



EMPLOYMENT TRIBUNALS

Claimant: Ms Carina McFarlane

Respondents: 1) ABC Recruitment & Training Ltd
2) Mr Clayton Barnes

Heard at: London South Croydon by CVP

On: 19 August 2022 and in chambers on 28 October 2022

Before: Employment Judge Tsamados
With members:
Mrs H Carter
Mr N Shanks

Representation

Claimant: Ms F Reilly, Free Representation Unit
Respondents: Mr A Alexandrou, Consultant

RESERVED JUDGMENT ON REMEDY

The **unanimous** Judgment of the Employment Tribunal is as follows:

The Claimant is awarded the sum of £9,677.28 net in respect of loss of earnings and the sum of £18,000 in respect of injury to feelings payable by the Respondents.

REASONS

Introduction

1. This is a remedy hearing following our Reserved Judgment & Reasons ("the Liability Judgment") sent to the parties on 17 January 2022.
2. The Claimant is Ms Carina McFarlane. The First Respondent is ABC Recruitment & Training Ltd, the Claimant's ex-employer. The Second

Respondent is Mr Clifton Barnes, a Director of the First Respondent. Reference is also made to UK Care Partnership Ltd ("UKCP") of which Mr Barnes was also a Director. We set out in some detail the relationship between these two companies and Mr Barnes in our Liability Judgment. In essence, the First Respondent is an employment and recruitment agency that provided staff to UKCP which is an accommodation support and monitoring organisation assisting young people transitioning from local authority full care to independence.

3. In our Liability Judgment we found that the Respondents had subjected the Claimant to 11 detriments as a result of her making protected disclosures contrary to section 47B of the Employment Rights Act 1996. This hearing is dealing with remedy for those detriments.
4. The same representatives were before us as at the liability hearing. We were provided with an electronic bundle running to 187 pages by the Claimant. We will refer to this as "RB" followed by the relevant page number where necessary. This included redacted medical records, although we had been provided directly with unredacted copies. We also had the electronic bundle from the liability hearing. We will refer to this as "TB" followed by the relevant page number where necessary. At our hearing, the Respondents provided 3 additional documents: a discharge document and 2 emails referred to at the liability hearing (which in any event were in the liability hearing bundle at TB413, 439 and 409).
5. We heard evidence from the Claimant and from Mr Barnes on behalf of both Respondents by way of written statements and in oral testimony. The Claimant's written evidence included a chronology.
6. We heard submissions from both representatives which we have taken fully into account and only refer to in our Judgment where necessary.

Conduct of the Hearing

7. The hearing was conducted by Cloud Video Platform ("CVP"). At the start of the hearing we established ground rules: the raising of hands to indicate if a break was required; care should be taken when questioning the Claimant as to medical evidence; and questioning of the Claimant should be slow and patient and as non-confrontational as possible. I indicated that I would intervene if needs be.
8. I must apologise to the parties for the length of time that it has taken to perfect and promulgate our Judgment. This was due to a combination of my part-time work pattern, pressure of work and ill-health.

Essential law

9. We considered our powers to award compensation pursuant to section 49(2) of the Employment Rights Act 1996. This states as follows:

*"(2) [Subject to [subsections [(5ZA),]7 (5A) and (6)] the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—
(a) the infringement to which the complaint relates, and*

(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right."

10. In Virgo Fidelis Senior School v Boyle (2004) ICR 1210, the Employment Appeal Tribunal emphasised that detriment suffered by whistle-blowers should normally be regarded by Tribunals as a very serious breach of an employment right that is the equivalent of - indeed, a form of - the right not to be discriminated against. However, this did not mean that, when having regard to the infringement complained of, a Tribunal should permit the nature of the infringement itself to have an impact on the level of damages awarded irrespective of any injury to feelings caused by the infringement. To compensate simply for the offence rather than the resulting injury or psychiatric damage would offend against the general principle that the aim is to compensate and not to punish. The reference to "infringement" in section 49(2)(a) should therefore be construed simply as a reminder to Tribunals to have some regard to the nature of the complaint when assessing the resultant loss, in that the more serious the offence, the more likely it is that feelings will have been injured.
11. We also had regard to the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction Ltd [2017] EWCA Civ 879 first addendum 23 March 2018 (the original Presidential Guidance being issued on 5 September 2017). This is the Presidential Guidance that was in force at the time of the presentation of the Claimant's claim. The Presidential Guidance relates to what are commonly known as the Vento Guidelines arising from the case of Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871, [2003] IRLR 102 as it has been affected by subsequent case law and updated to take into account inflation.

