



EMPLOYMENT TRIBUNALS

Claimant: Michael Baah
Respondent: Ballymore Asset Management Limited
Heard at: East London Hearing Centre
On: 31 March 2023
Before: Employment Judge Jones
Members: Ms A Berry
Ms S Harwood
Representation
Claimant: In person
Respondent: Mr P Collyer (Citation Ltd)

JUDGMENT

1. *The Claimant is entitled to a remedy for his successful complaints of race discrimination, victimisation and harassment.*

2. *Remedy*

<i>Injury to feelings</i>	£24,000.00
<i>Loss of income while sick (2.9.20 – 21.10.20)</i>	£2,222.08
<i>Gross pension for the same period</i>	£ 170.00
<i>Costs of Counselling</i>	£1,440.00
<i>Lost commission</i>	<u>£ 660.00</u>
Total	£4,492.08

3. *Interest under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 at 8%=*

(1) Regulation 6(1)(a) interest on Injury to feelings = £24,000 x 0.08/365 x 967 (number of days between 7 August 2020 and 31 March 2023, date of first incident and date of calculation) = £5, 086.68.

(2) Regulation 6(1)(b) – interest on all other sums = £4,492.08 x 0.08/365 x 483.5 (483.5 days is midpoint between 2 August 2020 and 31 March 2023) = £476.03.

4. ***The Claimant is entitled to a total sum of £24,000 + £4,492.08 + £5,086.68 + £476.03 = £34,054.79.***
5. ***The Respondent is to pay the Claimant the sum of £34,054.79 forthwith as his remedy for his successful complaints of race discrimination and harassment.***
6. This judgment was given today in court. The Respondent requested written reasons.

REASONS

1. The Claimant was successful in his complaint of race discrimination. This was his remedy hearing. The Claimant sought a basic award, injury to feelings, aggravated damages, loss of income, pension and commission while off sick and reimbursement of medical/counselling and legal fees. He also asked the Tribunal to award him compensation for personal injury.
2. The Tribunal heard from the Claimant in evidence and considered the documents presented to it.

Law

3. The Tribunal also had submissions from both parties. It considered the following law in reaching a judgment on the remedy to award the Claimant.
4. Section 124 of the Equality Act 2010 refers. The remedies a tribunal can award in a successful discrimination complaint are as follows:
 - i) To give a declaration on the rights of the complainant and the respondent regarding matters to which the complaint relates;
 - ii) An order for compensation to the complainant - which can include payments under the headings of injury to feelings, aggravated damages and for pain, suffering and loss of amenity (personal injury) and interest;
 - iii) Make an appropriate recommendation – of steps that the employer must take within specified period to obviate or reduce the effect on the complainant or any other person of any matter to which the proceedings relate.

Injury to feelings

5. The Court of Appeal gave guidance on the assessment of compensation for injury to feelings in the case of *Vento v Chief Constable of West Yorkshire Police (No.2)* [2002] EWCA Civ 1871. In that case, the Court set bands within which they held that most tribunals should be able to place their awards for injury to feelings. Those bands have been amended through subsequent case law and more recently, in Presidential Guidance. The Guidance has been updated annually so that awards for injury to feelings in exceptional

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cases for the year beginning March 2020 could be over £45,000. In cases of the most serious kind, the injury to feelings award would normally lie between £27,000 – £45,000. In the middle band, in less serious cases, the award would be between £9,000 - £27,000; while for less serious cases such as for one-off acts of discrimination or otherwise, the award would be between £900 - £9,000.

