EMPLOYMENT TRIBUNALS

Claimant: Mr David Palmer

Respondent: Anova London Limited

Heard at: Watford (via CVP) **On:** 5 March 2024

Before: Employment Judge Margo, Mrs G Binks and Mr W Dykes

Representation

Claimant: In person

Respondent: Mr E McFarlane (Senior Litigation Consultant)

JUDGMENT having been sent to the parties on 5 April 2024 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brought claims of claims constructive unfair dismissal, automatically unfair dismissal under s.103A of the Employment Rights Act 1996, whistleblowing detriments under s.47B of the Employment Rights Act 1996 and direct disability discrimination. The disability relied upon by the claimant was depression/anxiety.

2. In a Judgment and Reasons dated 25 September 2023 (the "**Liability Reasons**"), the Tribunal dismissed all of the claimant's claims save for the claim of direct disability discrimination relating to the comments made by Mr Azouri to Ms Doctorsky in June 2020.

3. The remedy hearing took place on 5 March 2024 and the Tribunal awarded the claimant the sum of £8,000.00 for injury to feelings and a further sum of £2,376,00 in respect of interest on that award at the rate of 8% for the period 18 June 2020 – 5 March 2024. In total, this comes to an award of £10,376.00.

4. The claimant also made an application for aggravated damages that was dismissed.

5. As set out above, the claimant succeeded in respect of one claim that was set out at Box 6 of the Further and Better Particulars; namely, that in a conversation that took place in June 2020 between Mr Azouri and Ms Doctorsky, Ms Doctorsky reminded Mr Azouri of the claimant's mental health issues and Mr Azouri responded by saying that the claimant did not need pills and that he knows how to heal him. At paragraphs 94-95 of the Liability Reasons, we found as a fact that this comment was made because Mr Azouri was in some sense sceptical about the nature of the claimant's mental health issues and the extent to which it was a medical issue that should be treated through anti-depressant medication. We also found as a fact that Ms Doctorsky reported these comments back to the claimant shortly after they were made. In these Reasons, we refer to the act in respect of which the claim was upheld as the "**discriminatory act**".

6. In advance of the remedy hearing, the Tribunal was provided with position papers by both parties, and at the hearing the claimant gave evidence and was cross-examined by Mr McFarlane.

7. The claimant sought £20,000 for injury to feelings, a further £4,000 for aggravated damages and interest on those sums at 8%. Overall, his total claim as set out in his schedule of loss was in excess of £31,000.

8. In his position paper and schedule of loss, the claimant stated that interest should run from 1 June 2020 but he accepted in evidence that the date of the act was in fact 18 June 2020 and that therefore any interest awarded should run from that date.

9. The respondent contended that the appropriate award was £3,500. The respondent did not suggest that it would be inappropriate to award interest on that sum and helpfully set out that in order to calculate the interest on any sum that was awarded (based on a period of 1,356 days) one should take the sum awarded and multiply it by 0.297.

The Law

10. It is necessary for the Tribunal to try to identify a rational basis on which any harm suffered can be apportioned between a part caused by the respondent's wrong (in this case the discriminatory act) and a part which is not so caused. This is relevant in the present case because the claimant brought numerous allegations of discrimination that have been dismissed. Accordingly, the Tribunal's task is to identify the injury caused by the discriminatory act alone.

11. We reminded ourselves of the principles relating to the apportionment of injury as set out in *Hatton v Sutherland* [2002] ICR 613 and *BAE Systems (Operations) Ltd v Konczak* [2017] IRLR 893.

12. In terms of the amount of an award for injury to feelings, the Vento Guidelines applicable to the claimant's claim (presented on 16 December 2020) provide for a lower band of £900 – £9,000; a middle band of £9,000 – £27,000; and, an upper band of £27,000 – £45,000.

13. Aggravated damages can be awarded in the most serious cases where the behaviour of the respondent has aggravated the claimant's injury. They can be awarded where the respondent has acted in a "*high-handed, malicious, insulting or oppressive manner*" (*Broome v Cassell & Co Ltd* [1972] AC 1027). This would usually be the case where there are clear examples of malice or bad intention on the part of the respondent, and indeed intention is an important factor. However, it is important for a tribunal not to focus on the respondent's conduct and motive; it is the aggravating effect on the claimant's injury to feelings that is important (*Rookes v Barnard* [1964] AC 1129).

Injury to feelings: findings of fact and conclusions

14. In accordance with the Liability Reasons and the claimant's evidence at the remedy hearing, we find that the discriminatory act took place on 18 June 2020.

