



EMPLOYMENT TRIBUNALS

Claimant: L YANG

Respondent: HYDE INTERNATIONAL (UK) (Appearance not entered)

Heard at: Newcastle Upon Tyne On: 28 June 2024

Before: Employment Judge O'Dempsey

Representation

Claimant: Parsons-Munn (Counsel)

Respondent: Kaur-Singh (Solicitor)

JUDGMENT

1. The claims for harassment and victimisation under the Equality Act 2010 and for unlawful deductions and unfair dismissal under the Employment Rights Act 1996 succeed.

2. The Respondent is ordered to pay to the Claimant the following (agreed) sums

a. Unfair dismissal:

Basic award of £2038.44;

with lost statutory rights of £500.

b. Race discrimination and harassment:

Loss to date £17681.44 together with interest thereon of £748.84;

Future loss £4206.40;

Compensation for injury to feelings of £14,000.00 with interest of £1188.09.

c. Compensation for unlawful deductions from wages:

Holiday pay £1888.48

Statutory Sick Pay: £65.64

REASONS

1. Written reasons were not requested at the hearing but before I had promulgated the judgement in this case they were requested. I waive any non-compliance with the rules in relation to this and give reasons as follows.

Case No: 2502329/2023 & 2502423/2023

2. By a claim form presented 11 October 2023 the claimant who was employed as a project manager from 5 June 2019 until 17 October 2023 makes claims for unfair dismissal, and race discrimination (harassment).

3. She complains of race discrimination (harassment) taking place on 7 June 2023 during a conference call during which she was referred to as a "fake Western devil" and was told that she had not learnt to be British but had also lost her Chinese identity as if she had been in the UK for 10 years. She was told that she should read more books which she says is the code for her being re-educated. She was also told that the employer could not understand how she had obtained her so-called Master's degree and that she had a long distance to go to reach the standards of society. She was told that the report did not look like something written by someone with a Masters degree fully understanding English culture.

4. She was told that she had not fully understood the British culture but had almost forgotten the Chinese culture. Among other things that she recounts she was told that she should not insist on using the British way to work but should keep her Chinese ideology. When she worked in a Chinese company, she was told, she should operate according to Chinese culture. It was said to her that she was Chinese and came from a particular province of China which she says is looked down on often because it is not as developed as places like Beijing.

5. The claimant went sick with depression as a result of this she says and started sick leave on 15 June 2023. On 7 September 2023 she was told that her contract would not be renewed and she was not given an explanation of why this was the case.

6. She pointed out in her claim form that she was at the time of writing 17 weeks pregnant which she felt would go against and find another job.

7. Later the claimant wrote to the tribunal asking to amend her claim to include a claim for victimisation which she said was not included because she was recently advised by her union representatives that the claimant's victimisation fell under the racial discrimination (harassment) claim she was already making. There was no evidence that the claimant had commenced the proceedings at a time when represented by the her union, and there was no evidence before me of when the claimant was advised by the union during the period after 7 June. In particular there was no evidence that she was in receipt of advice during the period between when the union reached out to the respondent and the date of the instruction of legal advisers in December 2023.

8. She also claimed for 22 days of annual leave and 3 days of sick pay which had not been paid to her.

9. On 6 November 2023 the tribunal acknowledged the receipt of the claim and the respondent was given 28 days within which to respond by entering an appearance. On 6 November 2023 a preliminary hearing for case management was fixed for 23 February 2024 and on 6 November 2023 the tribunal told the claimant that the application to amend would be discussed at that preliminary hearing.

10. On 7 December 2023 the tribunal wrote to the respondents stating that because they had not entered an appearance judgement might now be issued

Case No: 2502329/2023 & 2502423/2023

and that they might only participate in any hearing to the extent permitted by the employment judge hearing the case. Subsequently the tribunal received a letter which was undated and signed "best wishes Hyde" requesting an extension of time to present a response.

11. On 31 January 2024 the tribunal granted the respondent's application to extend time saying that the response should be presented on or before 16 February 2024.

12. On 7 February 2024 the tribunal combined the 2 claims to be heard together.

13. The hearing on 23 February 2024 was postponed at the request of the claimant, and postponed until 19 March 2024.

14. On 23 February 2024 the tribunal considered that rule 21 judgement was not appropriate because the claimant was required to prove her case. The tribunal's letter reiterated that the respondent would only be entitled to take part in the hearing to the extent permitted by the employment judge who heard the case.