6. In the case of *De Souza v Vinci Construction (UK) Ltd* [2017] IRLR 785 it was held that the general 10% rise in the level of damages mandated for common law claims for personal injury should also be to awards for injury to feelings. The above bands already take that rise into account.
7. Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The wrongdoer takes the risk that the wronged may be very much affected by an act of harassment because of their character and psychological temperament. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct. (*Essa v Laing* [2004] IRLR 313 and *Olayemi v Athena Medical Centre* [2016] ICR 1074, EAT).
8. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see *Vento* above).
9. In making an award for injury to feelings a tribunal needs to be aware of the leading cases in determining how much to award. Much will depend on the particular facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.
10. In *Alexander v Home Office* [1988] IRLR 190 CA, it was said that:

"Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or mind which may persist for months, in many cases for life."
11. The EAT in *AA Solicitors Limited Trading as AA solicitors and another v Majid* UAEAT/0217/15/JOJ stated that they did not consider that analogies drawn from personal injury awards applying the Judicial College Guidelines were

helpful when considering injury to feelings resulting from discrimination. They stated:

'in this jurisdiction, the governing authorities are Vento and the subsequent cases in which it has been updated and developed... [they] represent bespoke guidance tailored to this jurisdiction and this particular type of statutory tort, which is normally committed ... by the doing of deliberate rather than merely negligent acts.'

12. That court also said that *'while consistency is desirable, in future cases there is no need for employment tribunals to await guidance from the EAT or any other higher court, as far as adjusting the bands to take account of inflation is concerned. If there is cogent evidence before an employment tribunal of the rate of change in the value of money then a reasonable Tribunal acting on that evidence would be entitled without error of law to act on that evidence by adjusting the band ranges and any award of injury to feelings accordingly, as happens in personal injury cases....'*
13. The EAT in *Taylor v XLN Telecom Ltd* [2010] IRLR 49 held that the calculation of the remedy for discrimination is the same as in other torts, and that knowledge of the discriminator's motives was not necessary for recovery of injury to feelings. The EAT nevertheless observed that the distress and humiliation suffered by a claimant will generally be greater where the discrimination has been overt or the claimant appreciates at the time that the motivation was discrimination.
14. The following cases are taken from *Harvey on Industrial Relations and Employment Law* and provide some guidance to the Tribunal since neither party referred to much caselaw on which band of Vento they considered the injury to feelings award should fall.

Relevant cases of middle and higher band race discrimination cases.

15. In an old case of *Oluwole v North East Security and Investigation Services Ltd*, Newcastle-upon-Tyne Employment Tribunal, (Case No 2512468/05) (20 April 2006, *unreported*); the claimant was awarded the sum of £10,000 for injury to feelings and also given an award of £5,000 for aggravated damages. The facts can be summarised as follows: -
 - 15.1. The claimant, a security guard, was racially discriminated against from the time of his dismissal, on 29 September 2005, to the making of untruthful witness statements in January 2006. Serious and defamatory reasons for his dismissal were concocted, including that he had made expensive telephone calls to Nigeria and that he had accessed pornography. He was made the scapegoat for complaints by a client about the security services provided. He was denied access to his pay and lies were told about that.
16. In the case of *Olayemi v Aspers (Stratford City) Limited* (Case No 3200825/17) (27 June 2018, *unreported*), the claimant was awarded the sum of £10,000 for injury to feelings. The facts can be summarised as follows: -

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- 16.1. The claimant's dismissal from his post as a security guard in a casino was found to amount to direct race discrimination – his complaints that the extension of his probationary period and not being afforded access to a training course amounted to discrimination were dismissed. The claimant was said to have 'inevitably suffered a sense of injury to himself and his sense of wellbeing' as a result of the discrimination, and this affected his ability to sleep, and he suffered some headaches. His injury to feelings did not however impair his ability to look for work or take up work.
- 16.2. The ET found that the appropriate award was within the second Vento band, but at the lower end of that band and awarded £10,000.
17. See also the case of *Somers v Buckland Care Ltd t/a Consort Care* (Plymouth) (Case No 1701331/07) (29 July 2009, unreported) in which the claimant was awarded the sum of £11,000 for injury to feelings as well as aggravated damages of £5,000. The claimant, who was a care assistant with seven years' service was discriminated against in a disciplinary process for allegedly being asleep on duty, by being suspended unnecessarily for over four weeks, by the investigation being unfairly handled, by being given a final, rather than first, written warning and by only being allowed 24 hours to appeal rather than the contractual five days. She was also refused a week's paid holiday. She suffered long term and severe injury to feelings over two years beginning with incredulity that race could have been a motivating factor and ending with clinical depression. The tribunal held that on the basis of what happened and the effect on the claimant this was a middle band event.
- 17.1. The aggravated damages related to the respondent's successful efforts to prevent the claimant from gaining new employment. They had been responsible for the claimant losing two jobs in two years by their responses to reference requests.
18. We also considered the case of *Obikwu v British Refugee Council* (Bury St Edmunds) (Case No 1502553/06) (18 May 2009, unreported) in which the claimant was awarded the sum of £15,000 for injury to feelings. He was also compensated for personal injury caused by the respondents.
- 18.1. The respondent conducted a flawed and discriminatory redundancy selection process which resulted in racial discrimination against the claimant. The respondent's manager subconsciously tended to favour her ongoing small team of individuals with whom she had a good and friendly working relationship and a number of whom were excluded from the selection process. The claimant's sleep was affected, he had mood swings, his self-esteem and confidence were damaged and his relationship with his family affected. The effect on him was more acute because there was a total failure by the respondent to offer any form of apology to him at any time.
19. We considered the case of *Base Childrenswear Ltd v Otshudi* UKEAT/0267/18 (28 February 2019, unreported), in which the claimant was awarded £16,000 for injury to feelings; £3,000 for personal injury and £4,000 as aggravated damages.

