



EMPLOYMENT TRIBUNALS

Claimant: Ms S Rapal

Respondent: Shoppium Limited
Nisa Retail Limited

Heard at: Watford Employment Tribunal (in public; in person)

On: 5 August 2022

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: In Person

For Shoppium Ltd: No appearance and no representation

For Nisa Retail Ltd: Ms G Nicholls, counsel

JUDGMENT

- (1) The judgment made under Rule 21, dated 23 December 2021 and sent to parties on 21 January 2022, is revoked in relation to Nisa Retail Ltd.
- (2) All claims and complaints against Nisa Retail Ltd are struck out.
- (3) This decision does not affect the claim against Shoppium Ltd.

RESERVED JUDGMENT

- (1) Shoppium Ltd made an unauthorised deduction from the Claimant's wages of £618.75 gross. It is ordered to pay her those wages.
- (2) Upon termination of her employment, the Claimant had unused holiday entitlement. Shoppium Ltd was obliged to pay her in lieu of that entitlement and did not do so. It is therefore ordered to pay her the gross sum of £135.09.
- (3) Shoppium Ltd is ordered to pay the Claimant £11,929.81 as compensation for its contraventions of the Equality Act 2010. The breakdown of that sum is as follows:
 - a. Financial losses: £1100.00
 - b. Interest on financial losses: £154.55

c. Injury to feelings of	£9250.00
d. Interest on injury to feelings.	£1425.26

REASONS

1. The first part of the hearing dealt with Nisa Retail Ltd (“R2”). It was represented by counsel at the hearing.
2. After the Rule 21 judgment had been issued, there was an application by R2 for reconsideration submitted around 1 April 2022. This was not accompanied by any ET3, but an ET3 was later submitted. By letter dated 18 July 2022, EJ R Lewis ordered that today’s hearing (5 August 2022) would decide whether to revoke the judgment. In other words, R2’s applications would be considered. He did not dismiss R2’s applications as having no reasonable prospects of success or refuse an extension of time for the late response.
3. At the time it made its applications, and submitted the draft response, R2 had not received a copy of an important letter dated 3 July 2021, which set out details of the alleged discrimination, and background information.
4. The Claimant’s position is that Shoppium Ltd (“R1”) was her employer and R2 was not her employer.
5. Taking into account the guidance in Kwiksave v Swain, and the parties’ submissions, I was (for the reasons I gave orally) satisfied that it was in the interests of justice to extend time for R2’s response, as per Rule 20. As per Rule 20(4), the prior Rule 21 judgment was therefore revoked.
6. For the reasons which I gave orally, I was satisfied that (i) the complaints against R2 had no reasonable prospects of success and (ii) it was appropriate to exercise my discretion to strike out those complaints, rather than conduct case management and list a future final hearing.
7. After I gave those present this decision, and the reasons for it, orally, R2’s counsel took no further part in the hearing.
8. I was satisfied that Shoppium Ltd (“R1”) had had prior notice of this hearing. Under Rule 21(3), it would have been allowed to take part in the hearing only if I granted permission, and only to the extent that I allowed it. There was no attendance and no written representations by R1.

The Claims

9. The Claimant commenced ACAS early conciliation against R1 on 26 January 2021. That continued until 9 March 2021.
10. The Claimant presented her claim on 10 March 2021.
11. The alleged period of employment was 1 September 2020 to 29 December 2020.

