EMPLOYMENT TRIBUNALS

Claimant: Ms H Yongo

Respondent: The Association of Chartered Certified Accountants

Heard at: London Central

On: 29 July, & 4 October 2024 (Chambers)

Before: Employment Judge Akhtar
Mr M Simon

REPRESENTATION:

Claimant: Ms L Halsall (Counsel)
Respondent: Mr N Caiden (Counsel)

RESERVED JUDGMENT ON REMEDY

The unanimous Judgment of the Tribunal is that:

1. The Respondent shall pay the Claimant the following sums:
   Injury to feeling award of £21,000
   Financial loss of £3,276
   Interest £4,614.43.
   The total of the above sums is **£28,890.43**.

BACKGROUND

1. This hearing follows judgement dated 28th November 2023, where the Claimant was successful in her claim for maternity discrimination for the following acts;

    i) Nick Jervis comment made on 30 March 2022;
    ii) reducing the Claimant's role to a Social media Exec role from 1st July 2022;
    iii) The Social Lead role absorbing/ reducing the Claimant's old role from 1st July 2022;
    iv) Mr Jervis not providing the social lead job description provision from 30th March 2022; and
    v) Appointing Hammad Azim rather than the Claimant to the Social Lead Role on 23rd May 2022.

2. The Claimant was not successful in respect of her other claims, namely the 19 October 2022 pregnancy/maternity discrimination complaint and victimisation complaints post her return to work between January and May 2023.

3. In summary, the acts for which discrimination was found and the time period, we are therefore concerned with in respect of remedy is 30 March 2022 to 1July 2022.

4. The Claimant seeks an award for injury to feelings, aggravated damages, financial losses to include her KIT days and loss of earnings as well as interest at 8%.

5. At the hearing, the Claimant withdrew her application to amend to include personal injury, although continues to rely on the medical evidence advanced to support her claim for injury to feelings.

6. At the outset of the hearing, I advised the parties of the position in respect of the unavailability of one of the Tribunal non legal Members and sought the parties consent to proceed as a 2 panel Tribunal in accordance with s4(9) Employment Tribunals Act 1996.

7. The parties formal consent was noted on the hearing record and the hearing proceeded by consent as a 2 panel Tribunal.

Relevant Law

8. Compensation for discrimination cases is assessed in the same way as any other claim in tort, *section 124(6), Equality Act 2010.* The aim is to award a sum of money that will put the claimant into the position they would have been in had the wrong not taken place and not to punish the employer for wrongdoing, *Chagger v Abbey National [2009] EWCA Civ 1202; [2010] IRLR 47.*

9. To be recoverable, the loss suffered by the claimant must be directly attributable to the act of discrimination (*Coleman v Skyrail Oceanic Ltd [1981] IRLR 398*). There must therefore be a direct causal link between the act complained of and the loss being claimed.

10. An award for injury to feelings is assessed on the basis of the Vento guidelines which set 3 bands for injury to feelings. The original bands have been updated to reflect inflation by presidential Guidance dated 5th September 2017 and subsequent Addenda.

11. The award for injury to feelings should reflect the degree of the injured feelings, not the nature of the discrimination per se. Whilst there is often a correlation between the degree of discrimination and the degree of injury to feelings, that is not necessarily the case.

12. The Tribunal may also award aggravated damages where hurt feelings are increased because the acts of discrimination were done in an exceptionally

upsetting way, where the discriminatory conduct is evidently based on prejudice, animosity or is spiteful or intended to wound (as opposed to ignorance or insensitivity) or where the trial is conducted in an unnecessarily oppressive manner.

13. In *Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291*, the EAT took the view that aggravated damages are an aspect of injury to feelings, not an entirely separate award.

14. Aggravated damages are awarded in the most serious cases where the behaviour of R has aggravated C's injury. They can be awarded where R 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 R. However, it is important for the Tribunal not to focus on R's conduct and motive; it is the aggravating effect on C's injury to feelings that is important (*Rookes v Barnard [1964] AC 1129*).