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- 19.1. The claimant in that case worked for three months as a photographer for the respondent. She had invested time and money studying for, and developing, her career. Having obtained a job in her chosen vocation she justifiably expected to remain in her employment for the foreseeable future, with a reasonable prospect of a pay rise to reflect her hard work. The claimant was dismissed in a manner described by the tribunal as being 'out of the blue'. She challenged this and was given a patently false reason (redundancy) for why her employment was being terminated. When she sought to challenge this reason, she was subjected to a degree of managerial intimidation that she manifestly found upsetting. Shortly before the ET hearing, the respondent changed the nature of its case and argued essentially that the claimant had committed theft; it put this case to her in cross-examination. The claimant was depressed for a period of around three months. The respondent challenged the award of £24,000 by way of non-pecuniary losses which had been awarded.
- 19.2. In relation to the award of £16,000 injury to feelings for the act of dismissal, the EAT rejected an argument that any 'one off act' must fall within Vento band 1 and stated that *'the question is what effect the discriminatory act had on the claimant'*.
- 19.3. The EAT did accept that there was some overlap between the £5,000 the ET awarded by way of aggravated damages – given because of the employer's failure to offer any appeal or comply with its grievance procedure – and the 25% uplift to pecuniary losses it had awarded for non-compliance with ACAS procedures and therefore reduced this sum to £4,000.
20. In the case of *Mr Paul Bianca-Samou v Imperial College Healthcare NHS Trust* (Reading) (Case No 3313341/2019) (3 December 2021, unreported), the claimant was awarded £17,150 as injury to feelings. Mr Bianca-Samou, was directly discriminated against on the grounds of his race by the respondent's refusal to allow him to undertake a specialist portfolio (a professional qualification). After the liability hearing and some four years later than he would have done so but for the discrimination, BS was placed onto the specialist portfolio.
- 20.1. The refusal had left BS feeling *'rejected, betrayed and abandoned'* and *'ignored regardless of his efforts'*. He suffered with sleep difficulties, palpitations, chronic fatigue, migraines and loss of appetite. For periods of time following the discrimination, the claimant was unfit for work due to work-related stress, in receipt of anti-depressants, and dependent on the support of talking therapy and his GP.
- 20.2. For the purposes of the 'Vento Bands', the incident was not a *'one off act'* as the claimant had raised the question of a specialist portfolio a number of times and the respondent's refusal had persisted over two years.
- 20.3. The tribunal's award of £17,500 for injury to feelings was mid-way into the middle band of the *Vento* Guidelines, was determined by reason of the discrimination being more than a one-off act, taking account of any injury to health and following an assessment of proportionality – the tribunal reflecting that the award represented roughly six months' salary.

