Case No: 1303159/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms C McLean

Respondent: Aspiration Training Limited

Heard at: Midlands West

On: 11 March 2024

Before: Employment Judge Faulkner
Mr T Liburd
Mr P Wilkinson

Representation: **Claimant** - Ms S King (Counsel)
Respondent - Mr L Menzies (Solicitor)

REMEDY JUDGMENT

The Respondent is ordered to pay to the Claimant compensation of £22,215.41, comprised of:

1. £1,734.99 by way of compensation for financial loss (including interest).

2. £20,482.42 by way of compensation for injury to feelings (including interest).

REASONS

1. Oral reasons for the above Judgment were given at the Hearing. These written reasons are provided in response to an oral request made by the Claimant at its conclusion.

2. Neither party requested written reasons for the judgment on liability dated 14 November 2023 ("the Liability Judgment") which followed a Hearing held over six days from 6 to 13 November 2023. References to the content of the Liability Judgment below are therefore references to the notes I made in order to deliver that judgment orally, with reasons, at the end of that Hearing. The Liability Judgment concluded in summary that:

2.1. In contravention of section 40 of the Equality Act 2010 ("the Act"), the Respondent, by David Lea, harassed the Claimant on 16 December 2021 by accusing her of being aggressive without explanation.

2.2. In contravention of section 39 of the Act, the Respondent, by Kara Tuckey, victimised the Claimant on 2 February 2022 by terminating her probation period and thus dismissing her.

2.3. The Claimant's remaining complaints of harassment, discrimination and victimisation failed and were dismissed.

Issues

3. The Claimant did not seek any recommendations from the Tribunal. She sought only an order for compensation. It was agreed that the issues to be decided were as follows, and that they would be addressed without any further witness evidence and on the basis of submissions only:

3.1. What financial losses has the harassment/victimisation caused the Claimant? Her net weekly pay, whilst employed with the Respondent, was agreed to be £382.92. The Claimant made no claim for loss beyond the date of this Hearing.

3.2. The Respondent did not seek to argue that the Claimant had failed to take reasonable steps to replace her lost earnings, for example by looking for another job.

3.3. What injury to feelings has the harassment/victimisation caused the Claimant and how much compensation should be awarded for that? The Claimant did not seek any compensation for personal injury.

3.4. Is there a chance that the Claimant's employment would have ended in any event? Should her compensation be reduced as a result? The Respondent argued that it is certain her employment would have ended at the date of her unsuccessful appeal against dismissal.

3.5. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? The Claimant asserted that it did; the Respondent did not accept that.

3.6. If the Code applied, did the Respondent unreasonably fail to comply with it in dismissing the Claimant? The relevant failures were said by the Claimant to be manifold – see below.

3.7. If so, is it just and equitable to increase any award payable to the Claimant?

3.8. By what proportion, up to 25%?

3.9. Should interest be awarded? How much? It was agreed that the relevant rate of interest was 8%, that the number of days that should be used to calculate interest on any injury to feelings award was 817, and that the number of days that should be used to calculate interest on financial loss was 385.

Facts

4. From the notes used to deliver the reasons for the Liability Judgment, we noted the following on the question of the Claimant's performance and conduct.

5. Whatever had been raised with her up to the point of the meeting two weeks before she was harassed by Mr Lea on 16 December 2021, even if raised by Ms Tuckey in one-to-one discussions, cannot have been thought by the Respondent to be anything like a basis for terminating the Claimant's employment, given that it was said at that meeting that she was on track.

6. It seems surprising that within two weeks of such a meeting, Mr Lea could have put together a list of concerns as long as the one he compiled in his note of the 16 December 2021 meeting with the Claimant. We were unpersuaded that so much could have changed – as Mr Lea later told Mike Jones – in that two-week period, not least given that with the exception of the Claimant's emails related to taking holiday and the use of a tracker (only the latter of which was recorded by Mr Lea in his note of the meeting) nothing else that we were made aware of had arisen during it.

7. Accordingly, when one asks what happened between the congratulatory discussion with the Claimant and the meeting on 16 December 2021, one can only identify two things that the Respondent subsequently relied on as grounds for her dismissal, namely the email exchange about the addition of columns to the tracker and the complaint about the Claimant from Sarah Brooks. By the time the chronology moved to 19 January 2022, as far as the Respondent's own HR team were concerned, the latter was water under the bridge. The Respondent referred in the dismissal process to the Claimant's emails about her holiday, but we saw no evidence that these emails were ever raised with her, whether in the dismissal context or otherwise.

