant was disabled (page 39). However, by letter dated 4 June 2021 the respondents' representative wrote to the claimant's representative, "*As regards the concession of disability status, it is still our clients' position that your client exaggerates her symptoms, and regardless of the responses to the posted photographs, the fact remains that your client is selective in when her symptoms affect her day to day activities"* (page 64). We accepted the claimant's evidence that the respondent's continued disbelief in the severity of her symptoms made her feel confused and made her very nervous, in that she did not feel she was being taken seriously or believed.

19. The letter dated 4 June 2021 is written without prejudice save as to costs and is clearly a salvo in a longer exchange intended to seek a negotiated settlement. The Tribunal panel is familiar, of course, with the tone of this type of correspondence in general and we note that a number of the accusations made and arguments raised in the letter are not unusual nor, in our view, outside the range of communications reasonably seen in the normal course of litigation. There is therefore no need for us to re-visit those comments here.

20. However, we found the comments about the claimant's disability at paragraph 18 above, unnecessarily aggressive, given that the respondents had conceded disability by this point in the proceedings.

21. Further and separately, we noted that the letter spoke repeatedly of the claimant's claim as being "*opportunistic*" and having been "*engineered from the outset*". It contained an observation that "*clearly in hindsight revealing a medical condition in an open first telephone call to a prospective employer indicates every intention of setting up an unsuspecting prospective employer who would be unaware of her intentions"* (page 64). We found that allegation implausible and unreasonable, given that it was not disputed that the claimant had not approached the respondents for employment, but had in fact been contacted by Mrs Foster in the first instance, after Mrs Foster had seen mention that the claimant was looking for a newly qualified role on her LinkedIn profile. The letter states "*your client will be shown to be the opportunist that she is".* We noted in particular the unnecessary repetition of the allegation of opportunism and the aggressive and retaliatory tone.

22. Further and separately, the letter comments, "*your client clearly has not thought through the impact this will have upon her prospects of being employed as a Solicitor within the legal profession. Your client should by now be considering the ramifications for her, well before she is to give evidence in an open local employment tribunal office" (*page 65). While it is not uncommon for parties to remind their opponents of the wider implications of litigation when seeking to engage in negotiations, we considered that the respondents' reference to jeopardising the claimant's circumstances as a newly qualified solicitor seeking her first qualified position in her chosen career was particularly threatening.

23. We accepted the claimant's evidence that the respondents' allegations about her in this letter caused her to feel "like it was my body which had caused these issues…It made me feel very, very disappointed in my own body". We accepted the claimant's evidence that the suggestion that her future in the profession was at risk if she lost, made her nervous about her prospects as a solicitor and made her question whether it was the right career for her. We find that the respondents' repetition of the allegations and its aggressive tone in the letter dated 4 June 2021, in particular the repeated accusation that the claimant was an opportunist who had engineered the claim from the outset, caused the claimant significant additional anxiety and negative feelings towards her own body.

<u>Respondents' means</u>

24. Mrs Foster gave oral evidence as to her own and the second respondent's

means. However, no documentary evidence was produced to support that evidence, which we found somewhat surprising. It was the claimant's representative who referred the Tribunal and respondents to the second respondent's accounts filed with Companies House. We find, on the evidence of Mrs Foster and the accounts, that the second respondent is a relatively new company, in its 19th month of trading at the time of the remedy hearing, having started out with little or no revenue. Although Mrs Foster explained that work in progress was halted by issues with the Office of the Public Guardian and the Land Registry and the company was not in a good position, the accounts showed current assets of £235,907, less liabilities due within 1 year of £130,153, along with capital and reserves of £45,340 as of August 2021. Mrs Foster accepted that the second respondent was therefore not operating at a loss, although she told us that a large proportion of the profit for the year was tied up in unbilled client work. She accepted that the company was recruiting but referred to the accountant confirming that it was in a vulnerable position. However, there was no evidence provided from the accountant nor any other documentary evidence to support Mrs Foster's oral evidence. On the insufficient evidence available to us, we did not feel able to reach any conclusions about the means of the second respondent, other than those shown by the filed accounts dated August 2021 that the company was active and in profit.

