



EMPLOYMENT TRIBUNALS

Claimant: Miss Zarah Kamaly
Respondent: London Borough of Tower Hamlets
Heard at: East London Hearing Centre
On: 1 June 2023
Before: Employment Judge Barrett
Members: Mrs W Blake Ranken
Mr D Ross

Representation

Claimant: Represented herself with assistance from Mr Wahid Zaman
Respondent: Mr Benjamin Uduje of counsel

JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent shall pay the Claimant the sum of £20,268, comprising:
 - a. £15,000 in respect of injury to feelings including exacerbation of psychiatric illness;
 - b. An uplift of 10% in respect of a failure to comply with the ACAS Code of Practice on grievance procedures, amounting to £1,500; and
 - c. £3,768 in interest at a rate of 8% from 25 July 2019 to 1 June 2023.

REASONS

Introduction

1. By a judgment sent to the parties on 16 December 2022, the Claimant succeeded in part in her claim for victimisation. The Tribunal concluded that the Respondent had victimised the Claimant in two respects, namely by:

- 1.1. Failing to reach a conclusion on the Claimant's grievance as to whether the Claimant had been discriminated against; and
- 1.2. Failing to implement a formal process when responding to the Claimant's grievance.

The remedy hearing

2. The remedy hearing took place over 3 hours in person at the East London Employment Tribunal. The Claimant was assisted by her partner Mr Wahid Zaman. The Respondent was represented by Mr Benjamin Uduje of counsel.
3. The Tribunal was provided with a 3-page remedy statement from the Claimant and enclosures numbering 26 pages. The Claimant was cross-examined on her statement by Mr Uduje.
4. The parties agreed that a schedule of loss included in the liability bundle had been superseded by a judgment made following a preliminary hearing on 8 September 2022 striking out the Claimant's maternity and sex discrimination claims for time limit reasons, as well as the findings in the liability judgment.
5. The parties made helpful submissions on remedy.
 - 5.1. Mr Uduje suggested in respect of injury to feelings that the appropriate Vento award would be in the region of £8,000 to £10,000. He submitted that there was no evidence to support an additional award for psychiatric damage. He further submitted that there had been no unreasonable failure to comply with the ACAS Code of Practice on grievance procedures, but alternatively it would be proportionate to make only a minimal award in that respect.
 - 5.2. Mr Zaman submitted on behalf of the Claimant that an upper middle band Vento award would be appropriate and relied on the Claimant's medical documentation to support an additional award for psychiatric damage. He said he could not speak to the legislation on ACAS uplifts but reminded us of some of the deficiencies in the grievance process which we heard evidence on at the liability stage.
6. The parties agreed that there were no financial losses. The Claimant remains employed by the Respondent.

Relevant dates

7. The claim was presented on 19 November 2019. The complaint of victimisation (the sole complaint that proceeded to the liability hearing), concerned a grievance which the Claimant had lodged with her employer on 11 June 2019. The Respondent provided the Claimant with a draft grievance outcome letter on 25 July 2019 and a final outcome letter on 11 September 2020. There was no right of appeal afforded in the draft or the final outcome letters but on 31 March 2021, the Respondent sent the Claimant an email attaching a copy of the 11 September 2020 outcome letter and offering her an opportunity to appeal.