Findings and conclusions

Loss of earnings

Suspension

12. We make reference to paragraphs 226-227 and 208-209 of the Liability Judgment. We found that suspension was an unlawful act. The Claimant would have worked had she not been suspended. Whilst she would not have gone back to the house where CG lived or the other house where she first worked because she had a previous incident there, Mr Barnes had previously offered her outreach work. However, this offer was not repeated at this stage and he had other premises. Instead he made the unilateral decision that the Claimant would not be interested in working elsewhere based on his interpretation of their earlier discussion which in any event we did not accept.
13. Whilst suspension was from 28 August to 10 November 2018, the Claimant was paid by the First Respondent for two weeks (in her September pay slip). So the period of her loss of income is from 10 September to 10 November 2018.
14. We have taken the Claimant's net earnings from July to August 2020, rather than the three months prior to her dismissal, to calculate her average earning,

given that her September earnings were only for two weeks (at TB489-490). This gives a total figure of £2,298.84 which divided by two would give her average net monthly earnings.

15. The figures given by the Claimant's representative in the Claimant's Schedule of Loss in respect of this were impossible to follow. Doing the best we can, we could see that she had taken the total of the Claimant's July and August 2020 earnings and then divided this by 62 being the number of days during those two months. However, the Claimant did not work every day and whilst the pay slips show that she worked 264 hours, they did not show the number of days that she worked. We were referred to the rotas at RB143-146. However, these only show that the Claimant worked 18 days in August 2018. Thus we simply could not work out how the Claimant came to the total of £1727 claimed for this period (at RB88).
16. We take the view that if the Claimant had been offered work for the period 10 September to 10 November 2018, then the safest indication of what she would have earned is what she earned in her last two full months' salary.
17. So we award her the sum of £2,298.84 net for the loss of earnings for that period.

Loss of earnings from dismissal on 10 November 2018 to 26 October 2020

18. We refer to paragraphs 208-209 and 230-231 of the Liability Judgment.
19. The Claimant is seeking loss of earnings from the date of her dismissal of 10 November 2018 to 26 October 2020. This is a period of 102 weeks and 2 days or 102.29 weeks.
20. We refer to the Chronology of employment / earnings provided by the Claimant at RB95-99. The Claimant was in receipt of Universal Credit and had sporadic earnings from agency work. She then obtained permanent employment with Harris Academy from 19 October 2020 and from 27 October 2020 she was earning more than she did with the First Respondent.
21. We believe it just and equitable to award her loss of earnings for this period. There was no good reason for the First Respondent not to continue to offer her work. We are satisfied that the Claimant mitigated her loss during this period.
22. However, the Claimant's representative's calculations as to the Claimant's loss are based on an incorrect daily rate. A more reliable way to calculate weekly pay is, as we have done above, to combine her July and August 2018 wages, which equals £2298.84, divide by 2 and then multiply by 12 and then divide by 52. This comes to a figure of £265.25 net per week.
23. The Claimant did not receive an occupational pension. We do not know what the loss of pension benefit is or where the % rates within her Schedule of Loss come from or indeed how the total figures for each period have been calculated. We thought it might be a reference to lost National Insurance

Contributions ("NIC") but these do not tally with the rates applicable to NIC. So we make no award for pension loss.

24. 102.29 weeks x £265.25 per week comes to a total of £27,132.42 net.
25. The Claimant commenced work on 4 December 2018. Sums obtained in earnings and Universal Credit from 1 week after her employment ended (her notice period) until 26 October 2020 are shown in her Schedule of Loss (at RB88) as amounting to £20,034.08. We assume this is the total earnings shown in the Chronology of employment / earnings from 19 November 2018 onwards (at RB95-97). However, having checked these figures several times we only arrive at a total of £19,753.98.
26. £27,132.42 - £19,753.98 = £7,378.44.
27. We award the sum of £7,378.44 as compensation for loss of earnings for the period 10 November 2018 to 26 October 2020.
28. The total award for loss of earnings is £2,298.84 plus £7,378.44 = £9,677.28.

