



EMPLOYMENT TRIBUNALS

Claimants: (2) Mr W Butt (3200811/2021)
(3) Miss A Fountain (1401186/2021)

Respondent: Elevate Staffing Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton **On:** 4 May 2023 (Remedy)

Before: Employment Judge Gray **And Members:** Mrs C Date
Mr J Shah MBE

Appearances

For the Claimants: All in person
For the Respondent: Mr Piddington (Counsel)

RESERVED JUDGMENT (REMEDY ONLY)

The unanimous judgment of the tribunal is that:

- In respect of the Second Claimant's complaint of direct race discrimination as to matters on the 9 December 2020 we award compensation of £4,768, made up of £4,000 injury to feelings and £768 in respect of interest (877 days (the date of this decision) = 2.4 years, so £4,000 x 8% x 2.4 = £768).
- In respect of the Third Claimant's complaint of direct sex discrimination as to matters on the 9 December 2020 we award compensation of £5,960, made up of £5,000 injury to feelings and £960 in respect of interest (877 days (the date of this decision) = 2.4 years, so £5,000 x 8% x 2.4 = £960).

Pursuant to Rule 66(a) of the Employment Tribunals Rules of Procedure the time for compliance for the Respondent to pay these awards to the Claimants is within 14 days of the determination of any costs application made against these Claimants by the Respondent (or within 14 days from the expiry of the time within which such an application can be made pursuant to Rule 77).

REASONS

1. This hearing was to determine matters of remedy in these claims. It was listed for one day and evidence and submissions concluded just after 15:30 so it was necessary to reserve our decision.
2. Following a hearing on the 22 to 28 November 2022, liability was determined, and reserved Judgment was sent to the parties on the 15 December 2022.
3. When the Judgment was sent to the parties the Tribunal confirmed:

“As the following complaints have succeeded:

- The Second Claimant’s complaint of direct race discrimination as to matters on the 9 December 2020; and
- The Third Claimant’s complaint of direct sex discrimination in respect of matters on the 9 December 2020.

Matters of remedy remain to be determined.

It is proposed that the matter be listed for a three hour remedy hearing, where the parties (the Second and Third Claimants, and the Respondent) attend by video. From the judgment reached it appears to the Panel that the focus of the remedy hearing will be on injury to feelings and potentially the lower band of Vento. The attending parties are to provide dates to avoid for listing purposes by return please and confirm if they consider three hours by video to be sufficient and their suggested case management directions for the presentation of evidence relevant to remedy, if further directions are required.”

4. After dates to avoid were submitted by the parties this matter was then listed for this one-day remedy hearing in person. The parties did not suggest any further case management directions for this hearing. This is understandable as the hearing commencing on the 22 November 2022 was to determine matters of liability and remedy, so these matters were addressed by the parties in their witness statements and the documents presented in the hearing bundle.
5. For reference at this hearing the Respondent provided further copies of the original hearing bundle and of the Second and Third Claimant’s witness statements. Also, Respondent’s Counsel provided a written remedy submission.
6. The parties were reminded of the Tribunal’s indication and the hearing was then adjourned so that all could read the submissions of Respondent’s Counsel.
7. It was noted that the Second Claimant’s schedule of loss was at page 171 of the bundle and sought loss of earnings and injury to feelings in the middle band of Vento. The Third Claimant’s was at page 133 and she sought the same. These

Case Numbers: 3200811/2021 and 1401186/2021

schedules of loss were presented when the Claimants sought remedy on all matters. We would therefore expect what is now being sought in remedy to reflect the liability Judgment made.

