



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms J Henry

v Tattu Manchester Limited

Heard at: London Central

On: 11 July 2024

Before: Employment Judge Glennie
Ms S Went
Ms P Keating

Representation:

Claimant: Mr Newman (Representative)

Respondent: Mr Holmes (Counsel)

REASONS

1. These reasons relate to the Tribunal's judgment on remedies delivered to the parties on 11 July 2024, and are produced at the request of the Claimant.
2. The facts of the case are set out in the Tribunal's judgment and reasons dated 14 September 2023. The Claimant succeeded on liability on one out of ten allegations of discrimination.
3. Compensation for injury to feelings was agreed between the parties at £4,000. The Tribunal calculated interest on this figure at £703.12, which was also agreed.
4. There were 3 issues to be determined, namely:
 - 4.1 Whether an award of aggravated damages was appropriate.
 - 4.2 Whether loss of earnings could in principle be recovered.
 - 4.3 If so, whether compensation for loss of earnings should be awarded and if yes, in what amount.

Aggravated damages

5. In **Commissioner of Police for the Metropolis v Shaw** 2012 ICR 464 the Employment Appeal Tribunal stated that the purpose of aggravated damages is compensatory, and not to punish the Respondent's conduct. Giving the judgment of the Appeal Tribunal, Underhill J identified three categories of case where aggravated damages might be awarded, being:
 - 5.1 Where the manner in which the wrong was committed was an aggravating factor, the expression "high-handed, malicious, insulting or oppressive conduct" often being used as a non-exhaustive summary of the kind of conduct which might attract an award of aggravated damages.
 - 5.2 Where the motive behind the discriminatory conduct, such as prejudice or spitefulness, is likely to cause more distress than would be caused by the same conduct done without such a motive, for example as a result of ignorance or insensitivity.
 - 5.3 Where subsequent conduct has the effect of aggravating the injury, including cases where the Respondent conducts its case at trial in an unnecessarily offensive manner.
6. The Tribunal concluded that this case did not fall within the first category. We had regard in particular to paragraph 70 of our reasons for our judgment on liability, where we found that Ms Huang had made the comment concerned, but that this was not made with the purpose of harassing the Claimant, although it had that effect. The making of the comment could not be regarded as high-handed, malicious, or oppressive. Its effect was that the Claimant found it offensive, but that in the Tribunal's judgement is not the equivalent of its being insulting, which we considered was something more serious.
7. Our conclusion with regard to the second category is similar. The comment was not made with the intention of harassing the Claimant, and thus did not arise from the sort of motive that would justify an award of aggravated damages.
8. Mr Newman's submissions in support of an award of aggravated damages were mainly based on the third category in **Shaw**. He contended that the Respondent's case at the liability hearing had been based on lies. The immediate difficulty with this argument is that the Tribunal has found in the Respondent's favour on nine out of the ten complaints of harassment. This does not, of course, automatically mean that the Tribunal accepted the Respondent's evidence on all of those nine, but without entering into a detailed analysis of the Tribunal's liability reasons, it does not support the proposition that the Respondent's case was "based on lies".
9. Mr Newman referred in particular to the evidence of Mr Andrews. This was discussed at paragraphs 51 to 53 of the liability reasons. The Tribunal

concluded that we accepted Mr Andrews' evidence on the point in question: we have therefore concluded that he was not, as Mr Newman maintained, lying.

10. Mr Newman sought to take the argument further by submitting that he could demonstrate that, contrary to the Tribunal's finding, Mr Andrews was in fact lying in his evidence to the Tribunal. In that regard, there was an application on the Claimant's behalf for reconsideration of the liability judgment, based at least in part on the kind of arguments that Mr Newman now sought to raise. That application was refused by the Employment Judge under rule 72. This means that it is not now open to Mr Newman to argue, nor to the Tribunal to find, that Mr Andrews was lying. The parties, and the Tribunal, are at this stage bound by the findings we made at the liability hearing.
11. The Tribunal reminded itself that the three categories identified in **Shaw** do not necessarily amount to an exhaustive list of the circumstances in which aggravated damages may be awarded. Having done so, we found not only that the case did not fall within any of those categories, but also that there were no other features of it which would justify an award of aggravated damages. We found that such an award should not be made.