Injury to feelings

29. The Employment Tribunal has the power to make an award for injury to feelings. This is intended to reflect the degree of hurt felt by the particular claimant as a result of the unlawful treatment, in this case detriment for whistle-blowing.
30. Vento establishes that an injury to feelings award can encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, and depression.
31. Taking an overview of our powers from established principles:
 - a. There must be evidence of injury for an award of compensation to be made;
 - b. The detriment made out must actually cause the injury;
 - c. The award is compensatory, not punitive;
 - d. The principle of compensation in tort is to put the victim in the position that they would have been in had the tort not been committed;
 - e. A tortfeasor takes their victim as they find her.
32. In Essa v Laing Ltd [2004] IRLR 313, the Court of Appeal held that it was not necessary that a Respondent could reasonably foresee that the type of injury would be suffered. Once liability is established all the Tribunal needs to be satisfied of is that the loss or damage claimed was caused by it. The question to ask is, "does it in fact naturally flow from the discriminatory act that has been made out?" Essa makes clear that it is sufficient if the damage flows

directly and naturally from the wrong. In short, there is no requirement of reasonable foreseeability.

33. We have also had regard to the revisions to the original Vento Bands made in Presidential Guidance issued each year from 2017. The Claimant's representative has claimed the sum of £29,600 representing the upper level of the middle band of Vento in her Schedule of Loss (at RB87). Having looked at the figures for the year from 6 April 2018, the upper level of the middle band of Vento was in fact £25,700.
34. The Claimant has raised a number of factors going to injury to feelings within her evidence.
35. One matter that clearly had a great effect on the Claimant (as apparent from the evidence we heard at both hearings) was the damage to and the loss of her hair in the attack on her by CD and the resultant difficulties flowing from replacing it. We appreciate the impact this had on the Claimant and do not mean to minimise this in what follows.
36. However, we had to ask ourselves the question to what extent the Respondents were responsible for this in the context of those detriments that we found they had subjected the Claimant to.
37. The difficulty for the Claimant is that the detriment that we found, at paragraphs 206-207 of our Liability Judgment, is that Mr Barnes made an offer of help which did not materialise. We made no findings that either Respondent was responsible for the attack itself and that this amounted to a detriment.
38. The lack of contact by Ms Stone, which was the detriment which we found at paragraph 210-211 of our Liability Judgment. As the Claimant said in her written evidence, the lack of contact by her colleagues and especially Ms Stone after the attack by CD really hurt her. And as the shock of what had happened wore off she began to feel fragile and vulnerable and could not understand why Ms Stone had not called her. She had been physically attacked, bruised, traumatised and not one person called or messaged her to offer her their support, apart from Mr Barnes and then only on two occasions in the few days after the incident.
39. Being removed from the WhatsApp group, which was the detriment we found at paragraphs 213-214 of the liability judgment. the Claimant deals with the wider effects of this within her witness statement. We find that this act had the effect of isolating the Claimant because suddenly she was cut off from her work and work colleagues and her ability to earn and without explanation.
40. Mr Anderson's involvement, which arises from the detriment we found at paragraphs 215 -221 of our Liability Judgment. Mr Anderson's involvement was held out under false pretences. He was put forward as being safeguarding officer but in fact being used a means of removing the Claimant from her employment.

41. The delay by Mr Barnes in providing Mr Anderson's report to the Claimant, at paragraphs 224-225 of the Liability Judgment. The delay was from 6 September until 10 November 2018 and we found that no satisfactory answer had been provided for this. The Claimant said in her written evidence that during this period she was left in a state of confusion and dumb-foundedness. Her birthday was on 10 November and she had to cancel a party because of the way she felt when she received the report. She further states that the delay on top of the lack of contact from her co-workers and Mr Barnes made her feel worthless. She adds that for the report to have been written on 6 September and for Mr Barnes to have had the report and to have made up his mind about her future but not released a report until 10 November just added to the injury she had already suffered. She speaks of feeling abandoned and discarded.
42. The report itself, which forms part of the detriment found at paragraph 226-227 and in particular paragraphs 228-229 of our Liability Judgment. In her written evidence, the Claimant speaks of her shock that Mr Anderson did not mention any of the safety concerns she had raised, that the report did not appear to be an investigation of UKCP, as she had been told it would be but instead was an investigation into her. She refers to statements attributed to her in the report which she did not say and that her words had been twisted to suggest that she was just an anxious and frightened person when in reality she was concerned for the safety of staff due to lack of structure or process which caused her to worry that a serious incident would occur. She describes feeling so fragile at the time that the meeting with Mr Anderson took place (on 31 August 2018) and that she felt shaken and demeaned by the lengths that Mr Barnes had gone to avoid responsibility and disheartened by the attacks on her competencies.
43. In addition, the detriment at paragraph 228 of our Liability Judgment is that the Claimant also suffered with stress and anxiety due to the way she was treated by the Respondents particularised in the report after what was a vicious and shocking assault and that this led to depression, the Claimant undertaking counselling and becoming unwell. The detriment suffered was a significant impact on her mental health and well-being. In evidence the Claimant stated that she met with Mr Anderson as he had said that the purpose of the investigation was a learning exercise for UKCP. He told her he was actually friends with Mr Barnes and never introduced himself or talked about being UKCP's safeguarding lead, as she had been led to believe. She was suspicious but wanted to cooperate and to trust that this was the beginning of a formal process. Her further evidence is that the report was written to undermine and discredit her. She undertook counselling to help support her with the way she was being treated.
44. We take into account that the Claimant had previously experienced depression and anxiety and that whilst we acknowledge that the assault was vicious and shocking in itself, it is not one of the detrimental acts that we have found.
45. That she was not offered alternative work, which forms the detriment at paragraphs 230-231 of our Liability Judgment. The Claimant gave evidence that there was a future for her with the UKCP. Mr Barnes had taken 5 to 6