8. We concluded in relation to the Claimant's meeting with Mr Lea and Charlotte Angel of HR on 19 January 2022, that there was some discussion of the Claimant's performance and that the Respondent may well have identified issues that she was to work on. It was after all intended to revisit and re-run the one-to-one meeting of 16 December 2021. It is difficult to accept however, given how content the Claimant was after the 19 January 2022 meeting, particularly when this is contrasted with her immediate unhappy response to reading the copy of Mr Lea's record of the meeting, that what was raised with her on 19 January was as critical of her performance and/or conduct as the record of the meeting produced by Mr Lea set out.

9. We noted that nothing material had arisen in relation to the Claimant's performance or conduct, at least not that we were taken to, between 16 December 2021 and 19 January 2022.

10. There was no evidence before us of any issues of conduct or performance between 16 December 2021 and 27 January 2022 (or the probably earlier date) when the decision to terminate the Claimant's employment was made, and indeed there was no mention at the meeting on 19 January 2022 of the Claimant's probation being extended, let alone terminated, not even in Mr Lea's own later record of it.

11. It is not an unfair summary of these conclusions from the Liability Judgment to say that nothing of substance was raised by the Respondent with the Claimant regarding her conduct and/or performance, which had not already been dealt with, between the congratulatory conversation in early December 2021 and the meeting at which she was told she was dismissed.

12. In addition to the above, we noted the following extracts from the Liability Judgment in relation to the Claimant's injury to feelings.

13. Mr Lea's comment on 16 December 2021 clearly had the effect of violating the Claimant's dignity. Both in the Claimant's perception and objectively, his comments labelled her with a strong word that was simply unevidenced either then or since, fixing her with a well-known stereotype which her conduct did not merit.

14. To that we can add the references in the Claimant's statement as to how she felt as a result of what the Respondent did, which the Respondent did not seek to challenge, though it was given the opportunity to do so by way of cross-examination at this Hearing. We will come back to these references in our Analysis below.

15. As to the Respondent's processes, or as the Claimant would see it the lack of them, in effecting her dismissal, she was given the opportunity to provide her account of the Sarah Brooks matter at the meeting on 19 January 2022, but there are a number of additional matters to note from the Liability Judgment.

16. First, the Respondent relied for dismissal on issues that had previously been closed, re-opening what it had drawn a line under.

17. Secondly, we noted the absence of investigation by the Respondent of matters raised by the Claimant which were pertinent to the key issues that led to the decision to dismiss her, for example relating to the comment she is said to have made about a learner and relating to the Sarah Brooks issue.

18. Thirdly, we said that what the Respondent relied on to dismiss the Claimant was objectively weak. We noted in particular that Sarah Brooks' email about her conversation with the Claimant on 14 December 2021 in no way supported the case the Respondent relied on. In no sense did her original contemporaneous email (page 101 of the bundle) sustain a conclusion that she was extremely upset by the Claimant's conduct.

19. Fourthly, some of the issues said to have merited the Claimant's dismissal, for example the unspecified further list of concerns raised by Mr Lea (page 160 of the bundle), were opaque and unexplained not only to the Claimant but also to us.

20. Fifthly, we noted that if this were an unfair dismissal case, the appeal process would have rendered the dismissal unfair because Mr Jones was arguably lacking in the complete independence an appeal officer should hold, given that at least to some extent he had discussed the Claimant's conduct and performance with Ms Tuckey before she dismissed the Claimant. He also changed the basis for the Respondent's justification of the Claimant's dismissal without any notice to her, by focusing on two issues rather than four. We were nevertheless satisfied

that he reached his own decision once he had heard the appeal; it was not suggested that Ms Tuckey had an influence on the outcome at that point.

21. Sixthly, we noted that Mr Jones' principal focus was the Sarah Brooks issue, and we noted that he did not meet with her in the course of conducting the appeal, assuming that her evidence should be preferred over the Claimant's. He obtained further information from Ms Tuckey rather than interviewing her, relying on the one-to-one meetings he held with her. He could also have interviewed Harpreet Kaur who made the other complaint which was the principal basis for his decision that the dismissal was appropriate, but he did not do so. We held that Mr Jones can be criticised for all of those arguable shortcomings, and of course he reached a decision that there was no victimisation when we decided that there was.