Loss of earnings in principle

12. Mr Holmes submitted that, as a matter of law, it was not open to the Claimant to make such a claim. This aspect of the case concerned the reason or reasons for the Claimant's resignation. This was not identified as an issue at the case management stage or at the outset of the liability hearing. It followed that, although the Tribunal noted the fact of the Claimant's resignation in its liability reasons, we did not making any finding about the reason or reasons for it.
13. What the Claimant now seeks to argue is that she suffered a loss of earnings over the period after her resignation which was causally attributable to the single act of harassment which the Tribunal has found occurred. The question is whether in principle it is open to the Claimant to raise such an argument. Mr Holmes submitted that it was not, because the Claimant had not pleaded or made a case that she had resigned because of this one comment, and therefore there had been no evidence or finding about that issue at the liability stage. He argued that the Tribunal had not been asked to make a finding about causation of the Claimant's resignation.
14. The Tribunal found that, in principle, it was open to the Claimant to raise this issue at the remedies stage. We concluded that this was not, in the circumstances of the present case, a liability issue. It might be said that, as a matter of practice, this point would more often arise at the liability stage, because a Claimant alleged that she had been constructively dismissed. That was not so in the present case, and the issue was not before us at the liability stage.

15. Without making any findings as to the merits of the argument at this point, we considered that it was permissible for the Claimant to argue that a consequence of the act of harassment that we have found to have taken place was that she left her employment with the Respondent and/or found difficulty gaining further employment. We found that it was open to the Claimant to argue that the harassment had caused that loss, and that as a matter of law, she was not prevented from doing so. We were strengthened in that conclusion by the consideration that, in our judgment, it would not be right for the point to go wholly unaddressed by virtue of a conclusion that, as it had not been addressed at the liability stage, it could not be addressed at the remedies stage.

Loss of earnings as claimed

16. When the Tribunal had given its decision on the question of principle, the parties were asked how the hearing should proceed, in particular with regard to evidence in support of the loss of earnings claim.
17. Mr Newman said that there would be a need for further evidence from the Claimant. Mr Holmes submitted that there was a need for evidence which the Respondent could review. He proposed that the Tribunal could either proceed on the basis of the Claimant's existing witness statement, or adjourn for a further witness statement to be produced, urging that the first approach should be taken.
18. Mr Newman initially said that a further witness statement should be produced. Having taken instructions from the Claimant, he said that she wished to proceed to have the matter determined in the present hearing, on the evidence currently available. There was therefore agreement between the parties on the point, and the Tribunal proceeded to hear submissions based on the evidence already available, and to determine the loss of earnings claim.
19. The parties concentrated their submissions on the question of causation. In order to succeed in a claim for loss of earnings, the Claimant would have to establish that the loss flowed from the single comment about makeup which the Tribunal has found to be discriminatory. Mr Newman referred to the liability evidence of the Claimant and her mother, saying that the events had affected the Claimant psychologically. He said that the comment in respect of which the claim succeeded had affected the Claimant's mental health and confidence.
20. Mr Holmes submitted that there had been no finding of fact that the Claimant had been bullied. He said that the claim had succeeded in relation to one incident, after which the Claimant had returned to work. Mr Holmes submitted that at no point had the Claimant stated that it was the comment about makeup that was the reason for her resignation or was the last straw, and that this was one of 10 incidents which took place against

the background of the traumatic personal circumstance of the death of her stepfather.

21. The evidence on this aspect was as follows. First, there was the Claimant's email in which she gave her resignation, the contents of which are set out in the Tribunal's reasons on liability. The Claimant expressed an apology for a recent lack of communication and referred to her bereavement. She said that she felt that she was being bullied by a manager. She then continued:

".....I honestly just think that at this time Tattu is not a place that I want to continue working.....as I need somewhere I feel as though I can be happy and my authentic self. Overall, I have loved working for Tattu and it is a great company, but there are some things I am not happy with which have led me to feeling like this at work and on top of things going on in my personal life it was just all too much. I would like to hand in my resignation....."