25. Mrs Foster gave evidence that she herself was not affluent, that she put personal money into the second respondent's business, that she did not own her own house, and had not drawn a salary for the three months prior to the remedy hearing. However, in the absence of sufficient supporting evidence or any figures given as to capital, savings, income or outgoings, we did not feel able to reach any firm conclusions about Mrs Foster's means other than that she had sufficient means to put personal money into the business.

Law

Pecuniary loss

26. The Tribunal has powers to order payment of such compensation as could be ordered by a County Court or Sherriff (Sections 119 and 124(6) Equality Act 2010 ("EQA")). The aim of compensation for financial loss in discrimination cases is to put the claimant in the position, so far as is reasonable, that they would have been, had the discrimination not occurred. In other words, to calculate the sum the claimant would have received had the discrimination not taken place. Losses caused by anything other than the act of discrimination, or that are too remote or unforeseeable, are not generally recoverable.

27. The Tribunal can take into account the chance of events having occurred following the unlawful act, such as the chance of particular employment arising, and determine the award on the basis of the loss of that chance. For example, where a Tribunal finds that an employee had a 75% chance of being promoted shortly after their unlawful dismissal, the Tribunal could award future losses based on 75% of the increased salary to reflect the chance of the promotion having been obtained (**O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615 and **Ministry of Defence v**

Wheeler [1998] IRLR 23). The Tribunal is required to determine the future conduct of the employer (**Wardle v Credit Agricole Corporate & Investment Bank** [2011] IRLR 604 and **Chagger v Abbey National plc & Anor** [2010] IRLR 47).

Injury to feelings

28. An award for injury to feelings is to compensate for the anger, distress and upset caused to the claimant by the unlawful treatment. It is compensatory not punitive, the focus is on the actual injury suffered by the claimant not the seriousness of the discrimination, and Tribunals have a broad discretion about what level of award to make. We have had regard to the general principles for assessing injury to feelings awards set out in **(1) Armitage (2) Marsden (3) HM Prison Service v Johnson** [1997] IRLR 162 EAT and **Alexander v the Home Office** [1988] IRLR 190 CA.

29. We have also had regard to the bands set out in the case of **Vento v Chief Constable of West Yorkshire Police** [2003] IRLR 102 CA, subject to **Da'Bell v** NSPCC [2010] IRLR 19 EAT and **Simmons v Castle** [2012] EWCA Civ 1288, **Cadogan Hotel Partners Ltd v Ozog** EAT 0001/14 and the **Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd: Third Addendum**, as a result of which:

> *In respect of claims presented on or after 6 April 2020, the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.*

30. The parties directed us to examples of awards for injuries to feelings in **Harveys** which, the parties agreed, were of limited value, given that they are all fact-specific and in many instances of some antiquity. The claimant cited specifically the cases of **Ncube v Fresenius Medical Care UK** (1313506/2009) and **Mefful v Citizens Advice Merton and Lambeth** (2302813/2015) in support. The respondents cited the cases of **Loughlin v Broadgate Voice** (3202133/18), **Nicholson v Desire Cakes** (1802349/2021) and **Bainbridge v Atlas Ward** (1800212/2012) in support.

Aggravated damages

31. Aggravated damages are an aspect of injury to feelings and can only be awarded on the basis and to the extent that certain aggravating features are found to have increased the impact of the discrimination on the claimant and, thus, the injury to their feelings. The aggravating features include conduct subsequent to the discrimination which is in itself aggravating. For example, a respondent may act in a way which is aggravating by conducting the trial in an unnecessarily oppressive manner, failing to apologise or "*[rubbing] salt in the wound by plainly showing that he does not take the complaint of discrimination seriously*" (**Commissioner of Police of the Metropolis v Shaw** [2012] IRLR 291).

