EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Y Hassan El Nahla **v** **Top Discount Electrical Stores Limited**

Heard at: Watford by CVP **On**: 24 November 2022

Before: Employment Judge George
Members: Mr D Sagar
Mrs A Brosnan

Appearances
For the Claimant: In person
For the Respondent: Did not attend having been given notice of the hearing

REMEDY JUDGMENT

This has been a fully remote hearing, by C.V.P. A face to face hearing was not held because it was not practicable and the purposes of the hearing could be achieved at a remote hearing.

1. The respondent shall pay to the claimant compensation in the sum of £16,462.47 including interest, which is calculated as follows:

   1.1. In respect of the two incidents of harassment related to religion 18 June and 19 July 2018 (paragraph 1 of the judgment sent to the parties on 17 October 2022), an award of £7,000 compensation for injury to feelings;

   1.2. Interest on that award calculated at 8% from 4 July 2018 (the midpoint between 18 June and 19 July 2018) to 24 November 2022 (the date of assessment). That is 1,605 days at £560 per annum = £2,462.47.

   1.3. In respect of the three unlawful detriments set out in paragraph 2 of the judgment, an award of £7,000 compensation for injury to feelings.

REASONS

1. The acts that we found to be unlawful are set out in paragraphs 1 and 2 of the judgment following the liability hearing that took place on 16 and 17 August 2022. They are that:

   1.1 The claimant was subjected to harassment related to religion on 18 June 2018, by Phil Kurland of the respondent saying “Mecca, do you

mean that place where people go round and round and never get anywhere";

1.2 The claimant was subjected to harassment related to religion on 19 July 2018, by Phil Kurland, on seeing the claimant kneeling down, saying "Are you kneeling towards Mecca?"

1.3 The claimant was subjected to a detriment on grounds of protected disclosure by the respondent telling him, on about 27 September 2018, that he would have to take annual leave in order for them to investigate the allegation he had raised against a colleague;

1.4 The claimant was subjected to a detriment on grounds of protected disclosure by the respondent failing to take any action to ensure that the claimant was safe at work after he reported the colleague's behaviour on 27 September 2018; and

1.5 The claimant was subjected to a detriment on grounds of protected disclosure by the respondent failing to communicate the outcome of any investigation into the claimant's complaint.

2. The claimant provided a witness statement dated 18 November 2022 and an updated schedule of loss in the time stipulated in the unless order that was sent to the parties on 7 November 2022 following the hearing of 4 November. That hearing was adjourned in the circumstance described in that case management order. The losses that he claimed in that schedule of loss were

2.1 five days' holiday that he says he was obliged to take during the respondent's investigation,

2.2 loss of earnings,

2.3 injury to feelings,

2.4 aggravated damages,

2.5 interest, and

2.6 an uplift for an alleged unreasonable failure to comply with the applicable Acas Code.

Applicable law

3. The law in relation to injury to feelings is well established. We remind ourselves of the case Armitage, Marsden and HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

4. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved: MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604.

5. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

6. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. The present claim was presented on 13 December 2018 and therefore the applicable bands are

   6.1 £25,700.00 and upwards for the most serious cases;

   6.2 Between £8,600.00 to £25,700.00 for serious cases not meriting an award in the highest band;

   6.3 Between £900.00 to £8,600.00 for less serious cases, such as an isolated or one-off act or discrimination.

7. The claimant argues that this is a suitable case for an award of aggravated damages. They are, in principle, available for an act of discrimination: HM Prison Service v Johnson. They are compensatory rather than punitive and are available when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant. In Metropolitan Police Commissioner v Shaw [2012] I.C.R. 291 EAT, Underhill P, as he then was, cautioned against the risk that a separate award of aggravated damages can lead a tribunal, unconsciously to punish a respondent rather than compensate the victim. There is also a risk of duplication of compensation and the tribunal must be satisfied that there is a causal connection between the exceptional or contumelious conduct and the aggravation of the injury. In many cases it will be appropriate rather to include in compensation for injury to feelings an element which reflects the way in which the victim was treated.

