Case No: 3311949/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms I Pelle	**v**	Digital Grading Studio Limited

Heard at: Watford **On:** 4 August 2022

Before: Employment Judge R Lewis
Members: Mr D Sagar
Ms I Sood

Appearances:

For the Claimant: In person
For the Respondent: Mr A Burgess, Peninsula Consultant

JUDGMENT having been sent to the parties on 5 August and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REMEDY REASONS

1. This was the remedy hearing listed when judgment on liability was given on 19 May 2022.

2. Our judgment on liability was sent to the parties on 11 June. At the start of this hearing, the claimant told the tribunal that the judgment sums had not been paid. We record for the sake of completeness that while enforcement is not a matter for this tribunal, such sums were, in accordance with Rule 66, payable by 25 June.

3. Neither side had requested written reasons when judgment was given on 19 May, but a subsequent request in writing was received. We record that the judge signed off written reasons (109 paragraphs) on 25 July. In circumstances which are not clear, tribunal staff sent the parties on that day a document (104 paragraphs) which was plainly an incomplete working draft. Neither party seems to have queried this in correspondence.

4. The Judge was not aware of this mistake until he noticed that the incomplete draft had been included in the bundle prepared for today's hearing by the respondent. At the start of this hearing therefore, he apologised on behalf of the tribunal office to the parties, and immediately

emailed them the correct, final version. The Judge commented that he was not aware of any significant difference in substance between the draft and the final version, but could not as a matter of principle proceed to this remedy hearing on the footing that the parties might not have the final written reasons for the liability judgment. We then adjourned for one hour to enable the parties to read the final reasons, having alerted them to the fact that the focus of this hearing would be on paragraphs 46 to 52 and 96 to 108 of our reasons, both numberings inclusive.

5. After a break of just over an hour, both parties confirmed that they were ready to proceed. The claimant had produced a short witness statement on remedy. Mr Burgess questioned her for a few minutes, and we then heard closing submissions.

6. We gave judgment with reasons in the afternoon. In doing so, we told the parties that the judgment was a majority judgment. We identified the minority member (the Judge) and summarised his reasoning. The respondent subsequently wrote to ask for these written reasons. The reasons are written by the judge alone. He invited his colleagues to comment on these reasons in draft, so as to ensure, so far as possible, that the drafting does justice to views which he does not share.

7. We do not repeat the findings at paragraphs 46 to 52 and 96 to 108. We rely upon them as the entire factual basis of this judgment.

8. The tribunal was <u>united</u> in taking account of the following factors in its assessment of the award, which are not set out in order of priority:

    1. The claimant agreed that no award is requested for any financial loss caused by discrimination.

    2. The claimant agreed that her award should fall in the bottom band of the applicable Vento band. That was the band applicable from 1 April 2020, which was between £900 and £9,000.

    3. It was agreed in principle that the calculation of interest was 8% simple interest for 1,002 days (7 November 2019 to date).

    4. The tribunal was reminded, and agreed, that compensation was requested for the single incident of sex discrimination identified in our previous reasons. Our findings are set out at paragraphs 46-47.

    5. There was no evidence that any criticism was made at the meeting of any other person. The claimant therefore had grounds to feel singled out.

    6. The incident took place in the presence of a number of colleagues, and was therefore witnessed by others with whom the claimant worked. There was therefore an element of an effect which was humiliating, but we make no finding that that was the intention of the remarks.

    7. The incident took place during a meeting which was was stressful,

because it touched on the question of whether the business might have any future for anyone, including the claimant and all her colleagues. As said at paragraphs 46 and 47 of our earlier Reasons, there were edgy exchanges between the claimant and Mr Rousou.

8. The claimant commented that there was no medical evidence to support the contention that Mr Rousou was experiencing stress at the time. It seemed to us to stand to reason that if the business which he had created was facing collapse, Mr Rousou must suffer stress. We attached no weight to this comment.

9. The claimant gave a very good answer when asked by Mr Burgess why there was no supporting medical evidence about the impact of the incident. It was to the effect that as she was taking medication for a stress/anxiety condition at the time, there was no point in going to the GP to report one more stressful event, as she did not expect the GP to make any clinical change to her treatment.

10. The claimant's personal note, messages with a colleague, and communications with Acas, all of which took place on the day of the incident, or the next, were cumulative evidence that the claimant was upset at the time by what had been said.

11. What the claimant wrote at the time pinpointed that Mr Rousou's remarks left her feeling undervalued as an individual, and feeling that her skills and contribution to the business had also been undervalued.

12. The tribunal noted that the factual basis of the allegation remained fully defended before and throughout this hearing.

9. The tribunal divided on the relevance of the previous tensions in the relationship between the claimant and Mr Rousou. These were not expressly related to issues of gender or discrimination, but did focus on the most fundamental of employment rights, the right to be paid in full and on time. The majority noted that the delayed payment impacted particularly on the claimant, in light of her personal vulnerabilities (of which Mr Rousou was broadly aware). The majority considered it relevant that those conversations formed part of the background to the events of 7 November 2019. The minority member considered that those events were not brought as gender related, or decided to be gender related, and were evidence of a setting in which there had previously been disagreements which may have been emotional on both sides, and which the claimant had felt able to express to the respondent.

10. The tribunal divided further in its assessment of Mr Rousou's evidence, and on the relevance of any assessment. The majority found him lacking in empathy, remorse or credibility. The minority member goes no further than the tribunal's finding that it preferred the claimant's evidence that Mr Rousou used the words complained of (paragraph 102). The minority member writes,

'I approach each of the words empathy, remorse and credibility with great

caution. With due respect to two highly experienced colleagues, it is unrealistic to expect remorse in the context of an acrimonious workplace dispute between two inexperienced litigants. There is a danger that using terms such as empathy or credibility may lead the tribunal to make an award which is tainted by its subjective response to the two main characters in the story, or even by considerations of penalty rather than compensation.'

Further, I rely on the observations of Underhill P, as he then was, in Richmond Pharmaceutical vs Dhaliwal, UKEAT 0458/08. In the context of a remark which contained a negative racial stereotype, and which (unlike this case) was litigated as claim of harassment (under the predecessor to the present s.26 Equality Act 2010), the EAT gave a caution, which I apply to the facts of this case (emphasis added),

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award."

11. The view of the majority is that in light of all the above factors, the appropriate award for injury to feelings is towards the higher end of the lowest Vento band, and is £6,500. The minority member writes,

'The award should be proportionate to the objective facts of the wrong doing. I attach weight to the factor that this was a single incident, in which, in the heat of a stressful moment, Mr Rousou made a remark which was offensive, stereotypical, and ill-spoken. It was, in the language of the EAT, a transitory, unfortunate phrase; but in my judgement, it was no more than that.

With all due respect to my colleagues' expertise as 'industrial jurors', I do not agree with an award which seems to me significantly out of proportion to the wrong doing which we have found. I would set the award at £2,000, and would re-calculate interest accordingly at £571.06.'

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Employment Judge R Lewis

Date: 1 November 2022

Judgment sent to the parties on

3 November 2022

For the Tribunal office