32. LJ Underhill emphasized that aggravated damages are compensatory not punitive (para 24 of **Shaw**):

> *It is natural for a tribunal, faced with the difficulty of assessing the additional injury specifically attributable to the aggravating conduct, to focus instead on the quality of that conduct, which is inherently easier to assess. This approach is not necessarily illegitimate: as a matter of broad common sense, the more heinous the conduct the greater the impact is likely to have been on the claimant's feelings. Nevertheless it should be applied with caution, because a focus on the respondent's conduct can too easily lead a tribunal into fixing compensation by reference to what it thinks is appropriate by way of punishment or in order to give vent to its indignation. Tribunals should always bear in mind that the ultimate question is "what additional distress was caused to this particular claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?", even if in practice the approach to fixing compensation for that distress has to be to some extent "arbitrary or conventional".*

33. A Tribunal must avoid double recovery and consider whether the overall award of injury to feelings and any aggravated damages is proportionate to the totality of the suffering caused to the claimant (**Land Registry v McGlue** (UKEAT/0435/11). If a Tribunal makes an award of aggravated damages it should explain why the injury to feelings award alone is "*insufficient to compensate the claimant and the extent to which the conduct giving rise to the award of aggravated damages has increased the impact of the discriminatory act on the claimant"* (**Wilson Barca LLP and others v Shirin** [2020] UKEAT/0276/19).

Costs

34. Under Rule 76(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), a tribunal may make a costs order or preparation time order, and shall consider whether to do so, where it considers that:

34.1. A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

34.2. Any claim or response had no reasonable prospect of success.

35. Tribunals should take a three-step approach to assessing costs:

35.1. Consider whether a ground for considering costs has been made out;
35.2. Consider separately whether to exercise its discretion to make an award of costs;
35.3. If so, decide the amount of costs to award.

36. A tribunal may have regard to the paying party's ability to pay in deciding whether to make a costs order and, if so, what amount to award (Rule 84).

37. The respondent referred us to the decision of HHJ Tayler in **Opalkova v Acquire Care Limited** UKEAT/0056/21, on consideration of whether a response has no reasonable prospects of success:

> *17. … in rule 76 where reference is made to a response having no reasonable prospect of success, I consider that means the response made to each of the claims brought by the claimant, rather than the entirety of the response set out in the ET3 response form to all of the claims brought by the claimant in the ET1 claim form.*
>
> *…*
>
> *20. It is possible that a claim or response when served had reasonable prospects of success, but that a development, such as new evidence coming to light, meant that the claim or response ceased to have reasonable prospects of success.*
>
> *…*
>
> *22. Determining that a response did not have a reasonable prospect of success or that a respondent acted unreasonably in defending the claim and/or in maintaining the defence is a threshold that results in the tribunal having a discretion to make a cost or preparation time order.*

38. HHJ Tayler sets out at paragraph 24 of **Opalkova** that, ultimately:

> *there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success"?*

39. And at paragraph 25:

> *These questions are relevant whether the matter is analysed on the basis that the response had no reasonable prospects of success or that the respondent was guilty of unreasonable conduct in defending or maintaining the defence to the claims. The relevance of the questions differ between these two grounds for making a preparation time order. The question of whether a response had reasonable prospects of success is objective and is the threshold for making a preparation time order under Rule 76(1)(b) ET Rules, even if the respondent was not aware, and should not reasonably have been aware, that the response had no reasonable prospect of success. However, the lack of understanding of the merits of the response would be relevant, along with other matters, to the discretionary question of whether a preparation time order should be made. The questions of whether the respondent knew that the response had no reasonable prospects of success, or should reasonably have known, are relevant to the threshold question for a preparation time order on the basis that defending, or maintaining the defence, to the claim was unreasonable*

conduct for the purposes of Rule 76(1)(a) ET Rules; after which the discretion to make a preparation time order has to be applied considering all relevant factors. Whichever of the two provisions is applied it is hard to see that the result will be different. However, the matter must be analysed properly.