Findings of fact and conclusions on the issues

8. The first question that we needed to decide was whether the respondent owes the claimant for holiday which he was obliged to take during their investigation into his allegations against his colleague. We refer to our findings in paragraphs 79 and 80 of the liability judgment where we found that, although the respondent initially said that the claimant was going to have to take holiday, we were satisfied that they had, on termination of employment, paid him for all outstanding leave including recrediting him for those days. We do not award a sum under this head because our findings at the liability stage are that this was not a loss suffered by the claimant.

9. The next question that we need to decide is whether the loss of the claimant's employment flowed from the acts which have been proved to be harassment or unlawful detriment. We remind ourselves that the full scope of the claimant's original claim was much broader than those matters which we found to be unlawful.

10. We found that the disciplinary action that was taken against the claimant was not unlawful and indeed was reasonable. We found that there was objective evidence that the claimant was indeed frequently late for work as the respondent alleged. We will refer to but do not repeat paragraphs 79 and 118 of our judgment and paragraph 124 to 127.

11. The claimant's argument before us at the remedy hearing was that, in effect, he was not dismissed but he had absented himself from work because he did not feel safe. We accept that a part of the reason for him not feeling safe was that he had not received an outcome to the investigation into his allegation against his colleague and the lack of steps taken by the employer to ensure he was safe at work following the incident of 27 September 2018. He also said that some of the employer's previous behaviour was part of the reason why he did not have confidence that the employer was taking his concerns seriously. Up to a point we accept that there is a factual basis for that argument but we think that it is appropriate to award compensation for that in connection with the injury to feelings award because these are matters which exacerbated and aggravated the claimant's emotional reaction to the incidents that we have found to be unlawful.

12. The employer's unlawful act in respect of the allegations against RD we have found to be the failure to give an outcome and the failure to make the claimant feel safe. However, the employer did reach a conclusion on the investigation – they just did not communicate it. That conclusion, to prefer the information provided to the employer by RD, we found to be a genuine conclusion to prefer the evidence that was provided by the other employee.

13. We do not accept that the claimant effectively resigned. That is inconsistent with his having attended the disciplinary hearing and with him having put in a grievance. The argument that he raised at the liability hearing was that the timing of the disciplinary action was affected by his complaints but he accepted that taking disciplinary action for persistent lateness was itself justified criticism of him. So, it was not in dispute at that liability stage that employment ended by dismissal for reasons of conduct – namely the claimant's lateness.

14. Taking all that into account, and our finding at the liability stage, we have decided that the claimant has not shown that the loss of his employment was caused by the acts that we have found to be unlawful.

15. However, it seemed to us that the claimant may be arguing that loss of earnings flow from the discriminatory acts in an alternative way. It seemed to us that the claimant was arguing that he is unable at present to work because of ill health caused by the treatment that he received from the employer; so more in the nature of a personal injury claim. If the claimant had shown on the balance of probabilities that the unlawful acts caused personal injury which meant that he was unable to work then he would be able to show that loss of earnings flowed from the unlawful acts. That is a different argument to the question of why the employment came to an end.

16. There is evidence that there are health conditions experienced by the claimant which mean that he is unable to work. He explained to us that he is in receipt of Universal Credit but has been assessed as incapable of working and they no longer need him to prove that he is seeking employment. We would need to be satisfied on the balance of probabilities that the comments about religion on 18 June and 19 July 2018 caused the mental ill health that the claimant says is the reason why he is unable to work. We need to ask did the failures in respect of the complaint about RD's behaviour cause the mental ill health that means that the claimant is unable to work?

17. The claimant has forwarded some medical evidence to the tribunal. There is a printout of an online consultation about a consultation about his back; that took place on 4 May 2021, and about anxiety and depression, that took place on 5 May 2021. He has also provided a letter from his current general practice (the Samford Hill Group Practice) dated 19 May 2022 and a printout starting in February 2022 of GP consultations with that medical practice with whom he registered on 14 January 2022. There is also a printout from a previous GP's practice that contains some records of GP consultations, the earliest being 6 June 2019. There are two referrals to mental health professionals, one dated August 2019 and one dated in February 2020 and those correspond to some of the entries in the earlier GP records.