22. Finally, we concluded that if one were to summarise the reason why Mr Jones reached the appeal decision he did, it would be because he concluded his investigations did not reveal discrimination and victimisation of the Claimant by Ms Tuckey, rather than that the Claimant had done a protected act or her race.

23. It is not necessary to set out any other findings of fact on the question of remedy. That is not to say that everything else in the Liability Judgment was ignored; as we explained to the parties, we re-read the notes I used to give our full findings of fact and conclusions in the oral Liability Judgment before hearing the parties' submissions at this Hearing.

Law

24. Below is a brief summary of the law we took into account in reaching our decision.

Compensation for financial loss

25. It is section 124 which sets out the Tribunal's power to order payment of compensation for a breach of the Act. The object of an order to pay compensation is to put the Claimant in the position she would have been in but for the Respondent's acts of harassment and victimisation. There must be a link between the financial loss for which compensation is ordered to be paid and the Respondent's unlawful acts.

Reductions in compensation for financial loss

26. As for the duty of the Tribunal to consider whether compensation for financial loss should be reduced because even in the absence of victimisation, dismissal would have taken place in any event, the Tribunal must have regard to the case of **Polkey v A E Dayton Services Limited [1988] ICR 142**. This was applied to complaints made under the Act by **Abbey National Plc v Chagger [2010] ICR 397** in which the Court of Appeal held that the fact that the protected characteristic – race in that case, a protected act in this case – was a significant factor in a dismissal decision is sufficient to establish liability for that loss, but does not assist in determining the measure of the loss. It is therefore necessary for us to ask what would have occurred had there been no victimisation. If there was a chance that dismissal would have occurred in any event, even if there had

been no victimisation, then in the normal way that had to be factored into our calculation of financial loss.

27. As has been made clear in cases such as **Software 2000 Ltd v Andrews [2007] ICR 825**, this entails asking how long the Claimant would have been employed but for the dismissal, or applying a percentage deduction to reflect the possibility that the Claimant would have been dismissed. Either way, the Tribunal's assessment must be based on the evidence presented to it. As the Employment Appeal Tribunal ("EAT") put it in **Andrews**, the task is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no victimisation. The EAT acknowledged that there will be cases where a tribunal may reasonably take the view that reconstructing what might have been is so fraught with uncertainty that no such assessment can be made, but it must be recognised that in any such judgment an element of speculation is involved.

Injury to feelings

28. We applied the following principles in respect of compensation for injury to feelings:

28.1. Given that the Claimant presented her Claim Form in July 2022, with reference of course to the decision in **Vento v Chief Constable of West Yorkshire [2003] ICR 318** and subsequent Presidential Guidance, the lower band was £990 to £9,900 (for less serious cases) and the middle band £9,900 to £29,600 (for cases that do not merit an award in the upper band, which it was not argued this case did).

28.2. The burden was on the Claimant to establish injury to feelings.

28.3. As with much of the exercise of assessing compensation, determining an award for injury to feelings is not an exact science. What is clear is that any award should be compensatory for the Claimant and not punitive of the Respondent.

28.4. Our focus was therefore on the effect of the proven harassment and victimisation on the Claimant, taking into account in particular the degree of hurt and upset caused to her by it, which was of course assessed in accordance with the evidence she produced to the Tribunal.

28.5. Awards for injury to feelings should bear relation to awards given in personal injury cases and to the value of the amount in everyday life.

ACAS Code uplift

29. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") applies to cases brought under the Act.

30. The questions which that section requires tribunals to consider are reflected in the list of issues above.

31. Relevantly, the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the Code") provides that an employer handling disciplinary issues in the workplace should establish the facts of the case, inform the

employee of the problem, hold a meeting to discuss the problem, allow the employee to be accompanied, decide on appropriate action and provide an opportunity to appeal. The introduction to the Code says that "disciplinary situations include misconduct and/or poor performance" and that the Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry.

Interest and tax

32. The award of interest on compensation for discrimination is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). The appropriate rate of interest is 8% (regulation 3). There is no need to say anything about the number of days for calculation of interest under the Interest Regulations, given that they were agreed by the parties as set out above.