40. On the meaning of 'vexatious, abusive or unreasonable', Mr Sellwood directed us to the words of Bingham LCJ in **AG v Barker** [2001] 1 FLR 759: *"the hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the [party] to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the [other party]; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".*

41. Mr Sellwood also reminded us that, when considering whether conduct has been 'unreasonable', the threshold is a high one. It is, for example, not even a principle that lying will automatically justify an award of costs on the 'unreasonable' basis (**Kapoor v Governing Body of Barnhill Community High School** (UKEAT/0352/13)). The key principle when considering the 'unreasonable' basis is as set out by Underhill LJ in **Barnsley MBC v Yerrakalva** [2011] EWCA Civ 1255 [41]:

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the [party] in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

42. In assessing whether a party's conduct was unreasonable, the test is a 'range of reasonable responses' one rather than substituting its own view (**Solomon v University of Hertfordshire** UKEAT/0258/18).

Determination of the issues

Pecuniary loss

43. The respondents accepted the claimant's financial calculations. The only dispute was as to the likelihood of the claimant having been employed by the second respondent had the discrimination not occurred. The respondents submitted that, although the Tribunal found that the primary reason for the recruitment process terminating was the claimant's sickness absence, that was not the same as a finding that, had that absence not been considered, the claimant would have been hired.

44. The respondents' primary submission was that the other issues which the Tribunal found to be a part of the decision not to recruit (accuracy, honesty and ability to get on with colleagues) should lead to a finding that there was a 100% likelihood that the claimant would not have been hired, regardless of any discrimination. Alternatively, the respondents argued, those other issues would have reduced the chance of employment and should therefore

mean a percentage reduction in compensation for pecuniary loss to reflect the lower likelihood of employment.

45. We found as a fact that Mrs Foster had gone to some lengths to obtain references for the claimant and was, in her own words, keen to employ the claimant. We found at the liability stage, that the failure to obtain further references was one action which Mrs Foster could reasonably have taken which would have been proportionate. We found that Mrs Foster's main reason for not employing the claimant was the sickness absence, rather than the other issues. We considered that, had Mrs Foster not terminated the recruitment process when she did, she would in all likelihood have received the reference from Tori Moss which was written some 10 days later and that would probably have sealed the claimant's employment with the respondents. We considered therefore that, had Mrs Foster not terminated the claimant's employment when she did and, in particular, had she made further enquiries and/or received the reference from Ms Moss, there was a high likelihood that, despite the other issues, the claimant would have been employed by the second respondent.

46. We did, as the respondents submitted, however, make a finding that Mrs Foster had other concerns about the claimant than her sickness absence and time keeping. We also took account of the fact that the business was just starting up and Mrs Foster must have wanted to take care around who she recruited in those circumstances. We considered, therefore, that there must have been a chance that the claimant might not have been employed, even in the absence of any discrimination. We concluded, on balance, that there was around an 80% chance of the claimant getting the job, had she not been subject to the discrimination arising from disability.

47. We therefore concluded that the respondents should pay to the claimant, on a joint and several basis, compensation for loss of earnings of 80% of the amount set out in the claimant's schedule of loss to reflect the 80% likelihood that she would have secured the position had the discrimination arising from disability not occurred. That 80% figure is £6,052.39. The parties were in agreement that 589 days elapsed between the date of the discrimination and the date of calculation and, taking the midpoint as the basis for calculation of interest, at a rate of 8%, we calculated interest on pecuniary loss as 294 x 0.08 x 1/365 x £6,052.39 = £389.90. The respondents shall therefore pay to the claimant, on a joint and several basis, compensation for pecuniary loss of £6,442.29, of which £389.90 is interest.