21. In another old case of *Davies v Department for Work and Pensions* (Liverpool) (Case No 2100847/2011) (31 July 2012, unreported), the claimant was awarded the sum of £18,000 for injury to feelings, aggravated damages of £10,000; compensation for personal injury and the tribunal made recommendations upon the claimant's request. The facts can be summarised as follows: -
 - 21.1. The claimant was the subject of race discrimination by association, harassment and victimisation. She received extremely unpleasant, depressing and upsetting notes from a racist colleague. That was bad enough, but the reaction of middle and senior management caused much of the damage. The way in which they dealt with her during 3 months at work and then a further 2 months when she was away from work ill with stress was inept and ensured that they lost a valued and valuable employee. The claimant's life had not been completely ruined, but the events did have an extremely serious effect upon her. The treatment fell squarely at the top of the middle *Vento* band or at the bottom of the highest band (as adjusted).
22. The last case we considered was *Ms S Khan v SN Estates Property Services Ltd* (London Central) (Case no 2207611/2017) (18 February 2019, unreported), in which she was awarded the sum of £27,000 for injury to feelings and aggravated damages of £10,000.
 - 22.1. The claimant succeeded in ten claims of race discrimination and harassment including many 'paki' comments about herself and her fiancé including that people of her race were 'stingy' and 'retards', a comment of 'paki bitch' (also held to be sex harassment) and constructive dismissal amounting to race discrimination.
 - 22.2. The tribunal concluded that this was not a case about sending jokes; it was offensive and insulting harassment directed at the claimant personally and towards members of her family and her fiancé. The second respondent did not direct his comments at the claimant in a joking manner, but in an aggressive and intimidatory manner. The discriminatory harassment was particularly serious, offensive, aggressive, threatening and intimidating. It merited an award at the lower end of the upper range, namely £27,000. In addition to that and the aggravated damages, the claimant was also compensated with damages for personal injury in the form of psychiatric injury.
23. Some of the cases we considered were ones in which the tribunals had awarded aggravated damages. The Claimant seeks such an award. The Tribunal were aware of the case of *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162. In order to award aggravated damages, the necessary aggravation can come from the way the case has been handled, the way it has been defended or even from oppressive conduct post-termination.
24. Aggravated damages must still be compensatory and not punitive in nature. They are an aspect of injury to feelings and tribunals should have regard to the total award made to ensure that the overall sum is properly compensatory and not excessive.

25. In the case of *HM Land Registry v McGlue* 2013 EqLR 701 the EAT upheld the Tribunal's decision on the injury to feelings award where the claimant felt bullied; but did not uphold the award of aggravated damages. The court discussed the circumstances in which aggravated damages can be awarded. The tribunal would consider the manner in which the wrong was committed. The distress caused by an act of discrimination may be made worse (a) by being done in an exceptionally upsetting way i.e. in a high-handed, malicious, insulting or oppressive way; then there is (b) by motive: conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress as long as the claimant is aware of the motive; lastly (c) by subsequent conduct: for example where a case is conducted in an unnecessarily offensive manner or a serious complaint is not taken seriously or there has been a failure to apologise.
26. Other cases refer to aggravated damages being appropriate where there was evidence in the hearing that an employer has treated/rewarded the perpetrator of discrimination, for example promoting him before knowing the result of an inquiry into his conduct. In *HM Prison Service v Salmon* [2001] IRLR 425 aggravated damages were awarded and the EAT held that this was appropriate in circumstances where the employer had treated a complaint about harassment in a trivial way.
27. A tribunal has the power to award interest on awards made in discrimination cases both in respect of pecuniary and non-pecuniary losses. We refer to the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations* 1996. We must consider whether to award interest, without the need for any application by either party in the proceedings. The interest is calculated as simple interest which accrues daily. Since 1993 the rate has been 8%. For past pecuniary losses interest is awarded from the half-way point between the date of the discriminatory act and the date of calculation (Regulations 4 and 6(b)). For non-pecuniary losses interest is calculated across the entire period from the act complained of to the date of calculation (Regulations 4 and 6(a)). The tribunal retains discretion to make no award of interest if it deems that a serious injustice would be caused if it were to be awarded but in such a case it would need to set out its reasons for not doing so.