33. As to tax, whilst awards for injury to feelings related to discrimination during the Claimant's employment may be paid without deduction for tax, all compensation connected with the termination of the Claimant's employment, including any award for injury to feelings, falls to be taxed to the extent it exceeds £30,000 – see **Moorthy v Revenue and Customs Commissioners [2018] EWCA Civ. 847**.

Analysis

Financial loss

Measure/period of loss

34. The Claimant's claim for compensation for financial loss was by any measure modest. Mr Menzies argued nevertheless that any such compensation should be capped at the point at which the Claimant's appeal was unsuccessful. This was on the basis that the Tribunal did not find that Mr Jones' decision on appeal was an act of victimisation or discrimination as the Claimant had alleged. In short, this was in our view the wrong question and the wrong approach. What we had to consider, in accordance with **Chagger** and the related cases referred to above, is what the position would have been absent victimisation by Ms Tuckey at the point of dismissal. Is there a chance the Claimant's employment with this employer would have come to an end in any event, and if so, how should compensation for financial loss be adjusted to reflect that?

35. Relevant to answering that question was that:

35.1. The Claimant was awarded a bonus and told she was on the right track in early December 2021.

35.2. As set out in our findings of fact above, nothing of substance was raised by the Respondent with the Claimant regarding her conduct and performance, which had not already been dealt with, between the congratulatory conversation with her in early December 2021 and the meeting at which she was told she was dismissed.

35.3. Putting a bit more detail on that, broadly speaking we agreed with Ms King's submissions on this point. The comment the Claimant was said to have

made about special needs was resolved at the time; the Sarah Brooks' email was not in Kara Tuckey's view, or ours, a material complaint about the Claimant and had been resolved; signing in and out of the Respondent's premises was never raised with the Claimant and seems to have been commonplace practice amongst the Respondent's employees; the comment the Claimant was said to have made to Harpreet Kaur was not investigated; and we were not taken to any evidence of the Claimant not properly using the tracker.

35.4. Kara Tuckey had never dismissed a probationer, so that we could conclude it was not a high bar to pass probation in the Respondent's employment in the ordinary course of events.

36. Taking all of that into account and asking what would have happened had Ms Tuckey not victimised the Claimant, it is clear that the Claimant would not have been dismissed on 2 February 2022, because there was no basis on which Ms Tuckey would have taken that decision without a victimising mindset. As a result, there would have been no appeal before Mr Jones. Alternatively, if Mr Jones had identified that the Claimant had been victimised, we can only assume he would have overturned Ms Tuckey's decision. The Respondent has not suggested otherwise. It is not the case that a non-discriminatory appeal corrects a discriminatory dismissal and thus makes the discrimination (here, victimisation) vanish, akin to unfair dismissal cases. It is clear therefore that, absent victimisation, the Claimant's employment would not have ended at the point of the appeal decision, contrary to Mr Menzies' submissions.

37. The Respondent did not identify any other basis on which it says the Claimant's employment would or might have ended anyway, and we were not taken to any evidence that enabled us to say that it would. We were conscious of the usual vagaries of life in an employment relationship, such as the Claimant herself making a decision to move on, but given the evidence presented to us, we found no basis on which to make any deduction from financial loss on **Chagger** principles for the period to the date of this Hearing.

Loss of salary

38. We thus assessed the Claimant's loss of salary to the date of this Hearing, which was agreed to be £1,333.32 net. No pension loss was claimed.

Statutory rights

39. The Claimant claimed in addition a sum for loss of statutory rights, which Ms King argued would have accrued because in the absence of victimisation the Claimant would have reached two years' continuous employment.

40. We were not persuaded by Ms King's submissions on this point and thus made no award under this heading. This was because:

40.1. Whilst an award for loss of statutory rights is routinely awarded in unfair dismissal cases, it is not routinely awarded in discrimination cases as far as we are aware.

40.2. It is a particular and unique type or head of loss, in that it does not represent financial loss as such but is effectively a nominal sum to represent loss of protection from unfair dismissal, and the loss of statutory minimum notice

rights. It is not therefore a form of loss that is compensated for by tribunals asking what financial position the Claimant would have been in but for the dismissal – as we say, it reflects instead something valuable having been lost.

40.3. Here the Claimant did not have unfair dismissal protection and only minimal statutory notice entitlement. She did not therefore lose statutory rights.

