EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss N Chaudhry	**v**	Trustmark Plans Limited

Heard at: Reading Employment Tribunal (by CVP)

On: 6 October 2023
Before: Employment Judge George
Members: Mr J Appleton
Ms S Hughes

Appearances
For the Claimant: In person
For the Respondent: no attendance, having been given notice of the hearing.

CORRECTED JUDGMENT

1. The respondent's application for a postponement of the hearing is refused.

2. The unauthorised deduction from wages claim succeeds. The respondent shall pay to the claimant the sum of £570.52 gross to be paid after deduction of tax and national insurance contributions in respect of unpaid bonuses for October and November 2021.

3. The respondent shall pay to the claimant compensation for harassment related to sex and direct sex discrimination in the sum of £39,092.40, calculated as follows:

Injury to feelings	15,000.00	15,000.00
Interest on £15,000 @ 8% from **20.10.2021**[1] to 06.10.2023 (716 days) @ £3.29 p.d.	2,355.64	2,355.64
Loss of earnings and benefits with respondent as set out in the		

[1] The midpoint between 29.09.2021 and 09.11.2021

claimant's schedule of loss as at 15.09.2023		
Total loss of earnings (before interest)	19,866.18	19.866.18
Interest on financial loss @ 8% between 27.08.2022[2] and 06.10.2023: 406 days @ £4.35 p.d.	1,766.10	1,766.10
Total compensation subject to grossing up to take account of the incidence of income tax	38,987.92	38,987.92
Excess of total compensation over £30,000	8,987.92	
Excess of personal allowance in y/e 05.04.24 (£12,570) over income of £4,000 gross p.a.	8,570.00	
Amount potentially subject to income tax	417.92	
Grossing up at an assumed marginal rate of tax in y/e 05.04.24 of 20% (£417.92 X 100/80)	522.40	104.58
Total Compensation		39,092.40

4. The total award is £39,662.92.

REASONS

1. On 29 September 2023, the claimant sent to the Tribunal a letter that she had received from proposed liquidators of the respondent company, two partners of FRP Advisory Trading Limited. Prior to the start of the hearing, the Tribunal caused enquiries to be made on the Companies House website. As at the date of the remedy hearing, there was nothing on the Companies House site to suggest that there were any existing formal insolvency proceedings. The letter the claimant had received suggests that a meeting had been called for 5 October 2023 (the day before the remedy hearing) at which a proposal to wind up the company was to be considered. The claimant was notified as a prospective creditor.

2. It appeared, therefore, that there was a proposal for a voluntary liquidation. When the claimant, during the course of the remote hearing, received her post, it included a further letter dated 2 October 2023 which she forwarded to the Tribunal. It included a statement of affairs for the respondent prepared in accordance with the Insolvency Rules applicable to creditors voluntary liquidation. It showed an estimated deficiency as regards members of more than £78,000.00.

[2] The midpoint between 24.11.2021 and 29.04.2023.

3. We did not consider this to be grounds for postponing the remedy hearing. There was no notification to the Tribunal of any formal insolvency proceedings. There was nothing on Companies House to indicate that liquidators have been appointed. The information only went as far indicating that a meeting may have been held at which an a proposal for voluntary liquidation was to be considered. If, as appears may be the case, a resolution had been passed for liquidators to be appointed by means of a creditors voluntary process, then the only thing that would mean was that the name of the respondent would have to be amended to append "in Creditors Voluntary Liquidation" after the company name. Given that the Tribunal has not been informed that liquidators have been appointed it would be wrong to assume that that change should be made or to change the address for service of the company to that of the liquidators. That position may change by the time that the remedy judgement is signed. The claimant would be well advised to contact the proposed liquidators when she receives the judgement in writing and ensure that they have a copy of it. Other than that, the information provided by the claimant did not provide a reason why the hearing should not proceed.

4. Separately, the respondent had made an application to postpone the remedy hearing which the claimant resisted. It was a very last minute application, and was first notified to the Tribunal and the claimant by email just after 3 PM on the afternoon before the hearing was scheduled to take place. The email was sent from Mr Briggs' email address. However, it was not signed, it was written in the third person without saying who was writing. It states that Mr Briggs has been unwell for the past "couple of days" and is unable to attend. A second email was sent at 9:20 AM on the morning of the hearing which states that Mr Briggs is off work due to illness.