15. After 23 February 2024 the claimant supplied further and better particulars. This reformulated the labels for the claims into harassment, unfair dismissal, victimisation and a claim for holiday pay.

16. On 19 March 2024 there was a preliminary hearing by video before Employment Judge Sweeney who granted the application to amend the first claim to add victimisation. The claimant was ordered to provide a schedule of loss by no later than 2 April 2024. A list of issues was generated.

17. At that hearing it was noted that the respondents had failed to enter an appearance despite the extension of time. The case was listed for a one-day hearing noting that this would be necessary if the respondent appeared on the day and if the judge gave the respondent permission to participate.

18. The schedule of loss was duly provided and makes claims for unfair dismissal with a basic award of £2038.44 p. In relation to compensatory elements there is a claim for 59 weeks pay. The schedule noted the periods for which the claim is made. There was a claim for lost statutory rights at £500. In respect of injury to feelings £14,000 was claimed.

19. At the hearing of the claimant's claim the respondent attended by its legal representative, and asked to participate in the hearing in relation to remedies by making submissions. There was no application to participate by conducting cross examination of the claimant.

20. The claimant provided a witness statement and I heard evidence from her.

21. Having heard the evidence of the claimant, who appeared to me to be a credible witness (and there were no inherent implausibilities in her account), I concluded that her witness statement was in all material respects probably what had happened.

22. The respondent was given permission to participate in the proceedings solely in relation to issues of remedy and hence its request for reasons can only

relate to matters of compensation. However I have set out in summary my reasons on liability also.

The law

23. The law on unfair dismissal is contained in the Employment Rights Act 1996 and requires the claimant to show that she was dismissed. Once she has proved that she was dismissed, it is for the respondent to show the reason for dismissal.

24. In relation to racial harassment relevant provision of the Equality Act 2010 is section 26, which provides that the claimant must show that she has been subjected to unwanted conduct relating to her race and having the purpose or effect of either *violating the claimant's dignity or of creating an intimidating hostile, degrading humiliating or offensive environment* ("the prohibited environment") for the claimant. In deciding whether the conduct has that effect the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect are to be taken into account.

25. In relation to victimisation the relevant provision is section 27 of the Equality Act 2010. This provides that the respondent victimises the claimant if the respondent subjects the claimant to a detriment, because the respondent believes that the claimant has done a protected act, or may do a protected act. The concept of a protected act includes doing something for the purposes of the Equality Act 2010 and making an allegation (whether express or not) that someone has contravened the Equality Act 2010. There is no protection if the information or allegation is false and the information or allegation is made in bad faith.

26. In relation to the claim for holiday pay, this is a claim for unlawful deductions from wages under sections 13 and 23 of the Employment Rights Act 1996. Under section 13 the respondent shall not make a deduction from wages of a worker employed by it unless authorised by a statutory provision, or a relevant provision of the claimant's contract, or if the claimant has previously signified in writing his agreement to or consent to the making of the deduction. A deduction occurs where the total amount of wages paid on any occasion by the Respondent is less than the total amount of the wages properly payable by the respondent on that occasion (after deductions).

Discussion

27. The claim for unfair dismissal succeeds as no potentially fair reason for dismissal has been proven by the respondent and on the evidence of the claimant, of course unchallenged, it was clear to me that the reason for dismissal was not a potentially fair reason.

28. The claim for harassment succeeds in relation to the events outlined above in relation to 7 June 2023. The conduct was plainly unwanted, plainly related to race (including nationality and national origin), and clearly created the prohibited environment for the claimant. It was entirely reasonable for the unwanted conduct to have this effect having regard to the claimant's perception and all the other circumstances of the case. The claim for victimisation was presented outside the three month limitation period under section 123 of the Equality Act 2010. I do not accept the claimant's submission that there was an act extending over a period of time. Thus the dates of the act of victimisation are 7 June (when she asserted

that she was the subject of discrimination), 7 September and 17 October 2023. However I find that it was presented within such further period as appears to me just and equitable.

29. I considered all the factors presented in evidence to me in reaching that conclusion. First I considered that it was right that the respondent was prejudiced by losing its limitation defence in relation to this part of the claim. I also took account of the fact that the claimant's claim is not solely in relation to victimisation but contained a claim for unfair dismissal as well as harassment. She does not lose those parts of the claim.