12. The complaints contained within the claim form were:
 - 12.1 Discrimination on grounds of sex
 - 12.2 Discrimination on grounds of religion or belief
 - 12.3 Holiday Pay (failure to pay in lieu on termination)
 - 12.4 Notice Pay
 - 12.5 Arrears of pay (14 December 2020 to 29 December 2020)
13. Further details of the sex discrimination and religion discrimination allegations were given in the Claimant's letter of 3 July 2021. All the allegations related to the period after the date of a TUPE transfer from her original employer to R1 (which was approximately 17 November 2020, the Claimant alleged).
14. The sex discrimination allegations were:
 - 14.1 The Claimant was always allocated to work behind the till, whereas male colleagues were given more varied duties, which had more responsibility
 - 14.2 Having agreed a swap of duties with a male colleague, a director/owner, Bir Singh Madhang told her to swap back, saying "girls are not good to do this job" and "men are equipped for this".
 - 14.3 In December, the Claimant was bundling newspapers and Bir Singh Madhang and told her that she could not do that, because she was "a little girl" was too l'm weak for lifting. He brought in a male colleague to take over to replace her, and sent her to work on the till.
15. In relation to religions, the argument that she is atheist and harassed for reasons related to her (i) being atheist and/or (ii) not being Sikh. The allegations of unwanted conduct were:
 - 15.1 She was questioned about her beliefs in front of customers by Bir Singh Madhang. He asked said "Why are you an atheist?" and "This is not a good thing".
 - 15.2 She was asked to show Bir Singh Madhang her Kara (symbolic bracelet), which she did not have.
 - 15.3 She was asked to say, "Wahe Guru." When she declined, Bir Singh Madhang asked a muslim (male) colleague to recite a verse from the Quran, which he did. Then Bir Singh Madhang said to the Claimant, "See, it's simple just say it".

The Hearing and the Evidence

16. A judgment on liability had already been given. I heard oral evidence from the Claimant for the purposes of deciding remedy.
17. She supplied me with copies of payslips.

18. By the time we had finished the evidence and submissions, we had exceeded the 2 hours available for the hearing, and I therefore reserved my judgment on the remedy decisions and calculations.

The Facts

19. The Claimant started her employment on 1 September 2020 at a retail establishment which was a general store.
20. The original employer transferred the business to R1 on or around 17 November 2020. The existing employees were told that they were transferring to R1 by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").
21. R1 used branding and marketing materials supplied to it by R2. In the Claimant's opinion, staff were encouraged to believe that there was a close connection between R2 and R1, and customers were encouraged to believe that the premises were an outlet for R2. She does not claim to know the exact legal relationship between R2 and R1, but believes that R2 has required R1 to agree certain obligations as a condition of being able to sell the goods supplied by R2, and to use R2's branding. In the Claimant's opinion R2 could and should require R1 to adhere to employment legislation (including the Equality Act 2010) and best practice.
22. My finding was that each of the incidents set out in the Claimant's letter of 3 July 2021 did occur, and that each of the incidents by itself, and cumulatively, caused the Claimant to be very upset and distressed.
23. The Claimant cried frequently because of the Respondent's treatment of her. In her words, it left her feeling depressed. I accept that the Claimant was giving honest evidence by her use of the word "depressed". She did not visit her GP. She did not take medication and I have not been provided with medical evidence. I do not find that the Claimant suffered any personal injury.
24. Because of the Respondent's direct sex discrimination and its harassment related to religion or belief, the Claimant came to the decision that she had to leave for the sake of her well being. She decided the environment was toxic and that she could not put up with it any longer. She resigned with effect from 29 December 2020.
25. After the end of her employment, she continued to feel the effects of the discrimination and harassment. She continued to be very upset during January and had difficulties sleeping. The effects gradually diminished, ceasing by around the end of February 2021.
26. One thing which particularly caused distress to the Claimant was that some of the incidents were in front of customers, and she was made to feel humiliated and belittled. Another thing was that she was physically pulled away from where she was working, while she was being criticised.
27. The Claimant had been paid her correct salary up to the transfer date. She was paid at £9 per hour.

28. She had no fixed hours, but she worked the shifts that were allocated to her by her employer. After the TUPE transfer, she was working 5 days per week.
29. Prior to the transfer, she had taken 6 days as paid holiday. After the transfer, she took a further 1 day. She had planned to be off on 11 December 2020 as well, but ended up working that day, rather than taking it as holiday. Her employment ended on 29 December 2020. She was, therefore, employed for a total of 119 days, or 17 weeks.
30. The gross payments the Claimant received were as follows. There were national insurance deductions from these gross amounts, but she was under the income tax threshold.