Conclusions

Vento award for injury to feelings

8. Section 119(4) Equality Act 2010 provides that the Tribunal can make an award to damages to compensate for injured feelings. It is conventional to assess such awards by reference to guidance in the case of *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] ICR 318, in which the Court of Appeal set out three bands for injury to feelings compensation. At the time this claim was presented, the financial parameters of the bands were as follows:
 - 8.1. A lower band of £900 to £8,800, appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;
 - 8.2. A middle band of £8,800 to £26,300, for serious cases that do not merit an award in the highest band; and
 - 8.3. An upper band of £26,300 to £44,000, for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
9. An injury to feelings award is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have been subjected to. The purpose is to compensate the claimant, and not to punish the respondent. Therefore, the focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (see *Komeng v Creative Support Ltd* UKEAT/0275/18/JOJ). The Tribunal must compensate for the harm which it is satisfied, on balance of probabilities, was caused by the act or acts of discrimination (see *Essa v Laing Ltd* [2004] ICR 746). One factor which may be relevant to the assessment of damages is the personal characteristics of the claimant, including any pre-existing vulnerability which affected the subjective experience of discrimination (sometimes referred to as the 'egg-shell skull' principle).
10. The Respondent submitted, and we agree, that while the case law provides that the manner in which an employer handles a complaint of discrimination may usually be relevant to the level of an award for injury to feelings, in this case where the acts of victimisation were closely connected to the handling of a grievance, it would lead to impermissible double-counting to take the grievance process into account as an additional or separate factor. (However, the question of an ACAS uplift is addressed separately below.)
11. We have been careful to distinguish between the distress caused to the Claimant by the events which preceded and gave rise to her grievance, and the subsequent distress that was caused by the failure of the Respondent to address the complaint of discrimination within her grievance and to conduct a formal grievance process. Only the latter is relevant to the assessment of compensation. Further, we have not taken into account a submission made on the Claimant's behalf that delays in the grievance process affected her ability to bring sex and maternity discrimination claims within the Tribunal's time limit; the question of time limitation has been dealt with separately at a dedicated preliminary hearing.

12. We find that the Claimant was caused considerable frustration and distress by the Respondent's failure to reach a conclusion as to whether she had been discriminated against, as she complained of in her grievance, and to implement a formal process when responding to her grievance. The Claimant had submitted a serious and formal complaint of discrimination and relied on her employer to address it appropriately. The failure to do so affected her significantly over a lengthy period of time. The final outcome letter, sent over a year after the grievance meeting, failed to resolve the very deeply held concerns the Claimant had raised.
13. The Claimant provided medical records to the Tribunal and also described in evidence her experience of suffering from poor mental health. A brief chronology is as follows.
 - 13.1. While it is unnecessary to set out in this judgment the Claimant's prior medical history, we find that she was a vulnerable individual, for reasons her employer was aware of, and had previously suffered from a moderate depressive episode and generalised anxiety disorder.
 - 13.2. The Claimant was signed off work by her GP for intermittent periods from 2019 onwards. A letter from her GP dated 16 May 2023 provided for the purpose of these proceedings records that she reported a variety of symptoms including loss of sleep, appetite and memory, as well as physical symptoms which the GP notes might be affected by stress.
 - 13.3. The Claimant was referred to the Improving Access to Psychological Therapies ('IAPT') programme on 9 August 2019. Her IAPT notes refer to the wider issues that gave rise to the grievance. The 'presenting problem' recorded on initial assessment concerned the issues which arose on the Claimant's return from maternity leave (in January 2019) rather than the grievance specifically. We have inferred from these records that the Claimant was already suffering from psychological distress prior to the grievance process.
 - 13.4. The Claimant was referred to the Mind charity of 18 November 2019 and on 31 March 2020 she was offered weekly telephone counselling. The Claimant explained in evidence that she was initially offered face-to-face therapy but had been too unwell to access the appointments in person. She did take up the remote counselling sessions until she was able to later attend in person.
 - 13.5. The Claimant was referred to Occupational Health ('OH') by her manager (a subsequent and, she told us, more supportive manager than the manager referred to in her grievance). An OH assessment was carried out on 19 April 2022. The OH assessor recorded that "*delays in concluding the grievance have caused her a lot of anxiety, insomnia and some cognitive impairment*". The assessor went on to state that "*If operationally feasible management could expedite the conclusion of her pending grievance hearing which is contributing to Miss Kamaly's anxiety*". This reflects a degree of misunderstanding on the part of the assessor. The grievance hearing had by that time been concluded, insofar as the Respondent was concerned. However, the lack of resolution of the central complaint of discrimination in the grievance was contributing to the

Claimant's anxiety on an ongoing basis. We accept that what the assessor described as 'delays' encompassed the defects in the grievance process which have been found to amount to unlawful victimisation.