Decision

28. We drew the following conclusions from the evidence we heard today and had in mind the findings that we made in the liability hearing.
29. The Tribunal was mindful that it can only award the Claimant compensation for these aspects of the claim where he succeeded in proving race discrimination. The Claimant succeeded in allegations 2, 3, 8 10 and 13. They were also successful as acts of harassment. The Claimant succeeded in his complaint of victimisation. Firstly, that he had been victimised by Ms Gomes when she treated him in way described in allegation 12 on page 41 of the bundle (see paragraph 209 of the liability judgment), because of his grievance, and secondly, he succeeded in allegation 10 on page 41 of the bundle, which was another allegation of victimisation (see paragraph 216 of the liability judgment).

30. Acts of harassment are acts that create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
31. It is significant to us that these acts of discrimination, harassment and victimisation all happened at work and that they were done by the Claimant's line manager who was also the fitness manager for the gym. Acts of victimisation are deliberate acts of discrimination aimed at deterring someone from complaining about their treatment or to punish them for doing so. This is particularly worrying when done by a manager and had a detrimental effect on the Claimant.
32. The period of time concerned was August to October 2020. The last incident was in October when Ms Gomes followed the Claimant and his colleague, Ade around the gym when she had not done the same to any other instructor.
33. In relation to the customer complaint in September 2020, it was our judgment that Ms Gomes' part of the incident was that she spoke to the Claimant about it in the reception area, which we found to have been less favourable treatment and inappropriate. However, it was also our judgment that this was not race discrimination. Ms Gomes was in the habit of having serious conversations with members of staff, about performance and customer complaints, in the reception area. This was a public area which did not give members of staff any privacy. It was our judgment that it was not an act of race discrimination and therefore, we will not be compensating the Claimant for his hurt feelings arising from that particular incident.
34. We are therefore looking at awarding the Claimant injury to feelings for a period of approximately three months. The treatment from Ms Gomes could be considered to be a campaign against the Claimant. From the beginning of their working relationship Ms Gomes treated the Claimant in a discriminatory fashion.
35. The discrimination occurred in a public place, in the gym and she used language which we considered to be particularly humiliating. We refer to the racial slur which we judged that she used to refer to him. It was not suggested to us that this was a joke or that she could offer an alternative explanation for the words used. It is our judgment that what she said included the phrase '*Vai Para Africa Blackie*'. This was rude, humiliating, insensitive, insulting and discriminatory towards the Claimant. This treatment was not due to anything that he had done or said and was unrelated to his performance. It was totally unwarranted.

What was the effect of this treatment on the Claimant? (see *Base Childrenswear Ltd v Otshudi* above)

36. The Claimant loved his job. He went off sick for the first time after the Respondent received the customer complaint. It was significant that he referred to this as the '*last straw*'. Clearly, he did not use that phrase in the legal sense but in the sense that it was the last in a series of incidents that made him feel unable to come to work. It is our judgment there had been many things leading up to his ill-health at that point. Allegations 2, 3, 8 and 10 had all occurred before the customer complaint and we judge that they all contributed to the Claimant going off sick at that time.