30. On the other hand the merit of the claim for victimisation on the unchallenged evidence of the claim appears very strong. A week after the incident of 7 June 2023 the claimant started a period of sickness absence recorded as "reactive depression" and work related stress. She also confirmed in evidence that she had contacted her union for professional advice and that they had "reached out" to the respondent but received no response. The claimant recorded that she had lost her passion for doing things she used to enjoy as a result of these remarks and recorded that she struggled to get out bed each morning overwhelmed by a sense of hopelessness and despair. She described that this feeling (whether it constitutes the medical condition of depression or not does not matter for my consideration of this point) severely impacted her ability to carry out basic daily activities such as shopping, cleaning, and eating. She gave evidence that tasks that were once routine have become daunting challenges. She also gave evidence that during this period she was troubled with self-blame and fear of criticism. This arose out of the treatment by the respondent relating to the work she did which made her lack confidence in it. I consider that in those circumstances and in the state of her knowledge of her rights (which were later clarified on contact with lawyers now acting for her) there is an explanation for the delay in presenting the application for the amendment. I also consider that the prejudice to the claimant outweighs that to the respondent. Finally, the respondent was aware of the claimant's claims, including the proposed victimisation amendment, prior to the generous extension for submitting its grounds of resistance and response. However, it did not seek to respond to the complaint at all.

31. I concluded that the respondent had made unlawful deductions of holiday pay as claimed by the claimant and also of sick pay as claimed.

Remedy

32. Having found that the claimant's case succeeds on these matters, I asked the parties for their submissions on remedy and I am grateful for those submissions which I do not repeat.

33. I determined the principles on which compensation was to be awarded, which were by and large agreed. Where the parties differed was over the impact of the claimant's pregnancy and subsequent maternity status.

34. The respondent submitted that compensation ought to be limited by the fact that the respondent could not be liable for the fact that the claimant now finds it difficult to find work because she was pregnant and now is a new mother. I reject that submission. The respondent must take the claimant as it finds her. She is entitled to live her life in accordance with the ordinary way that people live their

lives and if the harassment and or victimisation had not taken place she would have been working whilst pregnant and after maternity leave. The loss she suffers arises primarily out of the respondent's victimisation and/or unfair dismissal of her, and the pregnancy and birth are not acts that break that chain of causation.

35. The respondent also argued that in some way the claimant's immigration status (having married a UK national) should in some way affect her ability to claim. In so far as I understood this argument, I reject it. It was not argued that the claimant has no right to earn in the UK due to her immigration status. It is clear that she did have a right to earn whilst with the respondent and had the victimisation and/or unfair dismissal not take place she would have continued to do so. It was not suggested that anything to do with her immigration affects what it is reasonable to expect the claimant (in her situation) to do by way of mitigation. The respondent is not able to demonstrate and did not seek to demonstrate that the claimant had not taken reasonable steps to lessen her loss. The burden of proving that is on the respondent.

36. The respondent argued that the injury to feelings award sought by the claimant (middle band Vento) was inappropriate and that the lowest band should be the appropriate band because this was a one-off act. I did not accept this argument. First it seems to me that it treats the appropriate point of reference in relation to injury to feelings awards to be the nature of the act involved. That is not the correct focus. Injury to feelings damages are designed to compensate for injury to feelings and not to perform the role that punitive damages perform of punishing the respondent for an act of victimisation/harassment.

37. Second, it seems to me that the consequences of 7 June 2023 alone were sufficient to warrant a middle band award, but that the claimant can point to consequences which have lasted over several months, and which are more than moderate. She has pointed to the fact that her confidence professionally and socially has been severely affected. She told me that whilst she was still employed by the respondent she would tremble or her hands would tremble, every time an email came in from the respondent. Not only does that illustrate that the environment at work (which was also her home) had been turned in to a hostile environment in which her dignity had been undermined, but it also illustrates the depth of the injury to her feelings that her treatment on 7 June had.

38. Third, the claimant can point to, and does point to, the cumulative effect of the events which constituted unlawful acts under the Equality Act 2010 had on her confidence; she can point to the manner in which the respondent conducted itself when asked for reasons for dismissal, essentially ignoring the request. All of these are matters which clearly have affected her. She powerfully described the sense of shame she felt as a result of the respondent's treatment, and the sense of isolation she felt from this also.

