



EMPLOYMENT TRIBUNALS

Claimant: Sundeep Dhiraj

Respondent: Cambridgeshire and Peterborough NHS Foundation Trust

Heard at: Watford by CVP

On: 6 & 24 October 2023, and 21 March 2024,
with deliberations on 26 March 2024.

Before: Employment Judge Liz Ord
Panel Member Eleanor Deem
Panel Member Lizzie Davies

Representation:

Claimant: Ms A Fadipe (Counsel)
Respondent: Mr M Islam-Choudury (Counsel)

RESERVED REMEDY JUDGMENT

The unanimous decision of the panel is:

1. The Respondent is ordered to pay the Claimant compensation in the sum of £4,592.66.

REASONS

Background

1. Liability judgment was given orally on 5 and 6 October 2023, followed by written reasons on 19 January 2024. The Tribunal unanimously adjudged that the Claimant's complaint of harassment concerning the "P" word had the effect but not the purpose of harassing the Claimant. The Claimant's second harassment complaint regarding "Fred" was dismissed.

Issues

2. The issues for the tribunal are:
 - 2.1. Has the discrimination caused the claimant financial loss?
 - 2.2. If so, what sum should be awarded?
 - 2.3. Should there be interest on the sum awarded for financial loss?
 - 2.4. Has the discrimination caused the claimant injury to feelings?
 - 2.5. If so, how much compensation should be awarded for that?
 - 2.6. Should there be interest on any sum awarded for injury to feelings?
 - 2.7. If so, how much?
 - 2.8. Should aggravated damages be awarded?
 - 2.9. If so, how much?
 - 2.10. Should interest be awarded on aggravated damages?

Evidence

3. The Tribunal had before it the following documentary evidence:
 - 3.1. Remedy documents bundle; Claimant's skeleton arguments, Respondent's skeleton arguments; Claimant's updated schedule of loss, Respondent's counter-schedule of loss, authority of *Habib v Dave Whelan Sports Ltd.*
 - 3.2. Witness statements: from the Claimant and, on behalf of the Respondent, Nadia Haider (Business Partner at the Trust).
4. We heard evidence on oath/affirmation from:
 - 4.1. The Claimant;
 - 4.2. Nadia Haider on behalf of the Respondent

The Law

5. Section 124 of the Equality Act 2010 provides:
 - (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
 - (2) The tribunal may –
 - (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
 - (b) order the respondent to pay compensation to the complainant;

- (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or sheriff under section 119.
6. Section 119(4): An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).
 7. In accordance with the Employment Tribunals (Interest on Awards etc) Regulations 1996, interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (reg 6(1)(a)); for all other sums it is from the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award (reg 6(1)(b)).
 8. The “eggshell skull” principle applies to loss arising from discrimination and so the discriminator must take the victim as s/he finds him.
 9. In order to award compensation, the Tribunal must be satisfied, on the basis of its evidence and its findings of fact, that the harm suffered by the Claimant was caused by the act of discrimination (**Essa v Laing Ltd** [2004] ICR 746, CA).
 10. In **Vento v Chief Constable of West Yorkshire Police (No.2)** 2003 ICR 318, CA, the Court of Appeal gave specific guidance on how employment tribunals should approach the issue of injury to feelings. Three bands of compensation were identified, namely:
 - A lower band for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;
 - A middle band for serious cases that do not merit an award in the highest band; and
 - A top band for the most serious of cases, such as where there has been a lengthy campaign of discriminatory harassment.
 11. The Court described some of the elements that can be compensated under the head of injury to feelings which, according to Lord Justice Mummery, include: “subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on”.
 12. The Court also emphasised that, after making an award for injury to feelings, the tribunal must stand back and have regard to the overall compensation figure to ensure that it is proportionate and not subject to double counting.
 13. Since then, the figures have been revised to take account of inflation (**Da’Bell v National Society for Prevention of Cruelty to Children** [2010] IRLR 19 EAT).
 14. For the year 6 April 2022 to 5 April 2023 (the year in which the claimant presented his claim which was on 13 October 2022, the Vento bands were:

- Lower band - £990 to £9,900;
- Middle band - £9,900 to £29,600;
- Top band - £29,600 to £49,300.