5. This does not provide sufficient reason to conclude that the director with conduct of the respondent's matters is unfit to attend or unfit to represent the company. The mails to not explain what the nature of the illness is. If Mr Briggs has indeed been unwell for a couple of days during the course of the week running up to the hearing, then why did he not take steps to notify the claimant and the Tribunal as soon as possible of the possible risk to the hearing date. The fact that the initial email is not signed is of concern against the background of some of the factual findings that we've made in the liability judgement when we found that some documents adduced in evidence were not genuine. These are grounds for us to be cautious about whether to take what we are told by the respondent at face value.

6. When an application for a postponement of a hearing is made at such short notice (less than 7 days before the hearing) we need to be satisfied that there are exceptional circumstances to justify granting the postponement and that it is proportionate to do so. Given the prospect of insolvent liquidation, we think there is more than the usual risk of prejudice to the claimant if the hearing does not go ahead. The fact that Mr Briggs written asking for postponement on the basis of his own unavailability is itself inconsistent with liquidators having been appointed because, were that the case, he would be unable as a director to act without their consent. He does not mention the proposed winding up which is curious. For various reasons we were not satisfied that Mr Briggs' alleged ill-health means

that he is not able to represent the company. We refused the application for postponement because no exceptional circumstances were shown and it was in accordance with the overriding objective to avoid delay.

Reasons for the remedy judgment including applicable law

7. The claimant's remedy claim was set out in the 4-page revised schedule of loss. We considered that and also took into account the documents in the remedy hearing bundle of 18 pages as set out in the index to it. We also had reference to some screen shots of the claimant's bank account from the original liability bundle and to our findings in the reserved liability judgment. We had already made findings at the liability stage that the claimant was entitled to be paid in respect of an unpaid bonus for October 2021 and we accept the figures that she sets out in section 2 of the revised schedule of loss and award the sum of £570.52.

8. We then consider the question of compensation for discrimination on grounds of sex and sex related harassment. The financial losses claimed by the claimant are said to flow from the discriminatory dismissal and the issues that we need to decide as set out in page 73 of the original hearing bundle in the order of Employment Judge Eeley. The claimant gave oral evidence confirming the truth of her updated schedule of loss and answered questions from the Tribunal in clarification.

9. The law in relation to injury to feelings is well established. We remind ourselves of the case of Armitage, Marsden and HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

10. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved: MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604.

11. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed in Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, in De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

12. Previously decided cases should not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the

ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. The applicable bands for the present claim are those set out in the 4th Addendum and include:

a. Between £9,100.00 and £27,400.00 for serious cases not meriting an award in the highest band;

b. Between £900.00 and £9,100.00 for less serious cases, such as an isolated or one-off act or discrimination.

13. The claimant argues that this is a suitable case for an award of aggravated damages. They are, in principle, available for an act of discrimination: HM Prison Service v Johnson. They are compensatory rather than punitive and are available when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant. In Metropolitan Police Commissioner v Shaw [2012] I.C.R. 291 EAT, Underhill P, as he then was, cautioned against the risk that a separate award of aggravated damages can lead a tribunal, unconsciously to punish a respondent rather than compensate the victim. There is also a risk of duplication of compensation and the tribunal must be satisfied that there is a causal connection between the exceptional or contumelious conduct and the aggravation of the injury. In many cases it will be appropriate rather to include in compensation for injury to feelings an element which reflects the way in which the victim was treated.

14. When considering the correct approach to the assessment of financial loss, the successful claimant is entitled to be compensated for the loss and damage which arises naturally and directly from the wrongful act: Essa v Laing Ltd [2004] IRLR 313, CA. As best as possible, the Tribunal must put the claimant into the position that they would have been in but for the unlawful conduct: Ministry of Defence v Cannock. It was also held in Essa v Laing that there is no need to show that the loss claimed was reasonably foreseeable, provided that a direct causal link between the act of discrimination and the loss can be made out. The discriminator must take their victim as they find them.

15. The first thing that we have to consider is how long would the claimant have remained in employment had she not been dismissed in discriminatory circumstances because that is the starting point for calculating the loss that she has shown. In relation to this, we consider whether, absent the discrimination and harassment, would she have resigned; during oral evidence at the liability stage, the claimant stated that it reached a point where she was considering her position (in effect). In our view, it is not possible on the available evidence to find that she would have resigned had she not been dismissed. The dissatisfaction with her employment that she described at some points in her oral evidence was inextricably bound up with the behaviour that we have found to be discriminatory or harassment. Absent that behaviour, there is no basis to conclude that she would voluntarily have resigned.

16. We then consider whether the respondent would have dismissed the claimant for poor attendance in non-discriminatory circumstances because, as we have found in the liability judgment, the claimant had had a significant number of absences during the short employment that she had with the respondent. However, roughly half of those absences were connected with her providing care to her daughter and it seems to us that, in order for a fair and non-discriminatory dismissal to take place, the respondent would have had to ignore absences that could be regarded as dependents leave. Mr Briggs clearly considered terminated her employment for absences during the probation period but then, for whatever reason, decided not to.