40.4. It seemed to us that Ms King's argument was akin to seeking compensation for loss of the right or opportunity to claim unfair dismissal, which the courts have ruled out of the scope of breach of contract complaints. The position must be the same for complaints under the Act.

Bonus

41. The Claimant also sought compensation for the loss of a bonus. It is agreed that she was previously given a bonus of £500 for good performance, in 2021. She says would have been paid one in 2022 as well, had she not been dismissed. She says that she was never told that the Respondent's arrangements for awarding bonuses had changed. Mr Menzies submitted that it is difficult to say what the amount of any bonus award would have been had the Claimant's employment not terminated. The question for us was whether she would have received a bonus had she remained in the Respondent's employment during 2022.

42. This was a very difficult point to decide given the almost complete lack of evidence on the point from both parties. All we had before us was the agreed position that the Claimant was awarded a bonus in 2021. The burden was on her to show an ongoing entitlement and we were not presented, either at the Liability Hearing or this Hearing, with any evidence of any standing bonus scheme, or any details of the basis on which a discretionary bonus might be awarded in the absence of such a scheme. Accordingly, we did not think that the Claimant had presented evidence based on which we could say with sufficient confidence that she would have received a bonus in 2022 and so were unwilling to make any order for compensation incorporating any such payment.

43. This meant that the starting point for the measure of the Claimant's financial loss was £1,333.32 representing net loss of salary. We then had to consider whether that figure should be increased on the basis of a failure to comply with the Code.

ACAS Code uplift

44. The first issue for us to decide was whether the Code applied. Mr Menzies submitted that it did not because the Claimant was in her probation period. He said that employers generally would be very worried to think that they had to comply with the Code when dismissing employees in that context.

45. We concluded that the Code did apply in this case, for the following reasons:

45.1. The first question, using the wording of section 207A(2)(a) of TULRCA, was whether the claim to which these proceedings relate concerned a matter to which the Code applied. The Claimant's complaint of victimisation concerned dismissal. As set out above, Section 207A of TULRCA applies to cases under the Act – see Schedule A2 of TULRCA. In our judgment, it cannot be the case

that in respect of complaints under the Act, only the grievance parts of the Code apply. Nothing in TULRCA or in the Code itself indicates that. In principle therefore, it seemed to us clear that the Code applies where the complaint in question concerns a dismissal held to have infringed the Act, here because it was an act of victimisation.

45.2. The Code does not say it does not apply to employees in their probation periods or below a certain length of service. The ACAS Guide to Discipline and Grievances at Work (July 2020), which provides guidance as to the application of the Code, makes brief reference in the Introduction to the law on unfair dismissal, but it does not say either that the Code only applies to employees with a certain length of service, whether two years or otherwise.

45.3. We were not made aware of any case law interpreting the Code in the restrictive way the Respondent contended for.

45.4. The broader concern raised by Mr Menzies about employers being unable to adopt processes for dismissal of probationers that are more rough and ready than might be expected for established employees, if the Code applies across the board, is readily answered. First, it is always open to a tribunal to find that a failure to comply with the Code was not unreasonable. Secondly, a tribunal could find that even if there was non-compliance it would not be just and equitable to increase any compensation. Thirdly, even if an award was increased, the amount of the increase could reflect probationary status if that were thought appropriate. And fourthly, and perhaps most pertinently, the question will only be relevant at all if an employee is dismissed in contravention of the Act or for a reason deemed by legislation to render dismissal automatically unfair. Not to contravene such legislation is well within any employer's control – which only serves to confirm that the Code is intended to apply in such cases, recognising the evil which discrimination represents – and ought in principle to make successful complaints along these lines, and thus increases in compensation pursuant to the Code in this type of context, relatively rare.

46. With that established, what matters is the substance of the reason for dismissal, not how a process or hearing is labelled. Here, the Respondent did not contest that the Claimant was dismissed for reasons related to conduct, performance or both, and objectively speaking the reasons it relied on fell within those categories. The Code therefore applied.

47. We have set out in our summary of the law the key provisions of the Code. The Respondent did some of what was required – it held a meeting with the Claimant, she was accompanied to that meeting, and it made available to her the opportunity to appeal against dismissal.

48. That said:

48.1. There was a material absence of investigation of matters raised by the Claimant which were pertinent to the key issues that led to the decision to dismiss her, specifically relating to what she is supposed to have said to a learner and her conversation with Sarah Brooks. There was not a complete absence of enquiry into these matters, but there was a complete absence of necessary further enquiry once the Claimant had raised questions that plainly needed looking into.