37. The Claimant was a celebrity fitness trainer in his spare time as well as a coach for the Respondent. He also did (PT) personal training for clients at the Respondent's gym under a commission-sharing arrangement with the Respondent. The discrimination he faced from his manager had a devastating effect on him. He experienced stress and anxiety. We find it likely that he experienced low mood and depression although possibly not in the clinical sense of the word.
38. As an athlete, the Claimant chose not to take the medication offered to him by his GP for his mental health and instead to take the GP's alternative advice which was to try talking therapies. His partner also encouraged him to see someone. The Claimant had counselling from Bradley Mace, who was recommended to him by the GP. Mr Mace is a qualified psychotherapist. Mr Mace's report confirmed that he saw the Claimant over 24 weeks from 25 September 2020. In his report, Mr Mace stated that the Claimant first approached the clinic suffering from stress, anxiety and mental health problems relating to issues within his workplace. The root cause analysis discovered that the main issue for the Claimant was the detrimental comments made to the Claimant at work. Mr Mace confirmed that those had a profound effect on the Claimant's overall mental wellbeing, which had an impact on his physical wellbeing and therefore on his quality of life.
39. The Claimant's partner, Kate Mills provided an unsworn statement to the Tribunal. They have two children together. Ms Mills described a dramatic change in the Claimant's moods after he started working with Ms Gomes so that his upbeat personality was replaced by a snappy, sensitive person with no energy or desire to engage in their social lifestyle. The Claimant became increasingly anxious and withdrawn, suffered from panic attacks and lack of sleep. The Claimant began having night sweats to the extent that sheets needed to be changed during the night and his preference was to stay at home with the curtains drawn. Ms Mills stated that in 2020, she and the Claimant separated for a short period of time as a direct result of the treatment that he received at work, as she was finding it difficult to be around his negativity and constant low mood.
40. She stated that the Claimant told her that he had complained at work about bullying and harassment from his line manager and that nothing had been done about it. *'He felt penalised bringing these complaints to the company which added further stress and uncertainty at work'*.
41. The Claimant told us, and Ms Mills confirmed in her statement, that the treatment he experienced at the Respondent affected him to the extent that he stopped taking on any media or TV based work for some time, because in order to do that work, he is required to be outgoing and larger than life. His confidence and sense of self-worth has been eroded. Today, the Claimant confirmed that he has not been doing any media content since the acts of discrimination that he experienced at work.
42. The Claimant confirmed that he returned to work while he was having counselling and before the grievance was concluded as he had no choice. He had also been told that Mr Minns had backed him in the business' response to the customer complaint. It is likely the Claimant felt reassured by that. However, it did not address his issues with Ms Gomes and her discriminatory treatment of him but as he had dependants at home, he felt

that he needed to work. He also had personal training clients whom he felt obliged to.

43. The Claimant continues to work on a self-employed basis with individual clients while he looks for employment. He has an association with Virgin Active gyms but is not employed by them. His DBS check has only just come through and he hopes to be engaged by them as a trainer but that has not been confirmed and at present, he is not in receipt of a wage from Virgin Active. He is helping to build a business. The Claimant told us that he was no longer sure if this was the correct career path for him and he found himself questioning this.

Pecuniary losses claimed

44. When the Claimant was off sick, following the customer complaint as referred to above, between 2 September 2020 – 21 October 2020, he was only paid SSP.
45. The Claimant therefore lost 7 weeks wages - £1,2699.76 + £952.32 = £2,222.08.
46. The Claimant also claimed commission for the month of September as he submitted that it was usually a busy month for personal training as when children return to school at the end of the summer, parents have more time to return to the gym. The Claimant had been told by one of the senior managers that there had been people asking for him at the gym, while he was off sick. He believed that he missed out on commission during that time. Although he contacted some of those people on his return from sick leave, some had already made agreements with other trainers.
47. The Respondent disputed that the Claimant had lost the chance of earning commission. It also submitted that it was not the grievance nor Ms Gomes that caused the Claimant to be off sick.
48. The Claimant claimed £1,800 in lost commission. He also claimed a loss of £170 gross pension payment for the same period – 2/9/20 – 21/10/20.
49. The Claimant claims for the costs of counselling with Mr Mace, which for 24 sessions cost 24 x £60 = £1,440. The Claimant submitted that he only stopped the counselling because of a lack of funds.
50. The Claimant sought legal advice about his employment situation and about the claim. We had copy invoices from three firms of solicitors, totalling £1,080. The Respondent opposed the Claimant's claim for reimbursement of legal fees as they submitted that the threshold set out in Employment Tribunals Rules 2013, rule 76(1) had not been met. The Respondent submitted that it had to defend the case.

Judgment

51. It is our judgment that the Claimant suffered injury to feelings, humiliation, stress, anxiety and depression as a result of the treatment covered in the successful allegations which occurred between August and October 2020.