hours out of his working day to give her a tour of the properties in his organisation with a view to her growing in the company and taking on a more senior role long-term. But after 24 August 2018, she was not offered any work at all and her future with the company disappeared when she emailed him, listing the issues she wanted to discuss with him.

46. Lack of procedure, which relates to the detriment found at paragraph 232-233 of our Liability Judgment. The Claimant's evidence is that the failure to follow the whistle-blowing policy caused her immense confusion. She could not understand why she was being cast out of the organisation so unceremoniously and that this made her feel small and demoralised. Without any communication from Mr Barnes she was left to speculate as to where she had gone wrong or what she had done to deserve this treatment. She felt dejected, neglected and worried that she had done something to cause this behaviour.
47. We also took into account general considerations.
48. We particularly note the contents of the Claimant's witness statement at paragraph 45:

"I regret the day I applied to work for (Mr Barnes), in hindsight there were warning signs that I overlooked; being asked to sign paperwork from ABC even though the company was known by all as UKCP, the director himself turning up without a Staff ID, unannounced at 8pm at night with a guest on my first shift, no response when I submitted a formal incident report alerting of the unsuitability of the locks and broken front window allowing easy access to Home A, sudden change in senior management, twice (Paulette Blye and Michael Mensah), not to mention the informal and conversational way I would learn about incidents involving knives between the young people."

49. We also particularly note the following paragraphs from her witness statement:

71. *I went to the doctors of my own accord on 30th August soon after the attack as I knew I needed to get support for my physical and mental health. I was also extremely concerned about my hair as the dreads had been pulled out from the roots (I could see the follicles from the bunch that fell in my hands after the attack) and I was worried it wouldn't grow back.*

72. *I was referred to Talking Therapies and had an initial assessment over the phone on 26/10/2018 but I was told there was a waiting list of several months to receive any treatment.*

73. *By Christmas 2018 after a failed application form, avoiding several friends and family birthdays and indeed cancelling my own 35th birthday celebrations I was in such a dark space that my mum took me to the doctor because of the way I was talking about lack of hope and lack of future (referring to witness statement paragraph 88). By that point I couldn't see any point in continuing with life. I didn't care to continue and ruminated on how I could end things. I thought about the best date to end my life concluding that my birthday would probably be the best date. I know birthdays and the day someone dies are usually hardest for surviving family members so if I joined the two it would lessen the impact on my family.*

74. *I had been attacked doing a job where I threw my all into supporting others yet I had been discarded without any care or consideration. I was not sent any cards or words of encouragement from my colleagues. I had no visits from my managers. While I was still a member of the UKCP WhatsApp groups (I could see they had hired two new members of staff, which means it was me (Mr Barnes) didn't want in his company; even though I had done everything asked of me with enthusiasm and care and was praised often by management for the work I did. I was given two weeks pay and ejected from the organisation without warning and without explanation.*

75. *I found myself suddenly out of work. While I had signed up to Careoline that was never going to be my main source of employment because their work is sporadic. They'll have an ongoing job for a week or two and then nothing until the next job comes up. Careoline was only ever going*

to supplement my income whilst I was at UKCP. I was too emotionally spent to start looking for permanent work. I was fragile, my confidence had been knocked, I was confused. Mr Barnes wasn't communicating with me in respect of the attack. I never saw him at any point at the time of or after the attack. I had wanted to use the meeting that he had suggested to share what had happened and my thoughts at how the attack could have been prevented and to get assurances from him that he would make the necessary changes in his organisation to protect staff and the young people in his care. Without this meeting I felt silenced and worried for others. Which added to my feelings of confusion, worry and helplessness.