48.2. Kara Tuckey appears to have been both investigator and decision-maker – the Code says this should be avoided where practicable.

48.3. Connected to that, some of the issues said to have merited the Claimant's dismissal, for example the unspecified further list of concerns raised by Mr Lea, which Ms Tuckey could not explain, were opaque and not explained to the Claimant.

48.4. Further, and again related to this point, Ms Tuckey had evidence to hand at the dismissal hearing that was not shared with the Claimant, contrary to what the Code says would normally be appropriate.

48.5. Ms Tuckey's decision to dismiss the Claimant was taken before the dismissal hearing, when the Code makes clear the decision should be made after the hearing.

48.6. As we have set out above, Mr Jones as appeal officer was not independent.

48.7. Mr Jones also changed the basis of what he considered to be grounds for the Claimant's dismissal without telling her, which is another failure to tell the Claimant of the problem as the Code requires.

49. In summary, the failures to comply with the Code were not wholesale, but some of the failures were very serious failures, in particular deciding the outcome of the dismissal hearing beforehand, and the failures taken together also represent a very serious breach.

50. We concluded that the failures to comply with the Code were unreasonable. The Respondent's explanation was is its belief that the Code did not apply because the Claimant was a probationer. We considered that to be a flimsy explanation. The Respondent clearly adopted some procedure, including inviting the Claimant to a meeting and allowing her to be accompanied and offering her an appeal, which belies the claim made before us that the procedure identified by the Code could be dispensed with. The Respondent also had HR advisers throughout.

51. We also found that it was just and equitable to increase the award because what the Respondent did in failing to comply with the Code substantially deprived the Claimant of the ability to properly understand what lay behind her dismissal (and indeed her proposed dismissal as it nominally was before her meeting with Ms Tuckey) and, unconsciously or otherwise, therefore the failures cloaked the victimisation that she experienced.

52. The next question was by what amount the award should be increased. We concluded that the substantial failures we identified merited an increase towards the higher end of the available percentage scale. We were prepared to make a small discount from the maximum 25% to reflect the probationary nature of the process and to reflect the ways in which the Respondent did comply with the Code and so increased the award by 20%, to £1599.98.

Interest and total

53. The agreed interest calculation on this amount was 385/365 x £1,599.98 x 0.08, namely £135.01. The total award for financial loss was therefore £1,734.99.

Injury to feelings

54. Mr Menzies' principal argument in support of the Respondent's case that the injury to feelings award should be in the lower **Vento** band was that what the Claimant said about injury to feelings in her witness statement must have been about everything she claimed to be acts of discrimination, harassment or victimisation. He argued that given that only two of her complaints succeeded, she cannot have been as seriously injured as the full content of her statement asserts.

55. We noted this point, and to address it made sure that we focused specifically on what the Claimant had said about the impact of the established act of harassment and the established act of victimisation. In any event, we noted that the matters complained of which we did not find to have contravened the Act were more procedural in nature, for example a failure to investigate. Ordinarily, tribunals would expect such matters to attract a lower injury to feelings award in any event. We also made sure not to take into account anything the Claimant had said about depression and anxiety and PTSD. She did not invite us to do so.

Harassment

56. What Mr Lea said on 16 December 2021 was a one-off act. It was also in private, though Mr Lea was the Claimant's supervisor and made the comment in a meeting which was meant to be supportive or at least instructive and discursive. As we found in the Liability Judgment, his comment adopted an unjustified stereotype.

57. As to the impact on the Claimant, noting that what she says in her statement was unchallenged, she says that at the time (paragraph 21) she was shocked, felt undignified, was very anxious, and feared dismissal. None of that was unreasonable, in our judgment. It led to her speaking to colleagues about how she came across (paragraph 22), in a state of upset. In paragraph 24, she refers to having had no opportunity to explain herself and her interactions with Ms Brooks.

58. The comment has continued to impact the Claimant in subsequent roles elsewhere. As she says at paragraphs 69 of her statement and following, she has found herself scared to speak to others for fear of being stereotyped, changing the way she speaks and shying away from asking questions. All of this plainly relates to this incident.

Dismissal

59. As to the dismissal, we noted:

59.1. The Claimant did not know why she had been dismissed because it did not make sense to her, given what the Respondent said it relied on for its decision, as we have summarised it above.