30.1 From original employer:

24 September 2020:	£396.30
22 October 2020.	£750.62.
19 November 2020:	£716.14

30.2 From R1:

(Also) 19 November 2020:	£242.55
17 December 2020.	£1080.10

31. She was paid in arrears. The 17 December payment represented salary up to 13 December 2020, and the Claimant accepts that she was paid the correct sums for the wages which were properly due to her up to 13 December 2020.
32. She was not paid anything at all for the work she did between 14 December 2020 and 29 December 2020. In that period, she worked 68.75 hours. Her contractual entitlement was to be paid £9 per hour gross for each of those hours. So her earnings between 14 December 2020 and 29 December 2020 were £618.75, and she was not paid those wages by R1 (or at all).
33. The Claimant did not have a new job lined up at the time she resigned from the Respondent. She was unemployed for the entire month of January 2021. She managed to obtain a new job, which paid more than the job with R1 had paid. She started that job at the beginning of February 2021.

The Law

34. Part II of the Employment Rights Act 1996 defines the right not to suffer unauthorised deduction from wages. This is a right given to workers (including employees). The right itself is defined in section 13, and wages are defined in section 27. Exceptions from the right are set out in section 14. There are specific provisions for cash shortages and stock deficiencies in retail employment.

35. Where the total amount of wages paid on any occasion by the employer to a worker is less than the total amount of the wages properly payable to the worker on that occasion (after deductions), the amount of the deficiency is treated as a deduction.
36. The Working Time Regulations 1998 give workers (including employees) the right to paid time off. For a full year, the entitlement is to have 5.6 weeks off. Unless a different date is agreed, the first leave year commences on the first day of employment, and subsequent leave years start each year on the anniversary of the start of employment.
37. When the employment ends part way through a leave year then (unless a different method has been agreed) the entitlement for that partial year is calculated in accordance with Regulation 14. That is:

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

38. Section 124 the Equality Act 2010 sets out the remedies that might be awarded in relation to breaches of that act, including compensation.
39. The purpose of compensation ordered under the Equality Act 2010 is to provide proper compensation for the wrong which the breaches of the Equality Act 2010 for which the Respondent was found liable. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.
40. For financial losses, I must identify the financial losses which actually flow from the contraventions. I must take care not to include financial losses caused by any other events, or losses that would have occurred any way.
41. For injury to feelings, I must not simply assume that injury to feelings inevitably flows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether the loss has been sustained. Some persons who are discriminated against or harassed may feel deeply hurt and others may consider it a matter of little consequence and suffer little, if any, distress.
42. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318, CA, and taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

43. The top band was (at the time) between £15,000 and £25,000. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
44. The middle band was, initially, £5,000 and £15,000. It is to be used for serious cases, which do not merit an award in the highest band.
45. The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.
46. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and updated them for inflation. In a separate development in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - with effect from 1 April 2013 - the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift provided for in *Simmons v Castle* should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.
47. There is presidential guidance which takes account of the above, and which is updated from time to time. This claim is one which was issued in March 2021. The relevant guidance applicable to this claim states

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.
48. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give us the discretion, but not the obligation, to award interest on awards made in discrimination cases

Analysis and conclusions

49. There was an unauthorised deduction from wages by the Respondent's total failure to pay the Claimant her wages (£618.75 gross) for the period from 14 December 2020 to 29 December 2020. The employer paid wages on a slightly fluctuating date, but the final salary payment was due by no later than 22 January 2021. (Other than her first month, when she was paid on 24 September, the Claimant was paid from around the middle of a month, to the middle of the next month, in arrears, shortly after the end of the period, and by no later than the 22nd.)
50. The Claimant's entitlement was to 5.6 weeks for her full year's holiday entitlement, including bank holidays. In fact, she worked there for 17 weeks and she used a total of 7 days (6 before the transfer, and 1 afterwards) of her entitlement. Based on 5 days per week, which is what the Claimant was working with R1, she used 1.2 weeks' leave.