76. *It took every ounce of strength I had to fill in the ET1 and start this claim in January 2019, after CB refused to communicate with me via ACAS. After being on the waiting list from October 2018 to February 2019 and was offered 6 weeks of counselling, because living in poverty, growing bills and the lack of secure work was really getting to me. I didn't feel like I could show my face around friends and family as I didn't have anything to contribute when they would invite me out to their celebrations. I couldn't even buy my Mum a gift for her 60th birthday. The weekly counselling started on 2/2/2019 and ended on 9/3/2019 (Please see discharge letter dated 24th March 2019).*
77. *At every turn (Mr Barnes) has dismissed me and acted as if he does not owe an explanation or at the least a conversation. I feel that He has tried to discredit my character for example by making accusations that I provoked the young people, that they complained I was overbearing with my faith and too afraid to go back to work because as he says, I was incompetent at my job.*
78. *It has been an exhausting 4 years made all the more degrading by how I feel that the respondents case has been run, particularly the accusation against me stating that I wasn't a great employee when I was only ever praised for my work, (Mr Barnes) saying that the only reason he didn't meet with me was due to a scheduling clash on a date I proposed (Mr Barnes' court testimony) which never happened. He refused to meet with me at every turn. During this time I've had to pick myself from the lowest point that I have ever experienced. I missed important friends and family celebrations and holidays. I was left to question, doubt and fend for myself when all I had wanted to do by taking a job with ABC/UKCP was support and encourage young people going through a tough time. I've picked myself up and continued with this case to show Mr Barnes and people like him that exploitation of staff and young people will not be tolerated.*
79. *It is for these reasons that I continue with this claim. Even through the dark thoughts and the isolation, the depression and the weight of this tribunal hanging over my head I continue, because I reject the treatment I have suffered before and during this case and I want CB to know I do not stand for it."*

50. We found the following oral evidence from the Claimant poignant:

"I'm incredulous, how he (Mr Barnes) conducted himself, how he treated me, how he has isolated me, I would never have expected that such an event could have happened on 24 August. I was expelled from work and he would not even have a conversation with me about it. That is what has made me continue with this. How could you treat a human being like this? One who was such a good worker. I'm incredulous and I don't understand it at all, and that is why it has affected my life, my relationships and feeling about myself. I was living hand to mouth. A terrible and traumatic ordeal made all the worse by Mr Barnes' behaviour. This knocked my confidence, I'm not fully myself but on the road to living the life I should be living."

51. We also considered the Claimant's medical condition as evidenced in her medical records. These only go back as far as 27 December 2018 and indicate that the Claimant suffered from past anxiety and depression for 2 years in 2016-17 (at TB120). However, we formed the view that these records did not detract from the Claimant's evidence of her mental state or add anything. We formed a similar view of the Talking Therapies letters dated 26 October 2018 and 24 March 2019 (at TB421). These evidence that she presented with anxiety and depression following the attack at work and was referred to Talking Therapies in October 2018 and attended a number of therapy sessions during February and March 2019.
52. We considered the duration of the detrimental treatment that we found. The detriments related to the period 24 August to 13 November 2018. There were

11 detriments and we considered them separately and as a whole given that it is clear that they had a cumulative affect on the Claimant.

53. We took into account the Respondents' approach during the events that we found amounted to detriments. There was a lack of contact at key times. A lack of resolution. No further work the claimant was offered without good cause not to. There was referral of the matter to Mr Anderson, which despite the way it was presented was not intended to address the safety and safeguarding issues. There was the report was delayed and the outcome ignored the Claimant's concerns and was used to force her out.
54. However, we have taken out the element of injury to feelings (and indeed pecuniary loss) relating to the assault itself, specifically the damage to and loss of the Claimant's hair, her attempts to resolve the matter and the impact on her, in reaching our assessment of the level of award for injury to feelings. Whilst we sympathise with the Claimant, this element of her claim for compensation does not arise from the detrimental treatment that we found.
55. Taking into account our above findings and considerations, we see this as a matter that quite definitely falls within the middle band of Vento. At the time this was from £8,600 to £25,700. We view it as a case not at the top end of that band but close. Doing the best we can, we put a figure of £18,000 on our award.
56. Finally, the Claimant's representative invited us to award an uplift in compensation for breach of the ACAS Code of Practice (1): disciplinary and grievance procedures (2015). However, this is not a matter that involved either disciplinary or grievance procedures and in any event we made no findings of fact in our Liability Judgment on which to base an uplift. We therefore make no respect of this.

Employment Judge Tsamados
Date: 13 March 2023