



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL

BEFORE: EMPLOYMENT JUDGE F SPENCER

MEMBERS: MS D KEYMS
MR I MCLAUGHLIN

CLAIMANT MS J NICCOLINI

RESPONDENT ALGEBRIS (UK) LIMITED

ON: 11 and 12 May 2023

Appearances:

For the Claimant: Ms R Tuck, KC
For the Respondent: Mr D Stilitz, KC

REASONS FOR THE REMEDY JUDGMENT

These written reasons for the remedy judgment given on 12th May are given at the request of the Claimant made on 24th May 2023.

1. This was a remedy hearing following the judgment of the Tribunal sent to the parties on 15 February 2023 in which the tribunal found that:
 - (i) The Claimant had been unfairly dismissed.
 - (ii) Two comments made by Mr Serre on 29th October and 11 December 2019 were unlawful harassment related to sex,
 - (iii) The delay in hearing the Claimant's grievance amounted to unlawful victimisation;
 - (iv) Her dismissal for redundancy amounted to unlawful victimisation.

- (v) In addition, we found that had Claimant not been unfairly dismissed and victimised she would have left the Respondent's employment within two months of her return from sick leave.

2. The issues between the parties at the remedy stage were:

- (i) To determine whether the Claimant had suffered any financial loss as a result of the unfair and discriminatory dismissal; and if so, what was that financial loss.
- (ii) To decide the correct amount of an award for injury to feelings.

3. The Tribunal heard evidence from the Claimant and from Mr Lasagna on behalf for the Respondent. We had a bundle of documents relevant to remedy and heard submissions from both parties. By consent a separate reconsideration application was dealt with under the slip rule and a corrected judgment has been sent to the parties.

Relevant law

- 4. The relevant statutory provisions relating to claims of unfair dismissal are set out in Sections 118-124 of the Employment Rights Act 1996. Where an employee has been unfairly dismissed, Tribunals are required to make an award consisting of a basic award and a compensatory award. The basic award in this case has been extinguished by the redundancy payment paid to the Claimant in December 2021. By section 123 of the Employment Rights Act 1996 the compensatory award is such amount that the Tribunal considers just and equitable, having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as the loss is attributable to action taken by the employer.
- 5. In assessing compensation, a Tribunal has to assess the loss flowing from the dismissal. In a normal case that requires it to assess for how long an employee would have been employed but for the dismissal.
- 6. Where a Claimant has been subject to discrimination, section 124(6) and section 119 of the Equality Act 2010 provide that compensation is to be assessed under the tortious principles. The central aim is to put the Claimant in the position, so far as is reasonable, that she would have been in had the tort not occurred. What loss has been caused by the discrimination in question?
- 7. What was the financial loss? The facts relevant to this issue are set out in our liability Judgment. Broadly the Claimant had been absent from work for

ill health for a considerable period of time. When she wrote to the Respondent in July 2021 to say she was ready to return to work the Respondent informed her that she was at risk of redundancy. We found that this, and the redundancy process, was unlawful victimisation and that she was unfairly dismissed.

8. In the event however the Claimant was not dismissed until 17 December 2021, as the redundancy process was halted pending resolution of the Claimant's grievance and grievance appeal.

9. In the liability judgment, however, at paragraph 192 we said this.

“What would have happened had the Claimant been permitted to return to work. The Tribunal first considered whether the Claimant would in fact have returned, if permitted to do so, when all the chips were down. On balance we concluded that she would have done but that, having regard to all that had gone before and the Claimant's assertion that she expected to be doing her old role, we find that, on the balance of probabilities the Claimant would have refused to confine herself to Investor Relations or to work constructively with Mr Lasagna (who she regarded as having usurped her role) and that a disciplinary process would have followed. Taking all things considered we find that the Claimant would have either have resigned or been dismissed for conduct within two months of her return.”

10. It was the Respondent's position that, given this finding, there was no financial loss flowing from the dismissal. In particular, on behalf the Respondent, Mr Stillitz submitted that, if it were not for the unlawful redundancy process, the Claimant would have been permitted to return to work in early July and, as we found would have refused to work cooperatively with Mr Lasagna and have either resigned or been dismissed (fairly) for conduct within two months of her return.