15. In **HM Prison Service and ors v Johnson** [1997] ICR 275, EAT, the EAT summarised the general principles that underlie awards for injury to feelings:

- a) Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;
- b) An award should not be inflated by the Tribunal's feelings of indignation at the guilty party's conduct;
- c) Awards should not be so low as to diminish respect for the policy of discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches;
- d) Awards should be broadly similar to awards in personal injury cases;
- e) Tribunals should bear in mind the value in everyday life of the sum they are contemplating;
- f) The Tribunal should bear in mind the need for public respect for the level of awards made.

16. The focus must be on the effect of the unlawful discriminatory treatment on the Claimant, not on the gravity of the discriminatory acts of the respondent (**Komeng v Creative Support Ltd** EAT 0275/18).

17. In **Ahsan v The Labour Party** EAT/0211/10, Mr Justice Underhill, the then President of the EAT, stated that liability extends only to those consequences which "directly and naturally" flow from the acts complained of.

18. Aggravated damages may be awarded where the behaviour of the respondent increased the impact of the discriminatory act on the claimant and therefore, the injury to his feelings. They are an aspect of injury to feelings and are awarded for the additional distress caused by the aggravating features. They are compensatory and not punitive.

19. In **Alexander v Home Office** 1988 ICR 685, CA, the Court of Appeal held that aggravated damages can be awarded where the discriminatory behaviour was carried out in a "high-handed, malicious, insulting or oppressive manner".

20. In **Commissioner of Police of the Metropolis v Shaw** UKEAT/0125/11/ZT, Mr Justice Underhill, the then President of the EAT, identified three broad categories of case for awarding aggravated damages:

- Where the manner in which the wrong was committed was particularly upsetting;
- Where the motive for the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound;

- Where subsequent conduct added to the injury, for example, where the employer conducted tribunal proceedings in an unnecessarily offensive manner, or “rubbed salt in the wound” by plainly showing that it did not take the claimant’s complaint of discrimination seriously.
21. The tribunal must consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant. In **Wilson Barca LLP and other v Shirin** [2020] UKEAT/0276/19, the EAT said that, if the tribunal makes an aggravated damages award it should explain why the amount of the injury to feelings award is insufficient to compensate the claimant, and the extent to which the conduct giving rise to the award of aggravated damages has increased the impact of the discriminatory act on the claimant.
22. In **HM Land Registry v McGlue** [2013] EqLR 701, the EAT warned that a Tribunal should “be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”.
23. Besides the above, we have taken account of all other caselaw referred to us by the parties, as set out in the skeleton arguments.

Findings of Fact

24. Page references in brackets are either to the remedy bundle (R) or the liability bundle (L), unless otherwise noted.
25. The “P” word incident occurred on 20 May 2022 at the staff away day. The three members of staff who were there, Lisa Hargreaves, Lee Post, and Donna Aldridge, all laughed, and the Claimant walked away in disgust. He felt deeply offended. As a child, he had been subjected to racial abuse at school, and had been called the “P” word.
26. Lee Post apologized to the Claimant that evening, having realised the Claimant had taken offence. Lisa Hargreaves also apologised at a later stage and explained that she was not racist and was just relating a story about a shop. The name (including the “P” word) was said in an historical context and was not directed at anyone. It was never intended to hurt him.
27. The Claimant informed his line manager, Sara Hart, of the incident. Ms Hart made a comment along the lines of “I have known [Lisa Hargreaves] for a very long time and I know that she is not like that.” This made the Claimant feel that Ms Hart was dismissive, had not taken him seriously, and was on Ms Hargreaves’ side. Neither Mr Post nor Ms Aldridge were interviewed.
28. The Claimant submitted a grievance (Lpp82-86) about Ms Hargreaves’ comment and Ms Hart’s handling of it. The outcome letter (Lpp95-100) upheld the complaint regarding the racist comment, and partially upheld the complaint about Ms Hart’s handling of the matter.
29. When Ms Hargreaves was giving evidence at the hearing, whilst acknowledging that the “P” word was racially offensive, she said she was only

reminiscing. When pressed, she replied that she would tell the story again. She conveyed that using the “P” word in the context of naming the shop was acceptable. Her response distressed the Claimant.