Injury to feelings – Act of discrimination

48. The respondents submitted that compensation for the injury to the claimant's feelings should be assessed in the lower band of **Vento** and that £7,000 plus interest should be the maximum. It was submitted that there was no long-term relationship between the claimant and respondents, the claimant was not even an applicant for a position, as the respondent had reached out to her and that the lower band, which was appropriate for one-off occurrences, was the right one in this case. We agreed that this was not a case in which a long-term employee was exposed to betrayal by a trusted authority figure. It was a one-off event, with some after-effects, but the extent of those effects was disputed. We noted, however, that the emphasis in assessing the

correct **Vento** band should be on the extent of the injury, rather than the behavior of the respondent.

49. The claimant sought injury to feelings of £13,000 plus interest and submitted that, while this was not a dismissal case, it still represented a job/no job situation, which is what often causes damage to a victim of discrimination. We accepted the submission that this was, in some ways, comparable to a loss of employment case, in that the claimant was at a critical moment in her career, as an unemployed disabled newly qualified solicitor who would require significant adjustments. The role on offer with the second respondent represented a promising opportunity and the claimant's communication with Mrs Foster led the claimant to believe that she stood a good chance of employment and that the respondents were open-minded about her disability. In these circumstances, we accepted her description of how the discrimination was particularly injurious to her.

50. We accepted the claimant's account of her extremely low mood, anxiety and depression, lack of confidence, feelings of embarrassment and that her body had failed her and her feelings of loss and grief over her career aspirations. We accepted that she still suffered anxiety attacks when her health was raised at work or when she required sick leave, as at the date of the remedy hearing. Although she had suffered mental ill-health in the past and the cause of that ill-health was a part of the factual matrix in this case, we found that she was well at the time of the act of discrimination. It was only following the act of discrimination that she discovered the involvement of her previous employers and, while that undoubtedly had some bearing on her feelings, we accepted her evidence that it was the respondents' actions which caused her to suffer the injuries she described. The claimant may have been susceptible to mental ill-health because of her experiences with her previous employer but the perpetrator of discrimination must 'take their victim as they find them' and we accepted that the claimant's injury, as described, was caused by the respondents' act of discrimination arising from disability.

51. Although the claimant was able to obtain a new job within 6 months and that position became permanent, it required the input of IAPT to enable her to have the confidence to obtain the post and she reported ongoing issues whenever her health was in issue, as at the date of the remedy hearing.

52. On balance, we considered that the most comparable cases in the caselaw on injury to feelings were those at the lower end of the mid-band **Vento** range. Taking account of the injury the claimant described, in particular the damage to her confidence and her anxieties around her condition and employment, we considered that the appropriate award for injury to her feelings, based on the **Vento** bands, as set out in the Presidential Guidance in force at the time the claim was presented, was £12,000 for the injury to her feelings suffered as a result of the act of discrimination.

53. The parties agreed that there were 589 days between the act of discrimination and the remedy hearing. Taking the date of the act of discrimination as the basis for calculation of interest, at a rate of 8%, we therefore calculated interest on injury to feelings as 589 x 0.08 x 1/365 (0.002739) x £12,000 = £1,548.74. The respondents shall therefore pay to the claimant, on a joint and several basis, compensation for injury to feelings of £13,548.74, of which £1,548.74 is interest.

Injury to feelings - Aggravated damages arising from conduct of proceedings

54. We found that there should be an award of aggravated damages because of the additional injury to the claimant's feelings caused by the unreasonable manner in which the respondents conducted the Tribunal proceedings, which 'rubbed salt in the wound', by plainly showing that it did not take the claimant's complaint of discrimination seriously, as per the third category cited by Mr Justice Underhill in **Shaw**.

55. We agreed with the claimant's submissions that there were the following aggravating features to the respondents' conduct of the proceedings:

55.1. An unreasonable and unsustainable denial of the factual causation for the termination of the recruitment process, in the face of incontrovertible evidence, by Mrs Foster even after that causation was conceded.