17. We accept the claimant's evidence that she has not been unwell since she left the respondent's employment and she seems to have sustained employment with Charity Link and in the temporary work that she carried out immediately before that. We have no reason to disbelieve what she says in that regard. So, we have come to the conclusion that the evidence suggests that the claimant would have been able to sustain a sufficiently good attendance record that she did not risk dismissal by the respondent at some future date had she not been dismissed in the discriminatory circumstances in which she was. For those reasons we are not satisfied that her employment would have ended in any event by a fair dismissal or that a potential deduction should be made from compensation to take account of that eventuality.

18. There is then the question that, at the time she was dismissed, although this was not known to the respondent, she was in the early stages of pregnancy. The claimant started her maternity leave on 3 June 2022 (remedy bundle page 5). The question is therefore whether she would have returned to work with the respondent from maternity leave and, if so, when. As a matter of fact she took nine months off during the period that she was covered by maternity allowance and therefore, it seems probable to us, that she would have done likewise had she remained in the employment of the respondent, remaining on maternity leave whilst she received statutory maternity pay. Her evidence was that the pay she earned through her employment with the respondent was sufficient that she would have been able to afford to return to work and provide childcare for her baby. We accept that evidence. It was paid at a considerably higher rate of pay than she received from her employment with Charity Link, the firm that she worked with for a short period of time before going on maternity leave. Therefore we accept that had she not been dismissed she would have returned to work with the respondent after maternity leave.

19. In principle, as a result of those findings, she should be awarded the sums that are set out in paragraphs 3.a. and 3.b. of the Schedule of Loss.

20. Some evidence was given by the claimant to the effect that, for a very short period, which we think was probably approximately two months, payments would have been made into a next pension or similar by Charity Link in the sum of 3% of what she was earning gross. It is a relatively small amount and it is difficult for us to calculate given the information that we have available to us. Given that the size of the sum is relatively insignificant, we do not take it into account in assessing loss; there are a number of other variables as we see below and overall it is not just or proportionate to make that further adjustment.

21. What we do consider is the question of whether the claimant, had she acted reasonably, would have sought alternative work at a higher level of pay rather than become self-employed. She explained partly in the schedule of loss and partly in oral evidence that since she could not afford childcare for her baby she decided to no longer seek paid employment but to start up a self-employed business which she has earned a limited amount of income in the short space of time that it has been trading. Her evidence was, in essence, that this was a decision that she and her partner reached in order to seize the opportunity of the claimant being at home in any event. In doing so, she did not seek to return to employment with Charity Link after maternity leave.

22. This was an employment about which we have a limited amount of information about based on the letter from them dated 4 April 2022 (page 5 of the remedy bundle). This was sent to confirm the claimant's maternity leave (she was not entitled to SMP because of short service). It reveals that the employment was a fixed term contract so it was not secure employment, although the claimant fairly says that she felt some confidence that Charity Link would have taken her back because they were pleased with her performance. She explains that the earnings from Charity Link would not have been sufficient to cover her childcare costs, which was part of the reason for her decision to become self-employed.

23. The claimant is only seeking loss of earnings for a further period from 6 March 2023, her return to work after maternity leave, to 29 May 2023, a period of 12 weeks. When we take that into account, together with her evidence that she and her partner made a conscious decision for her not to look for paid employment, when deciding whether the claimant has shown that she incurred those losses as a result of the discrimination. The respondent should not be fixed with a loss of income that is caused by a personal decision rather than caused by their unlawful act. We think that, acting reasonably, the claimant might have started looking for work before the end of maternity leave and she might have returned to Charity Link but then she would have had a continuing loss of income compared with her income from the respondent - possibly for a much longer period than she is in fact claiming. We are also mindful that here we are considering issues of alleged failure to mitigate loss and there the burden of proof is on the respondent. However, the respondent is not present and has not taken steps even in advance of today's hearing to supply any evidence. Taking into account all of the variables, we think it is just and equitable to award 12 weeks that are sought by 3.c. in the schedule of loss as a fair evaluation of the losses caused by the respondent's act but find that the claimant's loss finished at that point. Therefore the interest needs to be calculated form the mid-point between the date of dismissal and 29 May, that being the period over which the loss was sustained.