Injury to feelings

30. Whilst the Claimant provided a witness statement, he gave very little oral evidence at the hearing on injury to feelings, and therefore his written evidence in this regard was not tested.
31. The Claimant’s redacted medical records (Rpp36-38) make no mention of the incident. Relevant extracts from the GP entries record:
32. 26 May 2022 (Rp37): work stressful; not slept, mom dementia – getting worse. Wants time off and Zopiclone (which the panel understand is a sleeping tablet) short term to help sleep and support his mom.
Diagnosis: Stress/Anxiety.
33. 7 June 2022 (Rpp37-38) – Issues at work, states he is being bullied, raised with work and they are looking into it. Has time off work.
34. 14 June 2022 (Rp38) – Work issues have intensified...put a grievance against his boss, he is anxious about it. Also dealing with mum’s cognitive impairment is putting more pressure on him. But he is managing, has stopped drinking - had only one can in the past month (socially).
Improvement with Duloxetine (which the panel understand is an anti-depressant).
Diagnosis: stress/anxiety.
35. GP letter of 19 June 2023 (Rp36) says relevantly: He presented in surgery on 26th May...reported low mood, primarily due to stress at work and we agreed to sign him off.
Mr Dhiraj subsequently presented on two further occasions in June 2022, detailing ongoing stress at work which was resulting in anxiety. We agree it would be appropriate to extend his sick note and he was subsequently signed off work with stress and anxiety until 13 October 2022.
36. Various FIT notes from 26 May 2022 to 13 October 2022 record stress and anxiety (Lpp72, 75, 78, 89; Rp13).
37. An Occupational Health Report of 18 July 2022 (Lp79) refers to the Claimant declaring a pre-existing history of depression and reporting ongoing symptoms of this condition currently. The Claimant cited work-stress as contributing to increasing anxiety. It states that the declared underlying health condition could impact on attendance due to possible re-occurring symptoms that may require medical management. There is nothing about a racist incident.
38. Turning to the Claimant’s remedy witness statement (paragraph 10, he says that on 6 May 2022, he was prescribed Duloxetine due to a build up of stress he was feeling at work. He felt he was not given adequate support and equipment. He says (paragraph 17) that, after the incident in May 2022, he began drinking alcohol excessively, which continued until late July 2022. He also states (paragraph 18) that his mother was diagnosed with Vascular

Dementia and Alzheimer's in May 2021. In his liability witness statement (paragraph 32), the Claimant says he was prescribed the anti-depressant, Duloxetine, as a result of the incident.

39. We do not have the GP's notes from before 26 May 2022 or after 19 June 2022. Nonetheless, on the evidence before us, we find that the Claimant had pre-existing mental health problems that were compounded by his mother's poor health and stress at work that occurred before the incident on 20 May 2022.
40. The incident exacerbated his pre-existing condition, although it did not cause him to turn to drink, as he claimed. In fact, he was able to manage, and was hardly drinking at all at this time. It is not possible from the limited medical records before us to know when the Claimant was first prescribed Duloxetine, but on balance, given his pre-existing mental health issues, we find that he was prescribed this anti-depressant prior to the incident.