51. The part year's entitlement would have been to $5.6 \times 17/52 = 1.83$ weeks. She therefore had an unused entitlement of 0.63 weeks as of the termination date. As per Regulation 16 of the Working Time Regulations 1998, she had a right to be paid in lieu of this entitlement calculated at the rate of a week's pay, as per the definition of a "week's pay" in the Employment Rights Act 1996, as modified by Regulation 16.
52. In this case, the Claimant's total gross earnings during employment were: $\pounds 396.30 + \pounds 750.62 + \pounds 716.14 + \pounds 242.55 + \pounds 1080.10 = \pounds 3185.71$.
53. These were her earnings for the period 1 September to 13 December, inclusive, a period of 104 days (14 weeks and 6 days).
54. Her average weekly earnings during that period were therefore $\pounds 214.43$ gross.
55. So her entitlement to a payment in lieu of unused holiday is to $0.63 \times \pounds 214.43 = \pounds 135.09$ (gross).
56. There were several contraventions of the Equality Act 2010, spread out over a period of around 6 weeks from 17 November to 29 November 2020. They were connected to two different protected characteristics. The treatment was serious enough for the Claimant to reach the decision that she had to leave her employment. Even after leaving employment, she continued to experience the effects of the injury to her feelings for around 2 months, especially during January when her sleep was regularly adversely affected by her thoughts being occupied by what had happened to her.
57. This was not a single one-off event. Taking account of that, and of the effects of the contraventions on the Claimant, an award in the lower band is not appropriate. The appropriate Vento band is the middle band.
58. Given that the Claimant was able to overcome the effects of her own accord, with the passage of time (and having obtained a new job), my decision is that the appropriate award is towards the bottom of the middle band.
59. For injury to feelings, I award $\pounds 9250$.
60. I will calculate the interest award from 1 December 2020, which was before the final contraventions of the Equality Act 2010, but after the discrimination and harassment had started in November 2020.
61. The daily rate of interest, at 8% per annum is: $\pounds 9250 \times 0.08 \times 1/365$.
62. From 1 December 2020 to 3 November 2022 is 703 days.
63. Therefore, the interest on injury to feelings is $\pounds 9250 \times 0.08 \times 1/365 \times 703 = \pounds 1425.26$.
64. For financial losses, I also award compensation for loss of earnings for the period for which the Claimant was out of work, starting from 30 December 2020, and for the whole of January 2021. The net amount that she would have earned during that period (and the extra holiday entitlement that she would have accrued) is an

approximation, given that she had no set hours. In her last month (for which payment was received), her earnings had been slightly over £1080, whereas the previous month, they had been about £960, and the month before, it had been about £750. Her earnings had therefore been steadily increasing. This is also consistent with the fact that, for the period 14 December to 29 December (so approximately half a month), she had earned £618.75.

65. Doing the best that I can, with the limited information available, my decision is that the appropriate award for loss of earnings (caused by the fact that she had to leave her job as a direct result of the discrimination and harassment) is £1100 net.
66. Part of this loss occurred around the middle of January (when payment in arrears for work done from mid-December to mid-January was due) and part around the middle of February. I will therefore calculate interest from around the mid-point, which I deem to be 1 February 2021.
67. The daily rate of interest, at 8% per annum is: $£1100 \times 0.08 \times 1/365$.
68. From 1 February 2021 to 3 November 2022 is 641 days.
69. Therefore, the interest on injury to feelings is $£1100 \times 0.08 \times 1/365 \times 641 = £154.55$.
70. I make no separate award in relation to the allegation that the Claimant did not receive payment for a notice period from the Respondent. I have already compensated her for the loss of income between the end of employment with R1 and the start of her new employment under the Equality Act, and a separate award for breach of contract would amount to double recovery.

Employment Judge Quill

Date: 3 November 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

3 November 2022

FOR EMPLOYMENT TRIBUNALS