15. It was one of numerous acts in respect of which claims of discrimination were brought by the claimant. His case was that all those acts had caused injury to his feelings. However, we note that the comments that Mr Azouri made to Ms Doctorsky on 18 June 2020 and that were reported back to the claimant are barely mentioned in the documents contained in the very large Bundle that was before us at the liability hearing. This is despite the fact that the Bundle contained detailed transcripts of calls between Mr Azouri and the claimant that post-dated 18 June 2020. In the course of those calls the claimant raised numerous complaints about Mr Azouri's conduct.

16. Additionally, there was a grievance investigation and we had before us notes from an interview with the claimant that took place on 23 September 2020 (p.804 of the Bundle). Those notes record as follows:

> "*[Ms Doctorsky] did not know everything that had happened [in respect of the facebook pixel issue] but reminded Guy about my anxiety. After considering this, Guy told Mika that I do not need pills, and instead, he knows how to heal me. I still do not know what to make of that belief of his, but it did not sound like he took my mental health very seriously*."

17. We find that these notes suggest that the discriminatory act had some impact upon the claimant but not a particularly serious or significant impact.

18. We also note from the medical notes that the claimant did not report the discriminatory act when he saw his GP in August 2020 and it did not lead to any increase in his medication.

19. However, we have heard oral evidence from the claimant that he was distressed when he heard about Mr Azouri's comments. He felt that Mr Azouri

was expressing a view on something very personal to him (i.e. to the claimant) and that it was not something he would expect to hear from anyone, let alone his employer. The claimant also said that he now wonders what people will think when they find out about his mental health condition and is anxious about what they think behind his back and whether they will have doubts about his condition. He said that, as a result, he finds it even harder to be himself and to live with his condition.

20. We find as a fact that the discriminatory act did have the impact upon the claimant that he described in his oral evidence and as set out at paragraph 19 above. As such, there has been a longer-term impact upon the claimant in terms of his concern and anxiety about how other people will react when they learn of his condition and whether they will doubt or question it in some way.

21. The respondent submitted that, amongst other things, we should take into account the fact that Mr Azouri's comments were not made directly to the claimant. In our judgment that has little or no weight when assessing the nature of the injury caused by the discriminatory act. Our focus must be upon the impact that Mr Azouri's conduct had upon the claimant.

22. Taking all those matters in round we think that this award falls within the lower Vento band but, given the longer-term impact that the discriminatory act had on the claimant, we assess it as falling towards the top end of that band. In our judgment, the appropriate award is £8,000. Interest at 8% come to £2,376.00 (£8,000 x 0.297 = £2,376) – which brings the total award to £10,376.00.

Aggravated damages

23. We deal in turn with the different arguments advanced by the claimant as to why he should be entitled to aggravated damages in the sum of £4,000.

<u>The respondent denied the claimant's condition during the hearing</u>

24. The respondent did not deny the fact of the claimant's condition but it did argue that the claimant was not disabled within the meaning of the Equality Act 2010. The respondent was entitled to run those arguments. In particular, there was a genuine issue as to whether the condition was "long-term". That issue was resolved in the claimant's favour on the basis of the evidence but the respondent was entitled to test that evidence at the final hearing.

<u>Delays with disclosure and production of the Bundle</u>

25. Looking at issues of disclosure in the round, this was a very document heavy case – with a bundle that ended up coming in well over 1,000 pages. The tone and tenor of the correspondence from the respondent, again looked at in the round, showed that they were genuinely attempting to finalise the Bundle and to co-operate with the claimant in doing so. It may be that at times the respondent made mistakes as to what documents it already had in its possession but we have not seen evidence of anything that could justify an award of aggravated damages.

Illegally obtained documents

26. The claimant has not established, on the balance of probabilities, that the respondent did obtain any documents illegally and so that aspect of the application for aggravated damages does not get over that initial evidential hurdle.

Costs warning

27. We accept that it would have concerned the claimant to have received the costs warning letter and we accept the general principle that the respondents should think very carefully before sending letters of that sort to Litigants-in-Person. However, in our judgment the respondent was entitled to put the claimant on notice as to costs given the challenging approach the claimant had taken to the preparation of the Bundle which included making allegations of fraud and arguing that audio-recordings should somehow be embedded into the Bundle when in reality the respondent was right to say that if the claimant wanted a recording to be played at the hearing, it would be necessary for him to provide the means to do so. Moreover, it is true to say that, in the event, all but one of the claimant's claims were dismissed.

Conclusion

28. Accordingly, in our judgment the respondent has not acted in a way that would merit an award for aggravated damages in addition to the award of injury to feelings.

Costs

29. Finally, the claimant brought an application for costs that relied on many of the factors that under-pinned his claim for aggravated damages. Following the rejection of his claim for aggravated damages, the claimant decided not to pursue his application for costs.

Employment Judge Margo

15 May 2024

JUDGMENT SENT TO THE PARTIES ON
……16 May 2024…..
……..
FOR THE TRIBUNALS