15. In **Zaiwalla and Co v Walia** [2002] IRLR 697 (EAT) at [28] the EAT warned that "*We are sensitive to the possibility that overenthusiastic litigants and litigants in employment tribunals may be tempted to read our conclusions in a way which would give the green light to claims for aggravated damages in respect of alleged misconduct in the defence of proceedings almost as a matter of routine. They would be wrong to do so. The findings of fact in the present case (which were not challenged in the quantum appeal) were exceptional in their assessment of the litigation misconduct. We expect that cases attracting awards of aggravated damages for such behaviour will be few and far between*".

16. The damages awarded should reflect only the injury to feelings caused by the unlawful discrimination as opposed to any injury to feelings caused by claims which have not been upheld or external factors.

17. The usual common law rules of mitigation apply to claims for compensation in discrimination cases. A claimant is expected to take reasonable steps to mitigate their loss. The issue of whether the claimant has taken reasonable steps to mitigate is a question of fact for the Tribunal, and R has the burden of proving that C has not done so. It is not enough for R to show that there were reasonable steps that C could have taken but did not take. It must also show that C acted unreasonably in not taking them. This distinction reflects the fact that there is usually more than one reasonable course of action open to the claimant (*Wilding v British Telecommunications Plc [2002] IRLR 524 (CA)*).

Reasons

18. We heard further evidence on oath from the Claimant and from Ms Lynne Brown (Director, People) on behalf of the Respondent.

19. The parties were agreed on the following:

    i) The Claimant's salary at the relevant time was a grade C salary, amounting to 53,213 gross per annum, £664 per week net;

    ii) The pay banding for salaries in London and outside of London are accurately set out in Ms Browns statement;

    iii) In accordance with the Respondent's maternity policy, discrimination could not have caused financial loss until the Claimant's return from maternity leave on 12 November 2023. Paragraph 8.5 of the Respondent's maternity policy is that an employee's maternity pay is calculated with reference to the last salary they drew prior to commencing maternity leave.

20. The Claimant was on maternity leave from 16 March 2022 until 11 November 2022, returning to work on 9 January 2023 after a period of annual leave. At the stage, the claimant returned, her role title was that of Marketing Manager, which

was a grade C role. The Claimant was initially based in London, however, relocated to Manchester around the time of her maternity leave in March 2022.

Injury to feelings

21. We remind ourselves that in respect of any consideration for such an award that it is designed to compensate the Claimant and not to punish the Respondent. We have taken note of the fact that the Claimant was extremely distressed by the events set out in our November Judgment. Her pregnancy was her first pregnancy and she had been very much looking forward to the birth of her child. The Claimant was undoubtedly not only upset by the events but became stressed and anxious. At a time when she ought to have been looking forward to the birth of her child she had to deal with the events described in our Judgment and a subsequent deterioration in her health. In the circumstances, we consider that it is appropriate to award the Claimant a sum by way of Injury to Feelings.

22. We consider that this is a case, which the Respondent's also accept, can fairly be described as a "*serious case*" but one which does not fall within the category of "*the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment*".

23. The effect of the treatment is still ongoing as Mr Azim still remains in that role to this day and the Claimant in effect remains 'demoted'. There is a lack of medical evidence from nearer the time of the discriminatory conduct, however, we accept the Claimant's evidence that she suffered with stress and anxiety at the time. We conclude that the medical evidence from 2024, relating to stress and anxiety does partially relate to the ongoing impact of the discriminatory conduct, however, there is insufficient medical evidence to prove any causational link to the Claimant's other ongoing health conditions.

24. In light of these considerations, we conclude that it is appropriate to award the Claimant an injury award in the sum of **£21,000.00**.

Financial losses

25. We reminded ourselves that the approach we must take in relation to financial loss, as with the other losses in issue in this case, is compensatory. Critically, we must approach the issue by determining what would have happened if there had been no unlawful discrimination.

26. The parties were in agreement that discrimination could not have caused financial loss until the Claimant's return from maternity leave on 12 November 2023.

27. We start with the issue of 'bumping', which the Respondent contends is a policy applied by it in redundancy situations, to retain existing experience and talent.

28. Ms Brown's evidence to the Tribunal was that as part of a global restructure the Respondent would have considered 'bumping' in this case (it being considered on a case-by-case basis), meaning Mr Azim, who was at risk of redundancy would have ended up being offered the Grade D role. Mr Azim was already in a Grade D role as Head of Marketing and had 10 years' worth of experience at that grade. As part of the restructure, he was placed at risk of redundancy and later successfully applied for the Grade D.