18. We take particular note of a comment at the bottom of page 2 of the consultation on 5 May 2021 in relation to anxiety and depression where it appears that the claimant informed his doctor that he suffered a violent attack from behind in August 2018:

> "I protected myself as much as I could but I fell on my back and got hurt. My neck and back haven't been the same since. I fell into a deep depression following this. I still cannot bear people walking up behind me or getting too close where I cannot see them. It was completely unprovoked attack and I have struggled to get back to myself since. I left my job shortly after this incident. I worsened and I lost almost 15 kilograms as I lost appetite."

19. The triggers of anxiety and of losing weight were described by the claimant to his then GP as happening in the aftermath of the assault. However, in his witness statement, the claimant attributes them to the discrimination that we have found to be unlawful. There is a clear contradiction between the

claimant's witness statement and the information he provided in May 2021 to his GP. We find that that contradiction makes it difficult to rely upon the claimant's self-analysis in the recent witness statement of the effect of the specific incident. We also bear in mind that there is a very large increase in the injury to feelings claim between the original schedule of loss and the updated one which seems to us to be potentially viewed as an attempt to exaggerate the effect of the actions which have now been found to be unlawful.

20. The recent letter from the Stamford Hill Group dated 19 May 2022 does not assist and we give it little weight. There are no contemporaneous records showing whether the claimant consulted his G.P. in June 2018 or in July of that year (when the unlawful acts happened) or indeed in September 2018 when he was dismissed.

21. The records that we have referred to do not include a reference to the employers with one exception. The online consultation for anxiety and depression states on page 3:

> "I left my job after the attack because I was in a great deal of pain and I had a falling out with my boss because he did not want me to take a day off to seek medical attention or give my statement at the police station."

22. Those are clearly matters connected with the assault and not with the facts that we have found the acts that we have found to be unlawful. He then goes on to say to the GP:

> "I could not continue in my job after I was threatened with a knife at work and my boss refused to do anything to make me feel safe. I am still very upset at everything and I have a date in court in June for this very reason. I have had to think about it all for the last three years."

23. That is a reference to a preliminary hearing in the employment tribunal proceedings.

24. The medical notes suggest that there are a large number of factors in the claimant's life which he has told his GP at various times have affected his mood. Other than that cited at para.22 above, there is no refence to the behaviour of his employers that we have found to be unlawful. This is not enough to be reliable medical evidence that there are specific mental health problems that were caused by the unlawful actions of the respondents. We do not find that the claim for loss of earnings is made out. There is no evidence to support the claimant's assertion that the respondent is responsible for his inability to work. So, compensation is limited to an award for injury to feelings.

25. We do not think this is a case in which aggravated damages should be awarded because the injury shown directly flows from the acts we have found to be unlawful so there is a high risk of overcompensating the claimant, even were high-handed, malicious, insulting or oppressive conduct to have been shown. The appropriate thing to do is to properly identify the injury to feelings experienced by the claimant.

26. Although there is reference to the very highest award in his most recent schedule of loss, at the remedy hearing the claimant argued for an award in the middle Vento band between £8,600 and £25,700.

27. When making findings about the extent, depth and length of time over which the claimant has experienced feelings of hurt and insult as a result of the unlawful acts, we find that we cannot rely upon his written witness statement. It is apparent that it covers his reaction to everything that he says he has experienced in his employment.

28. We therefore go back to what the claimant said at the time in his grievance (page 97 and, in particular page 101). He described the religious harassment as being a disgusting, hateful comment. He explained, and we accept, that to some extent he was discouraged from making complaints to Mr Kurland because his relationship with him was poor for reasons that we have already explained and that he believed Mr Kurland viewed him separately because of his background. That belief flows from Mr Kurland's unlawful comments. We accept that they caused a lack of confidence during the time of his employment.

29. His oral evidence to us on the liability hearing included this description of how the first comment made him feel he described it as:

> "Incredibly insensitive and offensive. By the way he is talking about doing the Tawaf around Kaaba that is a deeply spiritual thing to do that one is obliged to do one time in our lifetime. To make that comment and tell me "the people go round and round" I cant tell you how upset and embarrassed I felt and it changed my mood."

30. We also recall that Mr El Nahla was upset that the respondent did not attend to give their version of events and to meet him face to face in his accusations.

