EMPLOYMENT TRIBUNALS

Claimant: Miss A Waring

Respondent: Tudor Contract Cleaners Limited

Heard at: Manchester (remotely, by CVP) **On:** 21 November 2022

Before: Employment Judge Feeney
Mrs C Bowman
Mr M Stemp

REPRESENTATION:

Claimant: Mr P Ekperigin, Pupil Barrister
Respondent: Mr B Hendley, Consultant

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

REASONS

Background

1. The claimant brought a claim of constructive unfair dismissal, direct race and sex discrimination, racial and sexual harassment and victimisation.

2. There was a hearing on 12-15 April 2021 and the final Judgment was issued on 22 November 2021. The Tribunal found in favour of the claimant on one issue in that a Ms Diane Cheesborough who was hearing her grievance appeal had said to her that she did not understand why she was so offended when the comment the claimant was complaining about had not been made in her hearing but had been relayed to her by someone else. We found this was direct race discrimination and racial harassment. It was a matter which arose after the claimant had decided to resign. In respect of her resignation, the claimant claimed constructive unfair dismissal. We dismissed that claim, including on reconsideration.

3. Therefore, the matter was listed for a remedy hearing in respect of the Diane Cheesborough comment. We indicated in the Judgment that we believed it would be a claim for injury to feelings only.

Schedule of Loss

4. In the claimant's Schedule of Loss she claimed her losses from the date of her dismissal, however it was not clear from that Schedule of Loss when the claimant had obtained other work and what her salary was in that other work. In addition, the claimant did not address this in her witness statement. We were not unduly worried about this as in our view the claimant could not claim losses arising from her dismissal as it was neither a constructive unfair dismissal nor a discriminatory dismissal.

5. The claimant also claimed injury to feelings at the top of the mid range of Vento, personal injury, and she indicated aggravated and exemplary damages although did not put a figure in for those matters and only aggravated was pursued. The claimant also claimed an uplift in relation to general damages following **Simmons v Castle [2013]** Court of Appeal.

Claimant's Witness Statement

6. The claimant's witness statement was extremely brief.

7. The claimant's evidence was that she had begun working for the respondent on 6 February 2017 and resigned on 15 October 2019. She stated that:

> "The series of incidents I complained of during my employment affected my ability to trust and build meaningful working relationships and develop a career within the business sector."

8. However, we would point out that the claimant only succeeded in respect of the very last comment she relied on in her claim and not in respect of the other matters.

9. The claimant stated that she lost her confidence and suffered anxiety and panic attacks.

10. The claimant submitted a letter from her GP and her medication evidence. The letter from the GP was provided on 8 November and stated that:

> "The following report is based on my own observations and that of my own GP colleagues from medical records. She attended in October 2006 with stress related problems. The records would suggest that her symptoms were not ongoing in that she was prescribed a month's course of medication which was not repeated. She attended by GP colleague, DR Sharma, on 21 April 2020. I enclose a copy of his consultation. She later attended my colleague Marie Hughes, Nurse Practitioner, on 12 November 2020 for which I have attached a copy of the consultation. She was reviewed by me on 21 December 2021 and I have enclosed a copy of the consultation."

11. The record of the consultation on 21 April 2020 stated:

> "Telephone triage encounter due to COVID-19. Spoke to patient as struggling with stress – was due to her job – has now left that job. COVID-19 has aggravated things – was getting more anxious that she might have it or get it. Now has developed a very bothersome twitch to her eye. Is intermittent.

Sleep has been affected. Requesting diazepam – which helped last time. Was looking for a new job but due to COVID-19 is unable to do so. Awaiting a Tribunal from last job which has also be stressful. Denies thoughts of self-harm.

Medication: Diazepam and Propranolol

Comment: Diazepam issued but advice to take care as can be addictive. Try the Propranolol. Self help advice. Self refer to Six Degrees. Slip issued again. Call back if fails to improve."

12. The entry for 12 November stated:

"Propranolol issued.

Comment: Telephone encounter requested as anxiety meds not had since February this year. Was taking Propranolol 10mgs. Did have some low pulse. Blood pressure 92/60. Feeling anxious again as has upcoming Tribunal. At work uses Propranolol. Has BP monitor at home and will self monitor."

13. The record for 21 December 2021 stated:

"Telephone triage encounter COVID-19. Intermittent flare-up, anxiety. No red flags. Takes Propranolol. Has no more, wishes repeat. Plan repeat issue, safety netted."

14. There was no mention of panic attacks in any of those consultations. The claimant said they were telephone consultations and were not a full record of everything that was said.