- 13.6. The OH assessor recorded that the Claimant had been referred by her GP to a psychiatrist who diagnosed her with depression and anxiety.
14. We accept on the basis of the evidence set out above that the acts of victimisation did on balance of probabilities cause some exacerbation of a psychiatric disorder, the onset of which predated the victimisation. In particular, the feeling that she was not being listened to and her concerns brushed aside had a destabilising effect on the Claimant's mental health. She experienced psychological distress commencing from the period after her return to work in January 2019, but the Respondent's failure to address her complaint of discrimination or conduct a formal grievance process made her mental health worse. She was subsequently diagnosed with depression and anxiety.
15. Apportioning the Claimant's suffering as between her pre-existing mental ill-health condition and the exacerbation attributable to the victimisation is necessarily a broad-brush exercise. After careful reflection, we have concluded it is more appropriate to compensate for the impact on the Claimant's mental health within her Vento award rather than making a separate award of personal injury damages in respect of the exacerbation.
16. Overall, we have concluded that this is a middle band Vento case. While the acts of victimisation are closely connected and relate to the handling of a single grievance process, given the lengthy period of time over which this affected the Claimant it would be inappropriate to classify it as a 'one-off', less serious case. Conversely, the findings of victimisation do not relate to a 'campaign' of conduct that would fall into the upper band. The psychological impact on the Claimant, discussed above, places the case into the middle of the middle band. Overall, looking at the impact on this individual Claimant given her personal characteristics, we have concluded that an award of £15,000 in respect of injury to feelings is appropriate.

ACAS code

17. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that in a relevant claim (including a claim such as this under the Equality Act 2010) if it appears to the Tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.
18. As the subject matter of this claim concerns a grievance procedure, it is one to which the ACAS Code of Practice on grievance procedures applies.
19. It is therefore necessary to consider: 1) whether there was a failure to comply with the Code of Practice, 2) whether any such failure was unreasonable, and 3) whether, if so, it would be just and equitable to increase the Claimant's award, up to a maximum of 25%.

20. This is a sliding scale, with the most serious non-compliance meriting a 25% uplift. The Tribunal will have regard to the proportionality of the uplift in relation to the overall size of the award (see *Secretary of State for Justice v Plaistow* EAT 0016/20).
21. Paragraph 40 of the Code says, in relation to grievance outcomes:
‘Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.’
22. The subsequent paragraphs of the Code are set out under the subheading ‘Allow the employee to take the grievance further if not resolved’.
23. In this case, there was some delay in providing the draft grievance outcome letter and a much longer delay of over a year in providing the final outcome letter. The Claimant was not told that she could appeal until March 2021. We conclude that this breached paragraph 40 of the Code in two ways: the delay in providing an outcome and the absence of a right of appeal at the time the outcome was provided.
24. The Tribunal found in the liability judgment that the Respondent did not follow a formal process, which would have included a right of appeal, because the Claimant had complained about discrimination (see paragraphs 75.5.3, 78-79 and 80.4). Given that those findings, it would be very difficult to say that the non-compliance was reasonable, despite Mr Uduje’s valiant submission to that effect. We conclude that the Respondent’s failure to comply with paragraph 40 of the Code was unreasonable.
25. In deciding what, if any, uplift would be just and equitable in response to the unreasonable non-compliance, we have taken into account that an investigation was undertaken, which looked at some aspects of the Claimant’s complaints with reasonable thoroughness (see paragraph 79 of the liability judgment). This was partial not wholesale non-compliance. However, the length of the delay and failure to provide an effective right of appeal was serious. We have concluded that an uplift of 10% would be just and equitable, amounting to £1,500. We are content that is a proportionate sum with regard to the overall award.

Interest

26. Regulation 6(1)(a) of the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides that the period over which interest accrues begins with the date of the discrimination and ends on the date the tribunal calculates compensation. The interest rate now to be applied is 8%.
27. We have taken the date of discrimination as the date when the draft outcome letter was handed to the Claimant, at which time the failure to address discrimination or to follow a formal procedure crystallised and was made known to her. Interest at a rate of 8% from 25 July 2019 to 1 June 2023, we calculate to amount to £3,768.

Taxation

28. The award of damages, uplift and interest is made in respect of compensation for victimisation which occurred during the course of the Claimant's employment. It is to be paid free of tax.

**Employment Judge Barrett
Dated: 1 June 2023**