31. In so far as the second comment is concerned, his oral evidence was that he could not believe how outwardly offensive Mr Kurland was as a human being; he had lost so much respect for him when he made the first comment and more respect was lost when he asked the claimant if he was kneeling down towards Mecca in a sarcastic way - laughing at his own comment. We accept that he has found it upsetting and difficult to have to relive for the purposes of an employment tribunal hearing and his difficulty in attending the hearing bears witness to that. We think there is therefore an element of a continuing impact of these specific comments.

32. Having said that, our impression is that the behaviour of his co-worker was in substance the reason why the claimant did not go back to work and we have already made findings as to why the loss of earnings does not flow from the limited actions that we have found to be unlawful.

33. We also refer to some paragraphs in our judgment which we take into account but do not repeat lest this judgment be unnecessarily long. They are paragraphs 85 and 105. There are also findings about matters that the claimant was not successful in but which nevertheless upset him and which

we have to exclude when trying to isolate the upset that was caused by these specific incidents, in particular paragraphs 53, 54 and 56.

34. There were other matters of importance to the claimant that affected his view of the employment relationship but which were not the subject of the litigation. They are his request for adjusted hours that he did not consider to be properly dealt with and the fact that he was late, which was being dealt with by appropriate management.

35. The claimant, as we have found, is quite sensitive and we bear in mind that the respondent has to take the claimant as they find him. So, if this claimant is more powerfully affected by comments than another claimant who was more robust might be, this claimant should be fully compensated for the injury that he has in fact experienced.

36. Taking all that into account we think that although these are two matters only they had a relatively serious impact on him. We do not think that it is right to put this in the middle bracket of Vento awards because they are two otherwise isolated incidents. However, as relatively serious incidents an award at the top end of the lower Vento bracket is appropriate. We award £7,000 for these two incidents. We have calculated interest on that as set out in the judgment. That means that the award for injury to feelings caused by harassment including interest is £9,462.47. Interest is available on awards of compensation for injury to feelings caused by acts which are unlawful under the Equality Act 2010 but not on awards for compensation for injury to feelings in protected disclosure detriment claims.

37. We then consider what award for injury to feelings should be made for the other three matters set out in paragraph 2 of the judgment sent to the parties on 17 October 2022. We must evaluate the effect of these on the claimant separately to the acts of religious related harassment. The three matters included a failure to take action which caused the claimant to feel unsafe. That, we accept, was a factor which caused him to absent himself from work. That is corroborated in the 5 May 2021 referral where he told his G.P. that he left because he felt unsafe and that his boss had not taken any action.

38. We also remind ourselves that this included telling the claimant that he had to take annual leave in order for the incident to be investigated when he was absent from work. We think that, taking into account that he was still remembering this incident some time later when he mentioned it to his GP, and that it caused him to absent himself from work (although not from the disciplinary hearing) the impact of these incidents, even taken in isolation from the harassment, was sufficiently serious that it itself should be reflected in an award at the top end of the lower Vento bracket and we award £7,000 for that. That makes a total award of £16,462.47.

39. No interest is awarded on compensation for injury to feelings caused by the detriment on grounds of protected disclosure because the power to award the interest for such losses is not vested in the employment tribunal.

40. We do not think it right to award an uplift for an unreasonable failure to comply with the Acas Code. We remind ourselves of our findings in

paragraph 90 of the judgment. The respondent scheduled a hearing of the grievance and changed the hearing manager when the claimant challenged the appropriateness of Chris Kurland who had heard his appeal against dismissal. The claimant said that his reference to a failure to comply with the Code was to a failure by the respondent to permit him to have a companion. We find that he was not deprived of the right to have a companion; he was told that he was able to be accompanied by a fellow employee or a trade union representative. He did not think that this was appropriate, he wanted somebody who was independent. In fact the claimant did not specifically say that he had asked for such a companion simply that he had been told that he could have a statutory companion and, in those circumstances, we do not find that the respondent was in breach of the Code let alone was guilty of an unreasonable breach of the Code.

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Employment Judge George

Date: …21 February 2023……..

Sent to the parties on: 23/3/2023

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For the Tribunal Office