15. The claimant obtained employment in August 2020. She had obtained a job in late June but due to the delay in the respondent providing a reference the job "timed out". The August job was in the homelessness sector, initially supporting vulnerable clients, and then she moved to a different job working with the homeless. In the claimant's original witness statement she stated that her new job was fantastic, the employer was very supportive and very aware of diversity issues. The claimant today tried to elaborate on her view that she had wanted a career in the business sector and therefore having to be in the public sector was a disappointment. We were not convinced by this given what the claimant had said at the first hearing and given the context of the fact that the claimant's employment in the public sector would generally be more secure than the private sector. The claimant agreed she was earning £10,000 a year more than with the respondent and she did not give any evidence about exactly what her ambitions were in the private sector. We also noted that the claimant had been in a position to start mitigating her loss in June 2020.

16. The claimant's medical notes also reflected that she was anxious because of COVID-19 and also that Tribunal hearings and worry about a Tribunal case also triggered her anxiety. It was clear that she did not take medication throughout the period and she agreed that she would tend to use it if a stressful event was coming up.

17. The claimant also stated that she was having to monitor her heart rate, which she managed by breathing exercises.

The Law

18. An Employment Tribunal has the authority to make a compensation award for discrimination under section 120 Equality Act 2010.

Injury to Feelings

19. In Vento it was suggested that the award at the lowest band might be appropriate where injury to feelings had arisen from a one-off event. In **Base Childrenswear Ltd v Otshudi [2020] EAT** the EAT rejected an argument by the employer that such cases must always fall in the lowest band, holding that the Employment Tribunal in each case must consider the particular effect on the individual claimant.

20. In **Da'Bell v NSPCC (2009)** the EAT revised the **Vento** guidance and increased them to reflect inflation, therefore the lower band was then £600-£6,000; middle £6,000-£18000; and the higher band £18,000-£30,000.

21. The Presidents of the Employment Tribunal then upgraded these as follows:

Lower band £990 - £9,000

Middle band £9,900 - £29,600

Upper band £29,600 - £49,300, subject again to exceptional cases possibly exceeding that limit.

22. Whilst the guidance is not binding, Employment Tribunals must have regard to it.

23. Harveys on Employment Law Industrial Relations does set out a number of Tribunal cases to give guidance as to factors considered in respect of lower, middle and higher band. None of these were cited to us, however there are cases in respect of one-off acts which could come in the middle band, the case of **Shadrake v Top Grove LLP** in March 2007, where £6,000 injury to feelings was awarded, the claimant was discriminated on the grounds of sex when she was dismissed because she could not work full-time due to childcare responsibilities. It was a one-off, but it was serious because it resulted in a dismissal – that is not the case here.

24. In a case where a claimant was discriminated against in the conduct of a disciplinary process against him for alleged harassment, he was suspended in breach of the employer's own policy: not giving details of the allegation until he was interviewed; required to attend a disciplinary hearing when he was unfit; not allowed to put his own side of the case and was not allowed access to emails or witnesses. A separate complaint by the claimant of bullying was ignored. This was a grave case but not a lengthy campaign; it was misguided and not malicious. The claimant suffered from stress, anxiety and depression as a result. The matter was serious, but the claimant was robust. It was a middle **Vento** case towards the lower end and £7,500 for injury to feelings was awarded. The case is from 2013.

25. In **Chapman v Simon [1994]** the Court of Appeal emphasised that Tribunals should consider only the act of which complaint was made which had been found to be unlawful dismissal. The claim must be attributable to that specific act which had been held to constitute discrimination and not to other acts. Where the loss has been caused by a combination of factors, including some which are not the unlawful discrimination, the compensation awarded can be discounted by such percentage as reflects the appointment of that responsibility (**Thaine v LSE [2010] EAT and Olayemi v Athena Medical Centre [2016] EAT**).

26. If compensation is ordered it is to be assessed in the same way as damages for a statutory tort (**Hurley v Mustoe No. 2 [1983] EAT**), albeit there is a discretion to consider what is just and equitable although that refers to the choice of remedy not the amount of compensation.

27. One of the other principles applying is the eggshell skull principle, that a discriminator must take the victim as they are. That means that the wrongdoer takes the risk the wronged may be very much affected by an act of sexual harassment, for example, because of their own character and temperament. Provided the losses claimed can be shown be causally linked to the unlawful act, the respondent must meet them. Consequently, the test of reasonable foreseeability is not applicable in these cases.

Non-pecuniary losses

28. Non-pecuniary damages available in a discrimination case consist of injury to feelings, compensation for pay and suffering and loss of amenity (personal injury or general damages, aggravated damages and exemplary damages).

29. The potential risk of double recovery in non-pecuniary was illustrated in the **Base Childrenswear** case where the Employment Tribunal had taken into account injury to the claimant stemming from the employer's failure to properly address the claimant's grievance both in relation to an award of aggravated damages and as one of several reasons for making a 25% uplift for failure to comply with the ACAS Code of Practice.