29. Other than a broad assertion, the Respondent presented very little evidence of matters pertaining to its bumping argument. We heard no direct evidence that bumping was used in the restructure and we heard no detail in respect of Mr Azim's skillset. We note crucially there was also the availability of another Band D role in leading the marketing 'email' team. We heard no evidence as to why this would not have been a suitable role for Mr Azim.

30. In light of these factors, there is insufficient evidence for the Tribunal to conclude that there was a significant chance of bumping coming into play or that if a competitive process was undertaken, Mr Azim would have been successful as oppose to the Claimant. Whilst the Claimant had less experience than Mr Azim

in terms of years, she was as per her performance rating considered to be 'exceptional' at her job.

31. We conclude that the Respondent has failed to evidence that bumping would have taken place in this case and as such we find the Claimant would have returned to the Grade D post upon her return from maternity leave. We then went on to consider any financial loss suffered by the Claimant and any reasonable efforts by her to mitigate that loss.

32. In terms of the applicable salary for the Grade D post, the Respondent's global redundancy policy, at paragraph 9.11.3 sets out that where a new role is at a higher grade then current salary will be increased to the minimum of the new role or by 10%, whichever is greater.

33. The Claimant's Grade C salary was greater than the National Grade D minimum range. If the redundancy policy was applied, the Claimant would therefore receive 10% increase to her gross annual salary taking her gross annual pay to £58,534.

34. The Claimant contends that her salary should be based on the London salary bandings due to home working arrangements for staff and the Respondent's limited office space making office attendance unlikely in any event. The Claimant further contends that she would have received a pay rise through job evaluation, however, we heard very little evidence in this regard. We accept the Respondent's evidence that it had no policy in place enabling the Claimant to have applied for a job evaluation mid-year, therefore any such job evaluation could only realistically apply post April 2023 and only then if the Claimant did indeed apply for an increase in pay.

35. Ultimately, there was insufficient evidence to aid us in a speculative determination that the Claimant would have received a pay rise through job evaluation. In such circumstances, having accepted the Respondent's position in respect of the applicability of the redundancy policy, we conclude that it is more likely than not the Claimant would have been placed on the national banding had she been appointed to the band D role upon her return to work and therefore,

she would have received a 10% increase to her gross annual salary taking her gross annual pay to £58,534. We accept the Respondent's calculations in respect of this equating to £718 net weekly salary and when calculating the difference between the Band C salary, this equates to a weekly loss of £54.

36. In terms of mitigation, the Claimant's evidence to the Tribunal was that she has applied for hundreds of jobs, she presented a significant number of screenshots evidencing her applications. The screenshots appear to cover the period between October 2022 and April 2024. Whilst the precise nature of the roles and their suitability was unclear from the screenshots, it is apparent the vast majority of roles applied for were Head of Marketing or Director of Marketing roles. We conclude these roles were significantly more senior than the Claimant's role likely requiring more wide ranging experience and skillset. It is perhaps unsurprising then that the Claimant has been unsuccessful in securing these roles.

37. The Respondent also contends that the Claimant has not taken reasonable steps to mitigate her losses as she did not apply for an internal Band E role which she was made aware of during the grievance process in December 2022. In response, the Claimant contends that the Grade E role was not an appropriate role for her given that she was later unsuccessful in applying for a Grade D role for which she applied in or around mid-July 2023. The Band D role was outside of the social media team but still within the broader sales and marketing department. On 13 September 2023, the Claimant was informed that she was unsuccessful for the second stage interviews. The Grade D role reported into the Grade E role. In the circumstances, we conclude that given the Claimant was later rejected for a grade D role, it is unlikely that she would have obtained the Grade E role.

38. In summary, we conclude that a 12 month period from 12 November 2022 represents a reasonable time period for the Claimant to have mitigated her losses and obtained alternative employment at the same remuneration as a Band D grade and with an employer offering similar benefits. We base this on the fact that the Claimant had applied for a Band D role with the Respondent and there

was also the possibility of a Band E role, which she could have applied for. It would have been reasonable for the Claimant to have taken steps to focus her external job applications on jobs more suited to her skillset and paygrade.