55.2. Unnecessarily aggressive attacks on the claimant's character and motivation in pursuing the claim, impugning her integrity and calling her an 'opportunist'. We agreed with the claimant's submissions that the respondent's conduct was unreasonably aggressive and retaliatory in the letter dated 4 June 2021 (page 64), in tone and expression and also the comments made about her future employability.

55.3. An ongoing implication that the claimant was lying about the impact of her disability, even after disability was conceded. The claimant submitted, and we accepted, that since this could not advance the respondent's case (it having already conceded disability) it must therefore have been intended as a slur on her character.

55.4. The inclusion of the claimant's social media posts in disclosure. We agreed with the claimant's submissions that, in light of the respondents' constructive knowledge of the claimant's disability at the time the discrimination occurred, the information contained in the GP records which were produced in the course of disclosure, and the focus of the definition of disability in the Equality Act 2010 on the effect of the impairment on the claimant's day to day activities, it must have been obvious to the respondents and their representatives that a selection of social media posts about key events in the claimant's life (for example, her 21st birthday, her honeymoon, a wedding) would be of little to no evidential value regarding the impact of her condition on her day to day activities. We agreed with the claimant's submissions that the production of her Facebook posts about such personal events could only have been intended to portray the claimant as a liar and/or to cause her distress. The disclosure of those posts caused the claimant to have to explain each of the images to her representative and the respondent, giving an account of the intimate details of the impact of her condition on her on each occasion and the measures she took to mitigate those impacts. The claimant submitted, and we agreed, that the inclusion of these images in disclosure was 'an exercise in humiliation' and 'rubbed salt in the wound'.

56. We accepted the claimant's evidence that this behaviour by the respondents caused significant additional injury, over and above that which

arose from the act of discrimination itself. We accepted that the letter dated 4 June 2021 resulted in the injury described at paragraph 23 above, that the disclosure of the social media posts resulted in the additional injury described at paragraph 17 above and that the ongoing questioning of the impact of her disability even after disability was conceded resulted in the additional injury described at paragraph 18 above.

57. In our judgment the cumulative effect of that additional injury was significant. The additional distress caused to the claimant by the aggravating features is not already reflected in the injury to feelings award above. In our judgment, the 'whole new level of anxiety', the negative feelings about her own body and the new feelings/fear of others disbelieving her about the impact of her condition, which the claimant suffered as a result of the aggravating features, require compensation in their own right. We considered that the sum of £3,000 is just and equitable in the circumstances.

58. The overall award for injury to feelings including aggravated damages is therefore £15,000, which we consider is proportionate to the totality of the claimant's suffering.

59. We take 4 June 2021 as the date on which the aggravated damages chrystallised, for the purposes of calculating interest on the aggravated damages award. There were therefore 256 days elapsed between the date of the aggravation and the date of calculation and, taking the mid-point as the basis for calculation of interest, the number of days is 128. At a rate of 8%, we calculate interest on aggravated damages as 128 x 0.08 x 1/365 (0.002739) x £3,000 = £84.14. The respondents shall therefore pay to the claimant, on a joint and several basis, compensation for aggravated damages of £3,084.14, of which £84.14 is interest.

Costs

60. The claimant pursued costs of £19,467.60 (including VAT) on the following grounds:
60.1. The response never had reasonable prospects of success; and/or
60.2. The respondents' conduct of proceedings was vexatious, abusive or unreasonable.

61. The respondents' primary pleading, up until shortly before the hearing, was that the termination of the recruitment process was nothing to do with her disability. The claimant's representative pointed out to the respondents throughout the course of the litigation (pages 6 – 10, 14 – 18, 54 – 55) that the email from Mrs Foster to Mr Clay dated 7 July 2020 made it clear that the central reason for the termination of the recruitment process with the claimant was her disability-related sickness absence. Yet, it was only shortly before the liability hearing that the respondents conceded that there was an element of causation. Mrs Foster continued to argue that point in cross examination. In our judgment, the respondents continued refusal to accept that there was any connection between the claimant's sickness absences and that decision was contrary to the evidence. Moreover, in our judgment, as the respondents are themselves legal professionals and were advised throughout the proceedings, they must have known that, on the balance of probabilities, the weight of the evidence was such that

continuing to dispute that fact was unsustainable. To continue to maintain that limb of the defence to the claimant's section 15 complaint, particularly once the email at page 288 of the liability hearing file was disclosed, was unreasonable in our judgment.