Injury to Feelings

30. In **Essa v Laing [2004]** the majority of the Court of Appeal held that the correct approach to the assessment of a claim for damages for the statutory tort of unlawful race discrimination is that the claimant is entitled to be compensated for the loss and damage which arises naturally and directly from the wrongful act. According to the majority, there is no requirement to show the particular type of loss sustained was reasonably foreseeable. It should be noted, however, that the **Essa** case concerned direct discrimination and harassment and it is unclear whether such a broad approach would be taken if the discrimination was indirect. The emphasis must be on the injury suffered by the claimant and not on the behaviour of the employer.

31. In **Vento v The Chief Constable of West Yorkshire Police No. 2 [2002] Court of Appeal** the Court of Appeal held that awards for injury to feelings of the most serious kind should normally lie between £15,000-£25,000. The Employment Tribunal had made an award for injury to feelings and aggravated damages of

£65000. This was reduced to £30,000 by the EAT and by the Court of Appeal to £23,000. For less serious the Court of Appeal stated that awards should fall within the range of £300-£5,000 (lower) and £5,000-£15,000 (middle). Only the most exceptional cases should exceed £25,000.

32. A specific race case from the middle band was a claimant was a security officer of mixed white Caribbean race. He was involved in an incident with two white colleagues which resulted in an allegation they had each laid hands on the other or attempted to do so. The claimant was investigated and disciplined whereas the two white colleagues were not. It was a single incident and did have relatively serious consequences as it led to the claimant's dismissal. There was no clear evidence he suffered depression as a result, but he had previously suffered depression. His relationship with his partner had ended and he was preoccupied with facing criminal trial for an offence for which he was later acquitted. This case from 2012 had an injury to feelings award of £7,000.

Personal Injury

33. The victim of unlawful discrimination may suffer stress and anxiety to the extent that a psychiatric or physical injury can be attributed to the unlawful act. In that situation the Employment Tribunal has jurisdiction to award compensation subject to causation being satisfied (**Sheriff v Klyne Tugs (Lowestoft) Limited [1999] Court of Appeal**). It was said that in such a situation it would be wise for a complainant to obtain a medical report to show the extent of his/her injuries. In that case a campaign of racial discrimination allegedly led to the victim's nervous breakdown. The Court of Appeal held that compensation for these injuries, if causally linked to the discrimination, could have been recovered before the Employment Tribunal though, on the facts of this case, no such recovery was possible as there had been a settlement of the discrimination claim covering all claims against the respondent. Sherriff has also been interpreted as requiring personal injury to be pleaded.

34. In **Hampshire County Council v Wyatt [2006] EAT** where a Tribunal had made an award for personal injury absent medical advice on the basis that such evidence would merely say whether or not the medical expert believed what the claimant was saying, the EAT disagreed.

35. In the Tribunal I asked the claimant's representative to clarify the situation regarding the personal injury claim as we understood no claim had been made by the claimant at any time from issuing her claim until today, and it was our view that such a claim had to be pleaded. This was also the respondent's view. I stood the case down for some time while the claimant's representative looked into this issue but he did not refer us to any specific authorities or to anywhere in the documentation where the claimant had referred to it. No amendment application was made.

Simmons v Castle

36. In the civil courts in 2013 in **Simmons v Castle** the Court of Appeal decided that general damages in all civil claims for pain and suffering, loss of amenity, physical convenience and discomfort, social discredit or mental discredit would be 10% higher than previously as a quid pro quo for changes that had occurred in the

civil litigation costs regime. At first it was considered this did not apply to Employment Tribunals as they had a very different costs regime, i.e. it was very rarely ordered. However, on the other side of the equation awards in the Tribunal for discrimination cases were supposed to be on a par with and reflect awards for similar torts in the civil courts, so in a case of **D'Souza v Vinci Construction (UK) Limited [2007] Court of Appeal**, the Court of Appeal held that **Simmons v Castle** did apply in the Employment Tribunal.

Aggravated Damages

37. Aggravated damages are available for an act of discrimination (**Armitage v Marsden and HM Prison Service v Johnson [1997] EAT**). An award must be compensatory and not punitive.

38. The EAT in the **Commissioner of Police of the Metropolis v Shaw [2012]** stated that such damages are really an aspect of injury to feelings and Tribunals should have regard to the total award made to ensure the overall sum is properly compensatory.

39. The EAT consider categories of conduct where it might be appropriate to make an award of aggravated damages i.e.

(1) where the distress caused by the act of discrimination had been made worse by, for example, being done in an exceptionally upsetting way, e.g. in a high-handed, malicious, insulting or oppressive way (Broome v Cassell [1972] House of Lords); and

(2) by motive based on prejudice, animosity, spite or vindictiveness;

(3) likely to cause more distress provided the claimant is aware of the motive; and

(4) by subsequent conduct i.e. where a case is conducted in an unnecessarily offensive manner or a complaint is not taken seriously or there has been a failure to apologise.

