EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101494/2022

Judgment on papers on 14 June 2023

Employment Judge A Kemp

Mrs Mandy Fleming	**Claimant** **Represented by:** **Mr R Dorrian,** **Solicitor**
McGill Facilities Management Ltd (in administration)	**Respondent** **No appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The decision of the Tribunal is that:

1. **The claimant was harassed in contravention of section 26 of the Equality Act 2010, the claimant was unlawfully dismissed by the respondent under section 39 of the said Act, and the claimant is awarded the sum of £2,000 in compensation for injury to feelings therefor.**

2. **The claimant was dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996, that dismissal is unfair under section 98 of the said Act, and she is awarded a basic award under section 119 of the said Act of £13,056 and a compensatory award under section 123 of the said Act of £350.**

3. **The total awarded to the claimant is accordingly the sum of FIFTEEN THOUSAND FOUR HUNDRED AND SIX POUNDS (£15,406).**

REASONS

Introduction

1. The Claimant presented a Claim against her former employer McGill Facilities Management Limited. It has had something of a lengthy history. A very brief summary is that originally the present respondent defended the claim, and in doing so suggested that another entity the McDougall Group was the employer. That entity was then convened as second respondent. The present respondent then entered administration, the then second respondent was wound up, and the claim against the then second respondent dismissed on withdrawal. The claim therefore at that stage proceeded solely against the present respondent, but was sisted in light of its administration.

2. The written consent of the administrator to the present proceedings was thereafter given, and the sist recalled. There was a Preliminary Hearing before me on 18 May 2023, after which a Note was issued. That was in relation to the prospective convening of the person named below as a new second respondent. Thereafter however the claimant indicated that she did not wish to proceed with the same, and instead wished to seek a Judgment against the respondent above only. After messages were exchanged with regard to that I stated that I would consider proceeding under Rule 21, as there was no defence to the claim presented by the respondent, that having in effect been withdrawn by the administrators who did not wish to defend the claim, and consented to an award being made in the terms proposed by the claimant. I sought additional information to do so, under Rule 21, which was then provided by the claimant.

Facts

3. I proceeded on the basis of the following facts (not having heard any evidence but from the papers provided to me):

4. The claimant is Mrs Mandy Fleming. Her date of birth is 21 November 1972. She is a married woman.

5. The respondent is McGill Facilities Management Limited. It is a company registered under the Companies Acts which has entered administration.

6. The claimant was employed by the respondent with effect from 5 February 1996, following a relevant transfer from her previous employer The McDougall Group. She worked in its offices in Grangemouth as a Client Operations Manager. She did so full time. She was paid £34,200 gross per annum, and received a twice-yearly bonus of £750 paid in July and December each year. Her gross weekly pay was £657.19, and her net weekly pay was £494.96 net.

7. On 2 December 2021 the claimant was in the office with colleagues, when another employee Robert McFarlane discussed an imminent site visit to a move of office. The claimant asked about seating arrangements, and was told that it was "boy:girl:boy:girl". When she said that the office was predominantly female he said something to the effect "you dykes sit at the top" when she asked if she would be near a colleague with whom she worked closely. He then laughed loudly. Mr McFarlane had made other such comments previously. The claimant was upset and embarrassed at the comment. She was affected by it such that she excluded herself from communications in the office and dreaded going to work. She spoke to her husband from the car park each day, and would cry when doing so.

8. The claimant raised a grievance with regard to the matter. The respondent accepted that the word referred to had been used, but claimed that it had been "just banter". On 24 February 2022 she was told that many people in the respondent knew of the matter, and she felt substantially embarrassed. She resigned on 25 February 2022 as a result of the effect on her. She obtained new employment on 1 March 2022, with less remuneration.

9. The claimant commenced Early Conciliation on 8 February 2022, received the Certificate for the same on 18 February 2022 and presented the present Claim on 8 March 2022.

Law

(i) Unfair dismissal

10. Section 95 of the 1996 Act provides, so far as material for this case, as follows:

> "**95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> ……..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

11. Section 98 of the Act provides, so far as material for this case, as follows:

> **"98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> ……
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the

dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."……..

12. The onus of proving such a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

13. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

14. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and

that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:***

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

15. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***, which in turn referred to ***Meikle v Nottinghamshire Council [2004] IRLR 703*** on the issue of causation. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v Sibson and Transport and General Workers' Union [1988] IRLR 305***, ***Prestwick Circuits Ltd v McAndrew [1990] IRLR 191***.