39. We accept the difficulties the Claimant would have had in looking for alternative employment whilst she was still on maternity leave with a young baby and therefore allowing an additional reasonable length of time we conclude that by 12 November 2023, the Claimant should have secured an alternative role had she focused her applications on roles that were suited to her skillset. We do not extend this period any further in respect of any time period that the Claimant was off sick after she returned to work as it is apparent from the evidence that this period of sickness predominantly related to the unsuccessful victimisation complaints.

40. In conclusion, the Claimant's past financial losses amount to £54 per week in earnings for 12 months (£2,808), that being the difference between the Grade C and Grade D banding that the Claimant would have been put on as set out at paragraph 23 above. We accept the unchallenged figure for Pension loss as calculated by the Respondent on the joint schedule of loss at £39 per month for 12 months (£468).

41. The total amount of past financial loss for a 52 week period is **£3,276.**

42. The Claimant has provided insufficient evidence to support any future losses claim and we repeat paragraphs 36 to 39 in this regard. We also find the recent medical evidence that was filed in support of a personal injury claim does not cover any causational link to the discriminatory treatment in the time period we are concerned with.

43. With regard to Keeping In Touch 'KIT' days, the Claimant provided no direct evidence that she did not feel able to utilise these days because of the discriminatory treatment. No evidence was provided of any contact or efforts to agree any such days, therefore, we award no financial losses in respect of these days.

Aggravated damages

44. The Claimant is claiming £7,000 in aggravated damages. We reminded ourselves that whilst such awards are still compensatory in nature, they seek to compensate for the aggravating feature of the manner the wrong was committed, the motive and subsequent conduct that is unnecessarily offensive.

45. The Claimant relies on subsequent conduct that is unnecessarily offensive, this includes a statement to the press on 4 January 2024, being referred to well-being concerns/resources with Antony Miller on 19 January 2024 post judgment, an email of 16 February 2024, and loss of 'KIT days'.

46. We conclude there is nothing that is "*unnecessarily offensive*" in the documents and conduct of the Respondent to justify an aggravated award. In particular:

    i) the statement in the 'press', did not challenge the judgment, it simply expressed the Respondent's disappointment at the decision but confirmed its acceptance of the same. Whilst the statement did not include an apology, we do not find that was unnecessarily offensive. There were no discriminatory remarks or insinuations against the Claimant;

    ii) the email in relation to Antony Miller is also not offensive, he was the Claimant's line manager and so dealing with him in relation to well-being resources was unexceptional. In addition, the Respondent also reminded of external confidential support available to her via its Employee Assistance Programme 'EAP' ;

    iii) the email of 16 February 2024 was the Respondent setting out its position that the Tribunal cannot force the Respondent, or any employer, to move the Claimant into a now occupied role. Within this email, the Respondent also acknowledges the Claimant may be finding waiting for the remedies outcome "distressing or frustrating" and reminds her of the welfare support available. We do not find the content of the email or indeed references

to the Claimant getting her own legal advice as unnecessarily offensive. The Claimant also contended that the original email, which was recalled by the Respondent was more offensive than the email with which it replaced. The email was not produced and we were provided with limited evidence as to the detail. As such, there was insufficient evidence to reach any conclusions on any unnecessarily offensive content in respect of the recalled email;

iv) we deal with the KIT days at paragraph 30 above, the Claimant has not proven causation and we fail to see any unnecessarily offensive conduct on the facts before us.

Interest

47. For the Injury on duty award, interest runs from the act of discrimination to the date of this calculation being 15 October 2024. Interest at 8% on £21,000 amounts to the sum of £4.60 per day. Nine hundred and 30 days have elapsed between 30 March 2022 and 15 October 2024 which results in an interest award in the sum of £4,280.55.

48. For financial losses, interest is calculated from the mid-point of the date of the act of discrimination complained of and the date of this calculation, being 15 October 2024. Interest at 8% on £3,276 amounts to the sum of £0.72 per day. Four hundred and 65 days have elapsed between 8 July 2023 and 15 October 2024 which results in an interest award in the sum of £333.88.

49. The total interest awarded is £4,614.43.

50. That sum is added to the award for Injury to Feelings and financial loss, resulting in a total award in the Claimant's favour in the sum of **£28,890.43**.

Employment Judge Akhtar

15 October 2024

Sent to the parties on:

15 October 2024

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For the Tribunal Office:

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