40. Exemplary damages can be awarded where the wrongdoer has behaved in an oppressive, arbitrary or unconstitutional way and they are the agents of Government, or where the defendant's conduct has been calculated by him to make a profit which would exceed the compensation payable to the claimant.

Interest

41. Regulations covering the award of interest are in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Regulation 2(1) requires Tribunals to consider whether to award interest on compensation in discrimination cases regardless of whether asked. Interest is to be calculated at simple interest which accrues daily and is fixed by section 17 of the Judgments Act 1838. At present the current rate is 8%.

42. For non-pecuniary losses the award is for the entire period from the act complained of to the date of calculation, although there is still a discretion to award interest or not and to calculate interest as it considers appropriate.

Submissions

Claimant's Submissions

43. In relation to claiming loss of income following her resignation, the claimant believed that section 120(1) of the Equality Act 2010 allowed the Tribunal to award these amounts even though in this case the discriminatory act had not contributed to the dismissal which took place earlier. The claimant also stated that the overriding objective to deal with cases justly would allow for the Tribunal to make such an award.

44. **PS v Johnson** was relied on, and an award should not be so low that public respect for discrimination would be undermined.

45. The claimant had produced medical reports which established that she had suffered from stress and anxiety, and that this had arisen as a result of her treatment by the respondent. She also relied on depression. She had stated in her witness evidence how she felt following leaving the respondent, and she has had to take medication from time to time. Accordingly, the claimant believed that the injury to feelings award should be at the upper end of the middle band of **Vento** and that there should be an interest award at the current rate of inflation (11.1%) and an uplift of 10% following **Simmons v Castle**.

Personal Injury

46. The claimant had pleaded harassment even if she had not pleaded personal injury. **Sheriff v Klyne Tugs** showed that such a personal injury claim could be made separate from injury to feelings, and the events had had a serious effect on the claimant. She was not obliged to produce further medical evidence and she submitted that she should receive a personal injury award in the moderate bracket of around £16,000

47. In relation to aggravated damages, that was left up to the Tribunal. No aggravating factors were stated even following a request from the panel.

Respondent's Submissions

48. Regarding the medical evidence, there was no mention of racial insults etc being a causative factor in how the claimant was feeling. There were other reasons given for her anxiety: COVID and the Tribunal proceedings. In addition, the claimant was to be praised for obtaining a job by August and she had done well since then. She was clearly looking for work before the pandemic and had obtained a job in June. The respondent submitted it was not enough to get into the middle band.

49. The claimant had not pleaded personal injury and the respondent believed the claimant needed to plead personal injury before this hearing. In any event, even if she had, while a psychiatric report was not required it would be needed in this case where it was not clear that any of the claimant's symptoms were as a result of the Diane Cheesborough incident nor was the depth of the claimant's injury described in any detail in the evidence the claimant had submitted from her GP.

50. Regarding loss of earnings, there was no loss of earnings attributable to the comment. The claimant had already resigned. There was no finding of constructive unfair dismissal and therefore that claim could not proceed.

51. In addition, the claimant was clearly not on the medication throughout the period. She would revert to it if something stressful was coming up, but that was not anything attributable to the respondent, it was the claimant's choice to bring a Tribunal claim.

52. In relation to aggravated, absolutely nothing had been said by the claimant to justify an aggravated damages report. The respondent agreed the claimant had been subjected to a very poor comment, but further than that there was no aggravation.

Conclusions

53. The Tribunal accepted that the causation evidence was not substantial in the medical records i.e. that the claimant's mental situation was due to the comment by Diane Cheesborough. It is far more likely it was due to the issues that she had pleaded in totality during her employment, however there would be some stress, anxiety, etc. arising from Ms Cheesborough's comment which was insulting and showed a misunderstanding of race discrimination law and practice and basically human feelings. Therefore, relying on the claimant's evidence, which we have to say was quite limited, we do accept there was some effect from the comment although we also take into account that she was concerned about other things such as COVID and Tribunal hearings. Accordingly, we would not put it in the upper range of the middle band of **Vento**. However, as it was a seriously upsetting comment, we would put it in the middle band of **Vento** and we award the claimant £15,000 .

54. In respect of interest, we have adopted a calculation of dividing with agreement of the parties £15000 by 365 (i.e. the days in the year) multiplied by 8 % the standard rate to give a daily amount of £3.28. We have then calculated the number of days since the act of discrimination, which was 20 January 2020. This gives us 1,035 days x 3.28, a total of £3,395

55. The overall total is therefore £18395.

Employment Judge Feeney
Date: 28 November 2022

REASONS SENT TO THE PARTIES ON

8 December 2022

FOR THE TRIBUNAL OFFICE

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