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## EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Frost

**Respondents:** (1) Retail Design Solutions (Consultancy) Limited  
(2) Anthony Kent

**Heard at:** East London Hearing Centre

**On:** 7 September 2018

**Before:** Employment Judge Brown

**Members:** Ms M Long  
Ms J Owen

### Representation

**Claimant:** Ms R White (Counsel)

**Respondent:** Mr I Ahmed (Counsel)

## REMEDY JUDGMENT

The judgment of the Tribunal is that the Respondent shall pay £52,269.16 to the Claimant in compensation for discrimination.

- (1) Economic Loss to the date of the Tribunal hearing: £23,174.01 plus £1,193.50 interest, giving a total of £24,367.51 loss;
- (2) Future economic loss: £9,750.26;
- (3) Injury to feelings in the sum of £14,000 plus £1,681.33 interest, giving a total of £15,681.53 for injury to feelings.
- (4) £2,469.86 agreed grossing up.

## REASONS

Facts

1 The Claimant succeeded in her claims against the Respondents for failure to make reasonable adjustments and discrimination arising from disability regarding the Claimant's progress being capped. Judgment was sent to the parties on 26 July 2018. The Claimant had also brought complaints of direct disability discrimination, harassment and victimisation and further claims of discrimination arising from disability against the Respondents. Those claims did not succeed.

2 At the time of the matters in question, the Claimant was employed by the First Respondent as a senior designer. She had been employed since 3 April 2014 and had changed careers to pursue a design role. The Claimant had suffered from anxiety for many years and has taken Propanolol, an anxiety medication, to control her symptoms. Essentially, the Tribunal decided that the Respondents had failed to make reasonable adjustments and had subjected the Claimant to discrimination arising from disability when the Respondents decided that the Claimant's progress in the company would be capped because she could not attend client meetings.

3 The Claimant submitted a grievance to the First Respondent, David Kent about this and about other alleged discriminatory acts. The Claimant attended a stage one grievance hearing on 28 March 2017, chaired by Mr Dave Kent. He investigated the matters and met with Mr Tony Kent and Darren Tucker on 20 March. Mr Dave Kent then held a stage two grievance hearing on 22 March 2017, when he told the Claimant the grievance outcome. He confirmed that it would be difficult for her to progress in the company if she did not attend meetings. The Claimant appealed on 29 March 2017 and attended a grievance appeal on 2 May 2017. The grievance appeal outcome was given to her at a meeting on 5 May 2017 chaired by Mr Ken Kent. Again, at that hearing, Mr Ken Kent told the Claimant that she would not be able to progress and would only be able to do so if she demonstrated that she did not have problems with attending meetings. The Claimant had problems attending meetings due to her anxiety condition.

4 The Claimant felt that, on other occasions, Tony Kent had made insensitive and discriminatory comments to her about her anxiety, but these complaints were not upheld by the Employment Tribunal. The Claimant went on sick leave on 26 May 2017. The Tribunal accepted the Claimant's evidence that she did so because of the Respondents' actions, including the Respondents placing an effective cap on her progression unless she could attend meetings.

5 The Claimant told the Tribunal, and the Tribunal accepted, that she had sought help and treatment for her anxiety since going off work sick, including the assistance of Mind who had provided the Claimant with a support worker called Christine. The Claimant sought counselling through a local centre, Sycamore Centre, in October 2017, and was provided with counselling from January 2018. The Claimant makes a financial contribution to her counselling.

6 The Claimant was given a treatment plan by the NHS Agency IAPT in September 2017, which included CBT Cognitive Behavioural Therapy. Unfortunately, CBT therapy has not been made available until May 2018. The Claimant has had 6 sessions of CBT and has also been referred for 10 weeks of self-esteem workshops, due to finish in February 2019. The Claimant has also been undertaking assessment of her mental health through an NHS Scheme and completing online questionnaires which indicate that

she has continued to suffer anxiety throughout 2017 and until at least 31 July 2018. At no point during that period has she entered a recovery stage.

7 The Claimant's GP has provided a report to the Tribunal by letter of 30 August 2018. In that report s/he has said that the Claimant has an increased fear of returning to the work environment due to her experiences at the Respondent company and that the Claimant has therefore been undertaking freelance work and seeking self-employment instead.