11. As such he submitted that she was in fact in a better position financially as a result of the unlawful victimisation, the redundancy process and the dismissal in December. She had been paid until December 2021 and had then received three months salary in lieu of notice plus statutory redundancy pay and some pay in lieu of holiday accrued but not taken.

12. For the Claimant Ms Tuck submitted that the that the relevant two month period of compensation should run from the effective date of termination i.e. until 17 February 2022. If that was the appropriate date then the Claimant would have been eligible for a bonus and be entitled to a pro-rata proportion of her annual discretionary bonus.

13. As set out above compensation for discrimination is to be assessed under tortious principles. The Claimant is entitled to be put in the position, so far as is reasonable, that she would have been in had the discrimination/victimisation not occurred. The Tribunal is required to compensate the Claimant for the financial loss that she suffered because of the victimisation. If she suffered no financial loss because of the discrimination/victimisation there will be no award. Awards are designed to be compensatory. They are not designed to punish the Respondent for its unlawful behaviour .
14. We were initially much troubled by Mr Stillitz' argument that the Claimant was in effect better off because of the unlawful conduct of the Respondent and therefore suffered no financial loss. Ms Tuck refers to it as an abusive argument, but does not clearly say why that is so. Our initial thinking was that the award should run from the effective date of termination. In our liability judgment we do not identify the date that the Claimant would have returned to work. Was this in December or in July?
15. However, on further reflection we consider that Mr Stilitz is correct. Our finding was that, had the Claimant been permitted to return to work, she would have done so, as set out above, but that she would have refused to confine herself to Investor Relations or to work constructively with Mr Lasagna and that a disciplinary process would have followed. We found that the Claimant would have either resigned or been dismissed for conduct within two months of her return.
16. The redundancy process in this case was particularly protracted because the Respondent put the process on hold while the Claimant's grievance was dealt with. It was the Claimant's case, and we found, that the Respondent had commenced the redundancy process in response to the Claimant saying she was fit to return to work. We also found (and the Claimant said so in terms) that she was not prepared to return to her old role and that she expected to be doing the same work she had done before the demotion in 2019 .
17. It must follow from this that the Claimant was in fact in a better position as a result of the redundancy process than she would have been absent the victimisation. Had the redundancy process not begun the Claimant would have returned to work in July; but the relationship would not have lasted, and she would have left or been dismissed by September. The grievance process would have continued while she was at work, as the Claimant was now well enough to pursue it. As it was, she remained employed, and was paid, until December.

18. We are, reluctantly, forced to conclude that there is no financial loss flowing from the unlawful victimisation of the Respondent.
19. As to compensation for unfair dismissal Ms Tuck pointed to the different formulation for the principles of compensation in section 123 of the Employment Rights Act 1996. This provides that the compensatory award for unfair dismissal should be “such amount as the tribunal considers just and equitable in all the circumstances in consequence of the dismissal insofar as the loss is attributable to action taken by the employer.”
20. The line of cases beginning with of Polkey v AE Dayton Services Ltd 1988 ICR 142 and Software 2000 Ltd v Andrews 2007 ICR 825 make clear that following a finding of unfair dismissal it is for the Tribunal to assess the loss flowing from the dismissal. In assessing that loss, the tribunal is required to consider the hypothetical. If the Claimant had not been dismissed when she was, for how long would she have remained in employment. Unusually in this case, because the Redundancy process was put on hold and the Claimant remained at home during the grievance process, the answer is that she would have left the Respondent’s employment before she was in fact dismissed. She therefore suffered no financial loss. There are no grounds for a finding that the reference to “just and equitable” in section 123, allows us to award a sum for a loss that has not occurred.
21. We are uncomfortable with a finding that, in effect, the Respondent is better off as a result of their unlawful victimisation than they would have been otherwise, but the purpose of compensation is to compensate the Claimant and not to punish the Respondent. Since we are satisfied that the Claimant would never have accepted a return to work in which she confined herself to Investor Relations, she has indeed suffered no loss as a result of the unlawful victimisation or her unfair dismissal.
22. Ms Tuck also submits that had the Claimant returned to work in July Mr Serre would have paid her a year’s salary to go. Her loss should therefore be assessed at a year’s salary She refers to the evidence Mr Serre gave in the liability hearing that he would “normally” give people a year’s salary to go. *“So, if she doesn’t want to go whatever go I will give you some money. I did this with everyone and typically its one year salary. Shake hands. In this case I said I would give her more.”* When it was put to him by Ms Tuck at the liability hearing that he had never said that to the Claimant, Mr Serre said (before he was stopped for divulging privileged information) that he “told it to his legal.”