16. Where it is argued that there was a final straw, being a last act in a series of acts that cumulatively lead to repudiation, that last straw must not be entirely trivial – ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833.***

17. Delay in resigning may be fatal to the claim for such a dismissal – ***WE Cox Toner (International) Ltd v Crook [1981] IRLR 443,*** and ***Cantor Fitzgerald International v Bird [2002] EWHC 2736.***

18. If there is held to be a dismissal, there must then be consideration of what the reason, or principal reason, for that dismissal was, and if it was a potentially fair reason under section 98(2) whether or not it was fair under section 98(4) of the Employment Rights Act 1996 ***Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166.*** It is possible, if somewhat unusual, for a dismissal under section 95(1)(c) to be fair.

19. In the event of a finding of unfair dismissal, the tribunal requires to consider a basic and compensatory award if no order of re-instatement or

re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

(ii) Discrimination

20. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) Statute

21. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that sex and sexual orientation are each a protected characteristic. Section 26 defines what is harassment where that is "related to a relevant protected characteristic".

22. Section 39 of the Act provides:

> "**39 Employees and applicants**
> An employer (A) must not discriminate against a person (B) –
> ……..
> (c) by dismissing B."

Dismissal is defined in section 39(7) as including the termination of employment…..

> "by an act of B's….in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

23. Section 212 of the Act defines "substantial" as "more than minor or trivial."

24. The provisions of the 2010 Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC,*** as well as the ***Burden of Proof Directive 97/80/EC.*** The dismissal was prior to the United Kingdom withdrawing from the European Union, and those

provisions remain part of the retained law under the European Union (Withdrawal) Act 2018.

25. In the event of a breach of the 2010 Act compensation is considered under section 124, which refers to section 119. That section includes provision for injured feelings under sub-section (4). Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "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."

26. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

27. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland

thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. At the time of presentation of the present Claim the lower band was £900 to £9,100.

28. Interest may be awarded under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. The awards made can include for injury to feelings, and for past financial losses.

Discussion

29. This is a case that is now undefended, and I consider that I am in a position to make a Judgment under Rule 21, as the respondent has in effect stated that no part of the claim is contested. Indeed I note that unusually in this case the Administrators have not only consented to the proceedings being continued, but separately to the amount of the awards sought.

30. Although I do not make findings in fact having not heard evidence I have set out above the facts on which I have proceeded. They are taken from the documents before me which include a statement from the claimant, signed and dated by her, supporting payslips, and a Schedule of Loss. I should also make clear that the Claim was directed to the respondent, and not to the individual named in this Judgment who has not therefore had an opportunity to defend personally the allegations made against him.

31. There has been no defence to the Claim, such that it is not necessary to make a decision on the merits of whether or not there was a dismissal, and if so either or both of unfair and unlawful, but from the information before me I am satisfied that there was not only from the remark itself, but also the cursory way in which it was treated by the respondent (prior to the administration). I am satisfied separately that from the facts before me what happened fell within the terms of section 26 of the 2010 Act and amounts to harassment.

32. I turn to remedy. The claim for harassment under section 26 of the 2010 Act, and the dismissal (the provision for which is in materially the same terms as that for the 1996 Act) is quantified solely as one for injury to feelings, and the sum of £2,000 is sought. I am satisfied that that is a

moderate sum given the circumstances referred to above, and less than could have been sought. I make the award in that sum. No interest is sought upon it, or it is sought on the basis that it is inclusive of interest, and on that basis I simply award the sum sought of £2,000.

33. The claimant has long service, and the calculation of the basic award for unfair dismissal follows from a calculation under section 119 of the 1996 Act assessing her earnings, which are capped at £544 per week, length of service, and age (49 at termination). The potential deductions in section 122 are not applicable. The basic award is £13,056.00.

34. As far as a compensatory award under section 123 is concerned the only sum sought is for loss of statutory rights, quantified at £350. I am satisfied that that is a moderate sum for such a matter, and make that award.

Conclusion

35. I make the Judgment above finding the claimant entitled to the total sum of £15,406.

Employment Judge :	A Kemp
Date of Judgment :	20 June 2023
Date sent to parties :	26 June 2023