52. Although it was the Claimant's choice to refuse medication and to instead, take up counselling to address the effect of the Respondent's treatment on his mental health; this was understandable, given his profession as a health advocate. This does not reduce the seriousness of the treatment that we judged he had been subjected to.
53. The Tribunal takes into account that the Respondent dealt appropriately with the grievance. The grievance was not upheld and the Respondent did not arrange for him to get the apology that he was seeking, which may have resolved matters but the procedure followed in addressing the grievance was appropriate.
54. The Claimant loved his job and only went off sick after the customer complaint. In our judgment, there had been many things leading up to that point and we refer again to allegations 2, 3, 8 and 10, which had all occurred before the customer complaint. It is our judgment that they contributed to the Claimant going off sick.
55. We considered the *Vento* bands and decided that the Claimant's treatment warranted an award in the middle band. We considered that this was not a one-off act and noted that it was discrimination done by the Claimant's line manager and included a racial slur which she made in his presence.
56. The serious and devastating effect of a racial slur on the sum awarded for injury to feelings can be seen in the case report above of *Ms S Khan v SN Estates Property Ltd*, which was a 2019 case. The Claimant was awarded £27,000 for injury to feelings and £10,000 for aggravated damages. At the time, the award was in the lower end of the upper *Vento* band.
57. In *Obikwu v British Refugee Council*, which was a 2009 case, the claimant was awarded £15,000 for injury to feelings. The effects of the discrimination on that claimant were similar to the ways in which the discrimination affected the Claimant in this case. At the time, this was in the upper band of *Vento*.
58. In the case of *Base Childrens Wear Ltd v Otshudi*, another 2019 case, the claimant was awarded £16,000 for injury to feelings and £4,000 as aggravated damages and £3,000 for personal injury, in a case with a shorter period of employment but a similar time span of the discriminatory conduct, with similar effects of the claimant's mental health and wellbeing as Mr Baah. The original award for injury to feelings was reduced but again we are aware that this was 4 years ago and that the *Vento* bands have since been adjusted further.
59. We also considered all the cases referred to above. We determined that the award for injury to feelings in this case – for less favourable treatment, harassment and victimisation - should fall within the middle band and that it should be at the higher end of that band. We say so because of the significant impact the treatment had on the Claimant, on his mental health, on his livelihood – both as a celebrity trainer and in terms of his absence from work in September 2020 - and on his family life. His relationship with his partner also suffered.
60. Taking into account all the above, it is this Tribunal's judgment to award the Claimant the sum of **£24,000** as injury to feelings. We do not award the

Claimant a separate sum for aggravated damages but take the aggravating features – such as the fact that the discrimination was done by his line manager – into account when deciding the size of the award. We do not award the Claimant separate amounts for personal injury/mental health as we considered that we took into account the contents of Mr Mace's report, the Claimant's evidence and the evidence of his partner, Kate Mills in her statement, in setting the level of the injury to feelings award at the top end of the middle band of *Vento*.

Pecuniary losses awarded

61. It is our judgment that the Claimant should be compensated for the loss of earnings over the period of time that he was off sick. The Tribunal's judgment is that the acts of discrimination and harassment referred to as numbers 2, 3, 8 and 10 had already occurred at the time that of the customer complaint and that they all contributed to the Claimant feeling that he could not face going to work on 2 September 2020. The Claimant felt unable to return to work until 21 October. In this Tribunal's judgment, it is difficult to separate out the hurt feelings and the upset the Claimant felt about the prospect of going to work because of the discriminatory incidents with Ms Gomes; from the shame and worry he was also experiencing because of the Facebook post and being confronted at reception about the customer complaint. The last two did not happen because of his race. It is likely that had the discrimination not occurred (as found in relation to allegations 2, 3, 8 and 10), the Claimant would have been upset about the Facebook post and being confronted at reception but continued to work. The Claimant is therefore awarded the sum of **£2,222.08** as lost earnings for that period. He is also awarded the loss of gross pension payments for the same period of **£170**.
62. It is our judgment that the Claimant should be compensated for the fees that he paid for counselling. The Claimant had been affected mentally and emotionally by his treatment by the Respondent. This occurred over a three-month period and has had a devastating effect on the Claimant's confidence and his ability to do his job. His career as a celebrity trainer has effectively been suspended and he is questioning whether this is the right career for him. It has also affected his family life.
63. For those reasons, it is our judgment, to award the Claimant reimbursement of the fees he paid for counselling from Mr Mace. The Claimant is awarded the sum of **£1,440**.
64. In relation to the claim for lost commission, it is difficult for the Claimant to provide evidence of lost commission as he would need to speak to the people who were going to book him as their personal trainer and get each one to give a statement attesting to the fact that they would have signed up with him in September/October 2020, had he been at work. We did not have that evidence.
65. The payslips we had today showed that the Claimant earned commission in January and February 2020. No commission was earned between March, when the coronavirus lockdown was announced up to August 2020. In August 2020, no commission was paid as it is likely that no commission was earned.