24. Moving on to injury to feelings, we accept the evidence and argument of Ms Chaudhry that it is not going to be possible, evidentially, to separate out the impact on her of, on the one hand, Mr Leon Briggs' actions, then Mr Neil Briggs' actions and finally the dismissal. She viewed this as being family acting against her and it was an accumulation of that behaviour that had an impact upon her. The impacts were all linked and the effect on her of having to deal with pursuing

this case obviously arises out of all of the actions which she has successfully shown to have been unlawful.

25. The 4th addendum to the Presidential Guidance on the application of the case of Vento provides that, for claims such as the present that were presented after 5 April 2021, the lowest of the three bands suggests a range of between £900 and £9.100 and the middle band a range between £9,100 and £27,400. The mid-point of that middle band is £18,250.

26. We remind ourselves that we did find in our liability judgment that there were occasions when the claimant had exaggerated or embellished her account to some extent, for example, in relation to what happened with the meeting that she described as a probationary review. However, we do not find that she has done so in her description of the impact on her of the acts that we have been found to be unlawful as set out in section 4 of the schedule of loss (page 3 of the remedy bundle). We accept that evidence and adopt it as our findings. The claimant appears to have made a conscious effort to identify how she felt about those acts and not about some of the other, sometimes more serious, acts that she describes in her witness statement. We do need to make sure that we are awarding compensation for the acts that have been found to be unlawful and not for other matters that the claimant originally complained about.

27. We take into account that there was evidence before us as we recount (in particular in paragraph 131 of the judgment) that she was as much angry and annoyed as upset by the behaviour of Mr Leon Briggs and she felt it to be an invasion of her personal space. Essentially we accept what she says in the description of the impact on her of the conduct and the last paragraph of that section, in particular, fits with the explanation she gave to us at the start of the liability hearing for not wanting to appear in person and the uncertainty she felt about that procedure.

28. On the other hand, happily, the claimant has shown great resilience in dealing with what she has experienced and there is no discrete psychological element to the injury that has either been claimed or evidenced and we need to take that into account when comparing the evidence we have and the findings we make about the impact on the claimant compared with other cases that we hear. Every case needs to be decided on its own merit and we need to also bear in mind the value of money in real terms. The award should be compensatory not punitive and we think that the middle of the middle band would be too high as an award. Just below the middle of the middle band we think is appropriate. The claimant has shown resilience, she has recovered her equilibrium and moved on which is entirely to her credit, and we think that an award for £15,000 is the appropriate figure.

29. The claimant has also claimed aggravated damages and gave evidence that what she meant by this was purely the conduct of the respondent in creating documents for the purposes of the litigation to demonstrate that they had taken steps to manage her absences, which they had not in fact taken, and she described herself as feeling really angry when she received them through the Data Subject Access Request. She argues then that this is a suitable case for an award of aggravated damages.

30. Such an award is, in principle, available for an act of discrimination , although it is relatively unusual that it can genuinely be said that the hurt caused by the conduct can be separated from the hurt cased by the discrimination itself. They are also intended to be compensatory rather than punitive and they are available where the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant or in the conduct of litigation thereafter. There is a risk of duplication of compensation and, in this case, we think that that is a real risk. We need to take care to see whether the anger the claimant felt about that particular matter is genuinely capable of being separated from the feelings that she experienced in conducting the litigation generally and, in particular, after Mr Briggs became self-representing, the feelings that she experienced in having to deal with him personally.

31. In our view, the hurt that she described is indistinguishable from that described in particular, in the last paragraph of section 4 of the Schedule of Loss. We think that the claimant risks being overcompensated if we award a separate sum for aggravated damages. However, we wish to make clear that the reason why we are not awarding aggravated damages is because the claimant has not shown a separate distinguishable loss. In principle, subject to proof of loss, this would be a suitable case for an award because it is available to compensate for injury caused by the kinds of conduct that we have described. Creating documentation to use in a tribunal hearing can certainly be described as insulting or oppressive or high-handed and manifestly shows a disrespect to the tribunal process. The fact that we have decided not to award aggravated damages is not a reflection of our view of the respondent's actions, it is simply that the purpose of aggravated damages is to compensate not to punish.

32. We then consider the question of the ACAS uplift and have come to the conclusion that there is not an applicable Code of Conduct for the circumstances of the present case. The claimant did not raise a grievance so there is not a question of the respondent having failed to comply with the Code of Conduct on grievances. The ostensible reason for the decision to dismissal was frequent absences of a capability type process so the ostensible reason was unreliability rather than misconduct. We therefore think that the ACAS Code did not apply and there has not been an unreasonable failure on the part of the respondent to comply with an applicable ACAS Code - deplorable though the process was that they followed.

_____

Employment Judge George

Date: 1 November 2023……..

Sent to the parties on: 9/11/2023

N Gotecha

For the Tribunal Office