8. The Claimants were then asked to make their submissions on what they were seeking in remedy.
9. The Third Claimant confirmed she was seeking £8,000 for injury to feelings and that she also considered that aggravated damages were relevant.
10. The Second Claimant confirmed he was seeking at least £9,000 for injury to feelings but would expect the middle band of Vento and that he wanted the Respondent to be punished (potentially with a fine).
11. Respondent's Counsel then responded to these submissions with reference to his written submissions. In short, he highlighted the lack of evidence specific to matters on the 9 December 2020, and that it would be appropriate to consider exercising our discretion to make no award. He highlighted that complaints for personal injury and aggravated damages were not apparent from the claims and there wasn't an evidential basis to find such matters. If we were minded to make an award, he suggested, based on the case authorities he referenced in his submissions, that the Second Claimant would be £900 to £1,000 and the Third Claimant would be £1,000 to £1,500. He also confirmed that the interest calculation would relate to 876 days from the act to this hearing, and the rate of 8% per annum. He also sought that if judgment is made in favour of the Claimant's that its enforcement be stayed or delayed (pursuant to rule 66) pending determination of a costs application the Respondent was anticipating making.
12. Both Claimants requested permission to respond to those submissions which was permitted. From that the Second Claimant referred to the comments having happened before and also being signed unfit for work after he had lost his job.
13. The Third Claimant referred us to page 38 of her supplemental bundle which had been admitted at the commencement of the original hearing. This was a medical note dated 22 January 2021 and a photo or an anti—depressant medication.
14. The Third Claimant also explained that she had medical notes that supported her remedy claim in respect of matters on the 9 December 2022. She explained that these had been disclosed but had not been included in the final hearing bundle.
15. The hearing was adjourned to allow for the Third Claimant to locate these. Copies were then provided to the panel and parties.
16. On the resumption of the hearing, it was confirmed that in view of the Claimants submitting further evidence as part of their submissions specific to the matters on the 9 December 2020, and the further medical notes now produced by the

Third Claimant, which we had reviewed, it was appropriate to have them confirm that evidence under oath and give the Respondent the opportunity to cross examine about it.

17. Respondent's Counsel confirmed that his instructions were that the Third Claimant's medical notes had not been previously disclosed. However, as they had already been circulated and considered, although he would have objected to their inclusion, a pragmatic view was taken where they could now be addressed through cross examination.
18. Both Claimant's then confirmed their evidence under oath, were cross examined, asked panel questions, and invited to clarify any answers given by way of re-examination.

RELEVANT FACTS AS TO REMEDY

19. It is helpful first to set out here a reminder of our decision in respect of the complaints we are considering remedy about.

20. The Second Claimant

21. We accepted the Second Claimant's evidence about what happened to him on the 9 December 2020 in particular what he set out in paragraph 13 of his witness statement ... "kept calling me "liar" and "sexist" and phrases like "I know you people" or "I've deal with people like you", which were quite racist and shown her prejudice, her biased (women to women or/and British to British) was very visible towards AF."
22. There was also a contemporaneous articulation of the Second Claimant's concern in his email to Mr Stoodly on the 10 December 2020 which notes ... "I would like to mention just like the last time I found Regional Manager Tara biased, taking words of the other party more truthfully than mine, not giving me enough time to explain myself, one of the reasons I had to record my concerns with you." (page 260).
23. We found that the Second Claimant had presented sufficient material from which we "could conclude" that, on the balance of probabilities, the Respondent had committed an act of race discrimination on the 9 December 2020.
24. In respect of the concerns over racist conduct towards the Second Claimant, him not being believed by Ms Stephens and being told that because of his race, we accept what the Second Claimant has told us in evidence about this matter and this would therefore be less favourable treatment as he asserts. There is sufficient in our view from the racial connection to the comments "I know you people" and "I've deal with people like you", and how Ms Stephens is perceived by others to move the burden of proof to the Respondent.
25. The Respondent did not prove on the balance of probability that such conduct was absolutely nothing to do with the Second Claimant's race.

26. The Third Claimant

27. We found that it was proven on the balance of probability that there was a verbal exchange between the Second Claimant, Third Claimant and Tia in the morning of the 9 December 2020 and we accepted what the Third Claimant's email records ... "... whilst shouting derogatory comments to intimidate Tia; 'Basic Bitch' 'Ugly' 'Greedy' 'Unthankful' Told to 'get ourselves in line' Coupled with other personal comments about appearance, make up and stature ie what have we achieved in life". Also, ... "wouldn't move out the door way when politely asked despite knowing the covid rule of 2 per cabin".
28. Further, we accepted the contemporaneous account as contained in Ms Stephens email that the Second Claimant shouted at the Third Claimant ... "you're going to be sacked you will have to go back to your stripping job as that's all you're good for".
29. We found that the matters proven on the balance of probability to have occurred on the 9 December 2020 were abusive and demeaning verbal references on the grounds of sex by the Second Claimant towards Tia and the Third Claimant. This is less favourable treatment when compared to a hypothetical male comparator as we accepted that such comments would not be made to a man, and we were not presented evidence by the Respondent to show that they would be. This was also in our view connected to work as it arises initially from a disagreement over travel to and from work, aired in the workplace during the working day, and addressed by managers at the Respondent. Then, the Second Claimant making the comment to the Third Claimant of her having to go back to a stripping job, on the basis she was going to be sacked, him having raised concerns about her, perceiving he was being accused of being sexist.