66. The country went back into a coronavirus lockdown at the end of 2020 and the payslips we had in the bundle show that the Claimant was paid furlough pay in November, December 2020, January, February, March and April 2021. There was no commission paid to the claimant in June and July 2021, but the large sum paid in August 2021 would suggest that it was an amalgam of the entitlement to commission for those months. The commission payment in August 2021 of £2,227.41 was high and might represent the total commission due to the Claimant that summer.
67. We therefore concluded that the Claimant earned commission at every month when he was working, apart from when in lockdown or on furlough. It is likely that the Claimant would have earned commission during the time that he was off sick, had he been working. It is our judgment that the treatment from Ms Gomes up to September, the Facebook post and the discussion about the customer complaint in the reception area were all reasons why he went off sick and lost commission. He returned to work because he knew that Mr Minns had backed him in addressing the customer complaint, because of his finances and because he felt a duty towards his clients. It is therefore our judgment that the Claimant is entitled to part of his claim for commission related to the period 2 September – 21 October 2020. We took into account the average amount that he usually earned as commission in a month with no lockdown and no furlough. We also discounted for the fact that the discrimination he had suffered leading up to this was not the sole reason why he went off sick. The Tribunal estimated that the approximate sum of commission lost over the period of 7 weeks due to race discrimination was **£660** and we award the Claimant this sum as lost commission.
68. We did not award the Claimant reimbursement of his legal fees as we did not have any submissions that the Respondent conducted the claim in accordance with the requirements of rule 76 of the Employment Tribunals Rules of Procedure 2013. It was also not submitted to us that the Respondent's case had no reasonable prospects of success. It is our judgment that as this was a discrimination complaint dependent on the inferences to be drawn from findings of fact, the Tribunal needed to hear the evidence before it could decide the issue of liability. It could not be said that the Respondent should have known that it had no reasonable prospects of success, especially on the allegations where the claimant failed.

Calculations

69. The total sums due to the Claimant before the calculation of interest is as follows:

Non-pecuniary losses: -

-injury to feelings - £24,000

Pecuniary losses of: -

-loss of earnings - £2,222.08

-pension loss - £170.00

-Commission - £660.00

-Counselling fees - £1,440.00

Total = £4,492.08

70. The Tribunal awards the Claimant interest on his remedy in accordance with the *Employment Tribunals (interest on Awards in Discrimination Cases) Regulations* 1996 as set out above.
71. The period covered by the injury to feelings award is from first act of discrimination, 7 August 2020 to 31 March 2023 = 967 days. The interest is calculated for the whole period at the rate of 8%. The calculation is therefore as follows: $£24,000 \times 0.08/365 \times 967 = £5,086.68$. This figure is slightly different from the figure we gave the parties at the hearing on 31 March in the oral judgment as at the time we started the calculation from 4 August whereas it is correct that the first allegation we decided was well founded was dated 7 August. That is the reason for the variation in the final sum.
72. The period covered by the pecuniary award is calculated from the mid-point between 7 August 2020 and 31 March 2023. Midpoint between those dates is 483.5 days. The calculation is as follows: $£4,492.08 \times 0.08/365 \times 483.5 = £476.03$.
73. The total award due to the Claimant is as follows:

Injury to feelings -	24,000.00
Interest -	5,086.68
Pecuniary losses -	4,492.08
Interest -	<u>476.03</u>
Total =	£34,054.79

74. The Respondent is ordered to pay the Claimant the sum of £34,054.79 as his remedy for his successful complaint of race discrimination and harassment.

Employment Judge JONES
Date: 8 May 2023