59.2. At paragraphs 38 and 49 of her statement she says she was distressed and shocked to be called to the meeting with Ms Tuckey, and could not sleep.

59.3. As for the dismissal itself, she describes feeling depressed and worried, and says she experienced a lack of sleep. We noted that she says that this was

due to perceptions of her race, but paragraph 68 of her statement is important. There she describes the dismissal as a traumatic experience and whilst she again references race discrimination, she also explicitly refers to the undignified way she was treated after raising concerns of race discrimination [our emphasis] – that is plainly a reference to victimisation. How she was treated affected her mental health, confidence and self-esteem, caused sleeplessness and a loss of confidence. She experienced a sense of anxiety, including about losing her home. In our judgment, none of that was unreasonable either.

59.4. The Claimant's concerns about speaking up in new employment can also logically be traced to her belief that for speaking up at the Respondent, she had been dismissed.

Amounts

60. As we have said, deciding on an award for injury to feelings is never an exact science. In reaching the individual awards we assigned to each of the two incidences of unlawful action on the Respondent's part, we also had regard to the overall picture and the importance of reflecting the value of the sums in everyday life whilst not diminishing respect for equality laws and the seriousness of the evils of discrimination.

61. We concluded that the award for the act of harassment should fall within the lower **Vento** band. That is not to diminish its seriousness, as the Respondent recognised in its submissions, as although it was a one-off act, it has had continuing consequences for the Claimant, as we have just described. We concluded that this one-off act of harassment, which we thought was serious in itself and unsurprisingly has had the ongoing consequences outlined, merited an award at the halfway point of the lower band, namely £5,490.

62. As to the dismissal, it was again important to have regard to the unsurprising consequences for the Claimant, both immediately after the dismissal in terms of the angst and panic the Respondent's decision induced, and longer-term. We could not ignore the fact that the main focus of the Claimant's statement when describing her feelings about the dismissal was on the impact of how she felt about being dismissed because of her race, rather than because she had done a protected act, though as we have pointed out what she says certainly did not exclude the latter.

63. For those reasons, we thought that the right award for the impact of the act of victimisation was on the cusp of the lower and middle bands, namely £9,900.

Uplift

64. Clearly, an uplift for failure to comply with the Code could only apply in this case to losses flowing from dismissal – that is only to the award of £9,900. The 20% uplift increased this amount to £11,880.

65. The total injury to feelings award was therefore £17,370. We noted that the Claimant's Schedule of Loss included a figure of £15,000 for injury to feelings, but, as Ms King submitted, it was for us to determine what any such award should be. Further, the Schedule did not include any ACAS uplift on what was claimed, which would, applying a 20% increase, have taken the figure of £15,000 to £18,000, more than the total we decided should be awarded.

66. Standing back and sense-checking the overall picture, it seemed to us that this overall award – below the mid-point of the middle band – for a serious act of harassment and a dismissal decision, all of which had an immediate serious impact and some, not insignificant, ongoing impact on the Claimant's feelings, conduct and outlook, even in her new employment, was an appropriate figure.

Reduction

67. Mr Menzies raised initially the question of whether any award for injury to feelings should be reduced to reflect the Respondent's view that the Claimant's employment would have ended anyway. That seemed to us to be wrong in principle, as did Ms King in referring us in her written submissions to the Court of Appeal's decision in **O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ. 701**. In fairness to Mr Menzies, he did not seek to pursue the point. It was in any event rendered irrelevant by our findings that we were unable to conclude other than that the Claimant would have remained in the Respondent's employment to the date of this Hearing, based on the evidence with which we were presented.

Interest

68. It was agreed that the correct interest calculation on the award for injury to feelings was 817/365 x £17,370 x 0.08, leading to interest of £3,110.42. The overall award for injury to feelings was therefore £20,480.42.

Summary

69. The overall total compensation which the Respondent was ordered to pay to the Claimant was thus £22,215.41.

70. It was not necessary for us to address any question related to tax given the overall size of the compensation to be paid, which was less than £30,000 which can be paid tax free in respect of compensation for termination of employment, and even further below that threshold when one takes into account the tax-free status of compensation for pre-dismissal harassment.

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Employment Judge Faulkner

Date: 5 April 2024

Notes

Public access to employment tribunal decisions

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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