62. However, section 15 EQA provides that a respondent can objectively justify its actions so as to avoid a finding that they have been guilty of discrimination arising from disability. The respondents pleaded, in the alternative to a lack of causation, that their actions were objectively justified. Assessment of whether the respondents' actions were a proportionate means of achieving a legitimate aim required a careful weighing of the evidence on the balance of probabilities at the liability hearing. Although we found that the respondents' actions were not proportionate and did not achieve the legitimate aim pleaded, it could not have been apparent to the claimant or respondents, prior to our judgment on liability, what the outcome of that balancing exercise would have been. We cannot say therefore that the respondent's defence to the section 15 complaint regarding the termination of the recruitment exercise had no reasonable prospect of success, nor that it was unreasonable to seek to defend that complaint. One limb of the pleading was unreasonable, but there remained the reasonable defence of objective justification. Following **Opalkova,** we considered that the threshold for costs in relation to that cause of action was not therefore reached.

63. The second basis for the application for costs related to the respondents' conduct of proceedings. The claimant pointed to the same conduct which formed the aggravating conduct set out in paragraph 55 above.

64. We considered that the respondent's conduct of the proceedings, set out at paragraph 55 above, was unreasonable. While we acknowledge that the examination of social media posts is an approach used in personal injury litigation, the manner in which it was done in this case, where an impact statement and medical records were already available, was injurious to the claimant and, in our experience, not usual in this context in employment litigation. The attack on the claimant contained in the costs warning letter dated 4 June 2021 was inappropriate and unnecessarily aggressive. We considered, given our experience of such correspondence, that the tone of this letter went beyond mere robust litigation. We therefore considered that the respondents' conduct of the litigation met the first stage of the test in amounting to conduct that was unreasonable.

65. We were therefore required to examine all of the circumstances before deciding whether to make an order for costs. We took account of the conduct of the claimant in withdrawing the section 19 complaint one day before the liability hearing and seeking an amendment at that stage. We also took account of the fact that the claimant lost on two out of her three complaints. As Mr Sellwood submitted, we made no finding of malice or deliberate falsehood on the part of the respondents and Mrs Foster was not found to have had actual knowledge of disability. We also acknowledge that the second respondent is a relatively new business and the information available to us on Companies House about the second respondent's finances.

66. We also take account of the fact that costs are the exception rather than

the rule and the threshold is a high one, but in our view no reasonable litigator would have harassed the claimant in the manner the respondent did in the letter dated 4 June 2021, nor would have continued to question the claimant's disability even after having conceded that she was disabled, nor delved into the claimant's social media posts in the manner described. In our judgment it is appropriate to make an order for the respondents to pay costs to the claimant in these circumstances.

67. In considering how much to order, we had insufficient reliable evidence as to the respondents' means to be able to take them properly into account. Nevertheless, we were able to rely on the information available from the filed accounts with Companies House for the second respondent and the fact that the company was a small one and was only 19 months old at the date of the remedy hearing.

68. Taking account of all of the factors cited, including what we knew of the respondents' means and the factors cited at paragraph 65, we concluded that a figure of around 25% of that sought by the claimant for her costs was appropriate. We therefore make an award of £4,867.00 (including VAT) in respect of the claimant's costs, to be paid on a joint and several basis by the respondents.

Employment Judge Bright
8 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

6 October 2022

CM Haines
FOR EMPLOYMENT TRIBUNALS