23. We consider that this is not something that we can take onto account. No open offer was made. We have no evidence that the Claimant would have accepted it . The Claimant had no entitlement to a settlement. Our memory of the evidence at the liability hearing (from which that extract was taken) was that Mr Serre was not asked in terms whether, if the Claimant had returned in July 2021 and asked for a settlement of a year's salary to go, he would have agreed. By July 2021 preparation for claims 1 and 2 were well underway (listed to be heard in November 2021). Further Mr Lasagna did not accept yesterday that employees would always get a year's salary to go. We also consider that this submission is straying perilously close to matters that are legally privileged.
24. It follows that the Claimant has suffered no financial loss under either tortious or unfair dismissal principles other than a loss of statutory rights which we assess at £500.

Injury to feelings.

25. The relevant principles relating to injury to feelings are well-known. In H M Prison Service -v- Johnson [1997] ICR 275 Smith J summarised the general principles applicable to awards of compensation for non-pecuniary loss. These principles were approved by the Court of Appeal in Vento -v- Chief Constable of West Yorkshire Police [2002] EWCA CIV 1871:-
- “(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
 - (ii) Awards should not be too low, as that would diminish respect for the policy of the anti discrimination legislation. Society has condemned discrimination and awards must ensure that it is deemed to be wrong. On the other hand, awards should be restrained, as excessive awards... could be seen as the way to untaxed riches.
 - (ii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.
 - (iv) In exercising that discretion in assessing a sum, the Tribunal should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to

purchasing power or by reference to earnings.

- (v) Finally, the Tribunal should bear in mind Sir Thomas Bingham's reference for the need for public respect for the level of awards made".
26. In **Vento** (above) the Court of Appeal identified three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band is for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Awards in a middle band should be used for serious cases which do not merit an award in the highest band. Awards in the lowest band were appropriate in less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. At the time of the last unlawful act the relevant Vento bands were £900 – £9,100 for lower band awards, £9,100 – £27,400 for middle band awards and 27,400- £45,604 for upper band awards.
27. We have found four discriminatory events. There are the two comments by Mr Serre, the delay in hearing the Claimant's grievance and the redundancy process culminating in the dismissal. The comments were unacceptable, and shocking and were made at a time when the Claimant was already suffering significant hurt to her professional pride.
28. Much of the upset and stress suffered by the Claimant in this case was caused by Mr Serre's decision in 2019 that the Claimant's role should be confined to that of Investor Relations. We have found that this decision did not amount to unlawful discrimination. Nonetheless we have no doubt that the Claimant has been devastated by the unlawful events which have been described in these proceedings. Disentangling the hurt caused by the two remarks, the dismissal and the delay in the grievance is not an easy matter.
29. We accept that the sexist and unacceptable remarks made by Mr Serre in 2019 would have wounded the Claimant even more deeply because they had been friends. She was subsequently signed off work with acute anxiety and distress. Although the Claimant was, by the time of her dismissal, "playing games", we have no doubt that she was upset by the fact that the Respondent had chosen to victimise and dismiss her because she had brought proceedings against them. She had worked for the Respondent for a considerable amount of time, she had enjoyed a great relationship with Mr Serre and considerable success at the Respondent and that her professional pride would have been severely wounded both by the remarks and by the realisation that the Respondent was victimising her.

30. All in all, we consider that an award at the top of the middle band to encompass all four of the unlawful acts is appropriate and we assess that at £27,000 of which half is attributable to actions of the Respondent not connected to the Claimant's dismissal.
31. We also award interest on the award, agreed between the parties by consent at £5,331.95.

Employment Judge F Spencer

6th July 2023

Reasons SENT TO THE PARTIES ON

06/07/2023

FOR THE TRIBUNAL OFFICE