39. I took account of the point made by the respondent that, although the claimant says that she suffered reactive depression, she produces no medical evidence to this effect. That is true but on the other hand she described to me in evidence, and I accept, that she suffered the ill effects which I noted above, and that she continued to suffer these. In those circumstances whether or not her condition could be described as "reactive depression" from a clinical point of view, the injury to her feelings is summed up well by this expression, and the

award is based on the information she gave about how in practice and on a day to day basis the events affected her.

40. I consider the award for injury to feelings that the claimant seeks is entirely appropriate to those facts.

41. The respondent argued that the respondent was dissatisfied with the claimant's performance and would have not renewed her contract at the end of October 2023. Whilst I heard that submission, the evidence to which I was pointed did not in the least suggest that absence the victimisation and unfair dismissal, the claimant would have been dismissed in any event. The problems to which the respondent pointed were not such as came remotely near being reasons for dismissal. I was told that there was evidence of the respondent being unhappy about the claimant using email rather than the "we chat" platform, and her use of English as opposed to Mandarin. However there was no evidence to which my attention was drawn that suggested that these would have been reasons why the contract would not have been renewed. I could see no evidence that the claimant was refusing to do something that the respondent asked her to do, but simply that the respondent had a preference for the platform in question and for the use of Mandarin rather than English.

42. So whilst I accept that there might have been a chance that the claimant's contract might have been brought to an end because of these things, I think that chance is fanciful on the evidence and not realistic. Short of massive and unwarranted speculation on my part, I cannot see that the claimant's contract would not have been renewed on the basis of these matters.

43. I consider that a reasonable employer (and even more so one which was not victimising the claimant) would not have dismissed the claimant for those reasons.

44. The respondent argued that I should not award £500 for lost statutory rights. I reject that argument; if the ordinary principles of updating sums of money to retain their true meaning had been applied to this sum, which has not altered for many years, it would have been considerably higher. The claimant only sought £500, and I consider in that situation it is the appropriate sum to award for loss of the right on dismissal to claim unfair dismissal until the qualification period of continuous employment has been fulfilled in any new job.

45. The respondent also argued that the claimant should not receive back payment of pension contributions following on from a failure to enroll the claimant, as the respondent accepts it ought to have done. The argument was that the claimant can claim these from the date of dismissal but not prior to that as the loss does not flow from the dismissal.

46. I reject that argument. A reasonable employer would not have dismissed. A reasonable employer would have ensured that the claimant's contributions were properly updated. A reasonable employer would have paid back contributions. If the claimant had not been unfairly dismissed these payments would have been made, and the claimant has lost a 100% chance of the respondent acting lawfully in this respect. However, had the claimant not dismissed as an act of victimisation, those payments would have been made. Either way the claimant is entitled to recover those sums.

47. Having dealt with the principles on which compensation was to be awarded (and only noting the points of disagreement above) I asked the parties to see whether, over the lunch adjournment, they could reach agreement on the sums to be awarded.

48. The parties reported back to me that the following figures had been reached on a basis agreed between the parties.

49. Basic award for unfair dismissal £2038.44 p

50. The financial compensation to date flowing from victimisation (dismissal)/ unfair dismissal comprised £17,681.44 p

51. To this interest is to be added in the total of £748.84 p

52. In terms of a future loss element £4206.40 p is awarded

53. To these financial losses needs to be added £500 for loss of statutory rights.

54. In respect of holiday pay the total to be awarded is £1888.48 p. The amount for statutory sick pay is £65.64 p

55. I award £14,000 for injury to feelings for the reasons set out above.

56. I award interest on injury to feelings totalling £1188.09 p.

57. The recoupment regulations do not apply to the award for dismissal as it is an award under the Equality Act 2010; that is the primary reason for the losses; however if the matter were solely an unfair dismissal, the recoupment regulations would apply. I find however that the loss is primarily attributable to victimisation and hence that the regulations do not apply to this award.

Conclusion

The claimant is awarded in respect of unfair dismissal:

(a) Basic award £2038.44;

(b) lost statutory rights £500.

In respect of discrimination by way of victimisation and harassment:

(a) Loss to date £17681.44 together with

(b) interest thereon of £748.84

(c) future loss £4206.40;

(d) compensation for injury to feelings of £14,000.00 with

(e) interest thereon of £1188.09.

In respect of compensation for unlawful deductions from wages:

(a) Holiday pay £1888.48

(b) Statutory Sick Pay: £65.64.

D O'Dempsey
Employment Judge **O'Dempsey**
17 July 2024