Loss of earnings – sick pay

41. It is common ground that there was an issue with the Claimant's sick pay. Nadia Haider first became aware of this when it was mentioned at the grievance meeting on 10 August 2022. She looked into it and emailed payroll later that day.
42. Following investigation, it was discovered that the Claimant had been underpaid sick pay in the sum £1,071.43 net. The Claimant received that additional sum with his September 2022 pay (September payslip R21). The Claimant did not question the amount he was paid at the time and accepted it.
43. The Claimant gave notice of termination of employment, with his last day of service being 31 October 2022 (Rp24). However, he was inadvertently paid until 30 November 2022 (November payslip p23). The Respondent wrote to him on 14 February 2023 informing him of the overpayment and requesting that it be repaid. It has not been repaid.
44. All sums paid to the Claimant throughout his short employment with the Respondent have been set out in a table, which has not been challenged (Rp26). This shows that he was overpaid £1,423.66 gross. We accept this evidence.
45. The Claimant started a new job on 10 October 2022, prior to his last day of service with the Respondent and just before his last FIT note expired.

Claimant's submissions

46. The Claimant's primary submission is that his injury to feelings falls within the middle Vento band and he claims £10,500.
47. He relies on the case of **Base Childrenswear Ltd. v Otshudi** UKEAT/0267/18 (28 February 2019, unreported). Here the EAT rejected an argument that any "one off act" must fall within Vento band 1 and stated that "the question is what effect the discriminatory act had on the claimant" (see paragraph 35 of Claimant's skeleton argument).

48. However, Claimant's Counsel in closing submissions conceded that the claim might now fall more into the lower band because the Claimant did not give evidence on injury to feelings and so his witness statement was not tested. Therefore, only limited weight could be given to this element of it. Nonetheless, if it ended up in the lower band, the award should be near the top.

49. The Claimant claims aggravated damages in the sum of £3,000.

50. With respect to financial loss, the amount is unclear. The updated schedule of loss states £567.18 for loss of income while off sick, but the next entry takes account of the overpayment and states "minus £658.99". The matter was not clarified at the hearing or in closing submissions, which failed to address the matter at all.

Respondent's submissions

51. The Respondent avers that this was a one-off act and the injury to feelings award falls at the lower end of the lower Vento band, namely up to £5,000.

52. They say there has been no conduct which would merit aggravated damages.

53. Their position on financial loss is that all outstanding sums were paid and, in fact, the Claimant was overpaid.

Discussion and Conclusions

Injury to feelings

54. The Claimant was already suffering from stress and anxiety prior to the incident, from causes unrelated. The incident added to his pre-existing condition, although it was only one factor contributing to his subsequent ongoing mental health problems.

55. There was no malice intended by the comment and the effect on the Claimant was unintentional.

56. We have considered all the case law on quantum that has been presented to us. We take the view that the Claimant's case is not dissimilar to that of **Ghali v Transperfect Translations Ltd (Stratford)** (Case No 3201752/08) (5 August 2008, unreported), which is on the first page of the annex to the Respondent's skeleton argument. That case referred to an isolated incident where there was no intention to harass, as the dialogue was meant to be funny. £1,500 was awarded.

57. We conclude that the Claimant's injury falls within the lower part of the lower Vento band. Taking account of inflation since the time **Ghali** was decided, we find that an appropriate award would be £3,000 to take account of the laughing that took place at the time. We therefore make an award of £3,000 for injury to feelings.

58. We have considered whether any additional award should be made for aggravated damages. The dismissive way Sara Hart dealt with the matter, and the fact Lisa Hargreaves stated she would tell the story again, caused

further upset to the Claimant. Consequently, we award aggravated damages in the sum of £1,000.

Financial loss

59. The burden of proof is on the Claimant to demonstrate his loss. He has not done so. In fact, we find he has been overpaid. Consequently, no award is made.

Interest

60. We award interest on the injury to feelings and aggravated damages award at the rate of 8% from the date of the discrimination (20 May 2022) to the date we calculated the award (26 March 2024).

Calculation of total award

61. Total of injury to feelings and aggravated damages award = £4,000.

62. Number of days from 22 May 2022 to 26 March 2024 = 676 days.

63. Interest: $676 \times 0.08 \times 1/365 \times 4,000 = 592.66$

64. Total award: $£4,000 + £592.66 = £4,592.66$.

Employment Judge Liz Ord

Date 9 April 2024

JUDGMENT SENT TO THE PARTIES ON
11 April 2024

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FOR THE TRIBUNAL OFFICE

Notes

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Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.