22. Then in similar terms in her witness statement the Claimant referred to her resignation email and said that she felt that the comment about makeup was sexist as well as misogynistic and that it was not an isolated incident because another colleague had told her that she also had been told to wear makeup. The Claimant continued that this person had not known at the time that a similar comment had been made to her (the Claimant) a couple of days earlier. The Claimant then said in a separate paragraph that on 5 April 2022 she handed in her resignation email, stating in the email that the reason for her departure was due to the personal circumstances of her stepfather passing away a few days earlier and the bullying she had received while working for Tattu. In another paragraph, the Claimant continued that, on top of all the harassment and bullying she endured while working for Tattu, she was then not paid for a shift she had worked for over 6 months after she had left. The Claimant said that this was intentional and malicious.

23. Further to this, the Claimant did not say in her oral evidence at the liability hearing anything to the effect that the main point that led her to resign was the comment about makeup.

24. The above was the Claimant's evidence about her resignation, in terms of what she said at the time and what she said in her witness statement. The Tribunal concluded that this could not form a basis on which it could find, as Mr Newman urged, that the reason or the primary reason for her resignation was the comment about makeup. In the Tribunal's judgement, both the email and the witness statement read as the Claimant saying that she resigned because of everything that had happened in the course of her work and with which she was dissatisfied, against the background of the personal circumstance of the loss of her stepfather.

25. We were also referred to the evidence given in witness statements from the Claimant's mother and sister, and another individual, and to the oral

evidence of the Claimant's mother. The Claimant's mother and sister both said that they recalled a number of occasions when the Claimant had told them about events at work. They recalled slightly different combinations of these. The Claimant's mother recalled 5 things that the Claimant mentioned over the course of a week, one of which was being asked to wear makeup. Others related to other aspects of the complaints made in the claim, which have not succeeded. The Claimant's mother said that the Claimant was very upset about the situation at work, and that she told her to "just leave if it was getting too much." She then said that they had been going through a tough time as a family for the previous year and that it was all getting too much for everyone. The Claimant's mother continued, saying that things got to the point where the family considered relocating to another country, where "this type of prejudice would be less likely to occur". In her oral evidence the Claimant's mother said that at the start, she thought that the problems her daughter was experiencing were examples of the pressures of work that everyone was under, but that later she took a different view of it and said that her daughter was very distressed when telling her about the "things" (plural) said at work.

26. The Tribunal found that the evidence from the Claimant's mother did not support a finding that the crucial element in the Claimant's decision to resign was the comment about makeup.
27. In a similar sort of way, the Claimant's sister referred to 5 things that she could recall the Claimant saying. These were not identical to the 5 listed by her mother, but included on one occasion the Claimant coming home and asking how she looked. Her sister continued that she told her she looked fine, and asked why, to which the Claimant replied that Joanne had told her to wear makeup from now on as she was looking tired. The Claimant's sister said that the Claimant had initially been excited about working at Tattu, but then "all of this came as something that no one in the family needed, as we were already dealing with so much". This too, does not suggest that the comment about makeup had any particular significance among the various factors that contributed to the decision to resign.
28. The Tribunal therefore found that there was no evidential basis for the determination sought by Mr Newman on the Claimant's behalf, that the crucial element in the Claimant's resignation was the comment about makeup.
29. The Tribunal emphasises that it has reached this conclusion on the basis of the evidence to date. Mr Newman's submissions went some way beyond this, but with all respect to him, these do not amount to evidence.
30. For completeness, we should say that the same conclusion about causation would also apply to any issue as to the effects of the comment on the Claimant's wider ability either to work or to seek work. There was nothing to distinguish the single comment from all of the matters in issue in this regard.

31. The Tribunal has therefore conclude that the Claimant is entitled to an award for injury to feelings in the agreed sum of £4,000, plus interest as also agreed.

Employment Judge Glennie

Dated:9 October 2024.....

Judgment sent to the parties on:

18 October 2024

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For the Tribunal Office