30. This hearing

31. Then from the evidence presented at this hearing the further following facts were found on the balance of probability:
32. For the Second Claimant that he was signed off work in January 2021 by a fit note as he was unfit when he lost his job.
33. By reference to paragraph 4 of his original witness statement he conveyed that it was significant to him and how he felt that the type of comment we found TS had made to the Claimant on the 9 December 2020 were not new.
34. With reference to an email, he sent in the early hours of the morning on the 10 December 2020 (pages 259 to 260) he accepted from the way it is written that it appears to show his focus was on the actions of the Third Claimant rather than TS, which is referenced at the end of the email.

Case Numbers: 3200811/2021 and 1401186/2021

35. The Claimant maintained that he did not discriminate against the Third Claimant. We note here that this was a matter we have already found facts about in our Reserved Judgment on liability (as also referenced above).
36. The Third Claimant's NHS note dated 22 January 2021 (at page 38 of the supplemental bundle), notes the Claimant having "Depression NOS", that she is feeling low again and had stopped taking anti-depressants over 6 months ago. It refers to a few weeks ago that she lost her job and wants to start mirtazapine. In cross examination the Claimant acknowledged she had previously been on anti-depressants, and we note that this would be before the matters complained about in her claim.
37. Considering the medical notes submitted at this hearing dated from 28 May 2021 to 15 July 2021, that were produced as a printout on the 2 March 2022 (see base of the page).
38. On the 28 May 2021 it notes the Third Claimant saying at the beginning of the call ... "... that she was in a bad place – the thoughts come and go but she is looking for help and feeling low about sexism issues she faced at work. Not accessed formal support before but is using antidepressants.". From the entry on the 15 July 2021, it notes the referral from Talking Change reports the Third Claimant having disclosed suicidal ideation. It records her feeling that way since an incident with a colleague who was discriminatory towards her at work in December. It also records a number of other factors affecting the Third Claimant including feeling guilty about the First Claimant losing his job. Also, that she worries about finding future work and her future reputation in the events industry. Further, it records that the old employer [the Respondent] is reluctant to accept responsibility for any actions preferring to encourage the view that she is the issue.
39. In cross examination the Third Claimant acknowledged that she did not seek GP assistance from the 9 December 2020 to the 20 December 2020 (the date she is removed from the campaign). She confirmed that on the 9 December 2020 she had faith that her employer would deal with it. She says it was their negligence that then compounded it.
40. We do not find facts from the evidence presented to us (both from the hearing in November and this hearing) to support a discrete personal injury award (as to injury and causation) nor a discrete aggravated damages award, specific to matters found on the 9 December 2020, even if it were apparent that such aspects of remedy were originally claimed.

THE LAW

41. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In

Case Numbers: 3200811/2021 and 1401186/2021

addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.

42. In respect of claims presented on or after 6 April 2020 and before 6 April 2021, the Vento bands are as follows (based on the Presidential Guidance Third Addendum dated 27 March 2020): a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.
43. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations").
 - 43.1 Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day.
 - 43.2 Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation.
 - 43.3 All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation.
 - 43.4 Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.
44. We were assisted by a summary of the law as contained in the written submissions of Respondent's Counsel and from that note the following:
45. The Tribunal are reminded that any award of remedy is discretionary, and a finding of discrimination does not automatically mean that an award of compensation must be made. Determination as to whether to make an award must be considered on the facts of the individual cases.
46. If the Tribunal decide to exercise their discretion to make an award, s. 124(6) and s. 119(2) EqA 2010 confirm that determination of the award ought to follow tortious principles. Of particular relevance to the determination in this case is the causation of any purported losses; the Claimants must satisfy the tribunal that they would not have sustained the alleged loss 'but for the discrimination.
47. The explanation as to the applicable bands in **Vento v Chief Constable of West Yorkshire Police /2002] EWCA Civ 1871** is:

Case Numbers: 3200811/2021 and 1401186/2021

[65] Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

[66] There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

[67] The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

[68] Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

THE DECISION

48. Having made the findings of fact as set out above and considered the relevant law as summarised above, we now confirm our unanimous decision as follows:
49. In respect of the Second Claimant's complaint of direct race discrimination as to matters on the 9 December 2020 we award compensation of £4,768, made up of £4,000 injury to feelings and £768 in respect of interest (877 days (the date of this decision) = 2.4 years, so £4,000 x 8% x 2.4 = £768).
50. The reasons for this are we found that in respect of the conduct towards the Second Claimant, him not being believed by Ms Stephens and being told that because of his race, on the 9 December 2020 (in particular what he set out in paragraph 13 of his witness statement ... "kept calling me "liar" and "sexist" and phrases like "I know you people" or "I've deal with people like you"), that this was less favourable treatment on the grounds of race.

Case Numbers: 3200811/2021 and 1401186/2021

51. We accept that this was not the first time such comments were made, and the Second Claimant does raise issues about Ms Stephens, including within the email on the 10 December 2020 (page 260).
52. We accept that the Second Claimant's feelings were injured by the act of discrimination we found, albeit that it is only a part of the matters he complains about, him linking his health issues to his loss of job, and still not accepting the findings against him by the Respondent and this Tribunal as to his conduct against the Third Respondent.
53. With reference to the Vento bands, we consider the amount of £4,000 in injury to feelings to be fair, reasonable and just compensation in the particular circumstances of this case.
54. In respect of the Third Claimant's complaint of direct sex discrimination as to matters on the 9 December 2020 we award compensation of £5,960, made up of £5,000 injury to feelings and £960 in respect of interest (877 days (the date of this decision) = 2.4 years, so $£5,000 \times 8\% \times 2.4 = £960$).
55. The reasons for this are we found that in respect of the conduct towards the Third Claimant, that there was a verbal exchange between the Second Claimant, Third Claimant and Tia in the morning of the 9 December 2020 and we accepted what the Third Claimant's email records ... "... whilst shouting derogatory comments to intimidate Tia; 'Basic Bitch' 'Ugly' 'Greedy' 'Unthankful' Told to 'get ourselves in line' Coupled with other personal comments about appearance, make up and stature ie what have we achieved in life". Also, ... "wouldn't move out the door way when politely asked despite knowing the covid rule of 2 per cabin". Further, that the Second Claimant shouted at the Third Claimant ... "you're going to be sacked you will have to go back to your stripping job as that's all you're good for". We found that these things were abusive and demeaning verbal references on the grounds of sex by the Second Claimant towards Tia and the Third Claimant.
56. We accept that the Third Claimant's feelings were injured by the act of discrimination we found, albeit that it is only a part of the matters she complains about. The Third Claimant does evidence seeking medical assistance in May/July 2021 when reflecting on the comments in December 2020, but as is clear from the more contemporaneous medical note dated 22 January 2021, the loss of job plays a part. Also, assistance was not sought after the incident on the 9 December 2020, the Claimant confirming she had faith that her employer would deal with it. She says it was their negligence that then compounded it.
57. With reference to the Vento bands, we consider the amount of £5,000 in injury to feelings to be fair, reasonable and just compensation in the particular circumstances of this case.

Case Numbers: 3200811/2021 and 1401186/2021

58. In respect of both Claimants, we do not find facts from the evidence presented to us (both from the hearing in November 2022 and this hearing) to support a discrete personal injury award (as to injury and causation) nor a discrete aggravated damages award, specific to matters found on the 9 December 2020, even if it were apparent that such aspects of remedy were originally claimed.
59. Pursuant to Rule 66(a) of the Employment Tribunals Rules of Procedure the time for compliance for the Respondent to pay these awards to the Claimants is directed to be within 14 days of the determination of any costs application made against these Claimants by the Respondent (or within 14 days from the expiry of the time within which such an application can be made pursuant to Rule 77).
60. This is done because of the following reasons: the Respondent has indicated it will be seeking costs against all three Claimants and a deposit order was made against the Second Claimant in respect of part of his claim (in which he was unsuccessful). The Second Claimant indicated at this hearing that he intended to seek a preparation of time order against the Respondent. Finally, there is a deposit order against the Respondent in respect of part of the Third Claimant's claim (in which she was successful).

Employment Judge Gray
Date: 5th May 2022

SENT TO THE PARTIES ON
19th May 2023 by Miss J Hopes

FOR THE TRIBUNAL OFFICE