8 The Claimant received statutory sick pay while she was on sick leave. She resigned on 19 January 2018. The Tribunal accepts that the Claimant resigned because of the Respondent's treatment, including treatment that the Tribunal has found to be discriminatory.

9 The parties agreed some figures for calculation. They agreed that the Claimant's weekly net loss, including pension loss, from the date that she went on sick leave was £375.01. They agreed that 34 weeks passed from the day she went on sick leave until her resignation on 19 January 2018.  $34 \times £375.01 = £12,750.34$ . The Claimant received a total of £2,739 in statutory sick pay during that period, which meant that her net loss from the date she went on sick leave to the date of her resignation was £10,011.34.

10 The Respondent contended that the Claimant failed to mitigate her loss. She was cross-examined about this by Mr Ahmed for the Respondents. The Claimant told the Tribunal that she had felt unable to work for an employer due to overwhelming anxiety that she felt as a result of the Respondents' actions, but that she had taken steps to find ways back into the workplace, including undertaking volunteering work and setting up her own business. She started a design project for her brother to build up a portfolio and has also undertaken some freelance CAD work. She has been paid £390 for this and has also submitted an invoice to a client for £1,200, which she expects to be paid shortly, page 1024.

11 The Claimant had set up an office at home for which she seeks to recover the costs. The total costs she claims are £2,622.34, page 1025.

12 The Tribunal accepted the Claimant's evidence that she was genuinely unable to return to employment. It noted that the Claimant did not take time off work while she was at the Respondent due to her anxiety, until the discriminatory acts. The Tribunal decided that the Claimant was a person who does work when she is able to.

13 It accepted that she had sought treatment for her anxiety, but had still not been able to return to work for an employer. It accepted that it was reasonable for the Claimant to seek to mitigate her loss through self-employment. It accepted that it was reasonable for the Claimant to have set up an office and that the expenses she was claiming were reasonable, save for a new carpet which may have been luxury at this point. The Tribunal therefore ordered the Respondent to compensate the Claimant for the cost of the office, less the carpet, in the sum of £2,377.34.

14 The Claimant was unable to return to work after 26 May 2017. The Tribunal accepted her evidence that she felt that her self esteem had been very damaged by the

Respondent placing a cap on her progression and that she is now concerned about how other people will view her. It accepted the Claimant's evidence that she has felt very isolated and that she feels that she has lost a job which she enjoyed and valued. Her relationships with her family and friends have been significantly affected. She has found many events since the Respondent's discriminatory treatment to be overwhelming, including, for example, attending a meeting at the DWP. The Tribunal found that the Claimant became very stressed, anxious and obsessed regarding the Employment Tribunal proceedings. She was distressed and tearful at many points during their liability and remedy hearings.

### Relevant Law

15 In assessing injury to feelings awards, the Tribunal is guided by principles set out in *Prison Service v Johnson* [1997] IRLR 162. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong.

16 Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power. It is helpful to consider the band into which the injury falls; *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. In *Vento* the Court of Appeal said that the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race or sex. The middle band should be used for serious cases which do not merit an award in the highest band; the lower band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

17 *Joint Presidential Guidance on Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury following Da Vinci Construction (UK) Limited* [2017] EWCA Civ 879 was issued on 4 September 2017. It reviewed the effect of recent case law and inflation on the Vento Bands and said that, when awards are made by Tribunals, the Vento bands should have the appropriate inflation index applied to them, followed by a 10% uplift on account of *Simmons v Castle* [2012] EWCA Civ 1039 *Simmons v Castle* [2012] EWCA Civ 1288.

18 The Joint Presidential Guidance concluded as follows, "... as at 4 September 2017, that produces a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,000 (cases that did not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases); with the most exceptional cases capable of exceeding £42,000. ... the Employment Tribunal retains its discretion as to which band applies and where in the band the appropriate award should fall."

19 In *Kemeh v Ministry of Defence* [2014] EWCA Civ 91, [2014] IRLR 377, the Court of Appeal approved the EAT's reduction of an Employment Tribunal's award for injury to

feelings of £12,000 in respect of a one-off racial slur. The Tribunal had seen the case as one falling within the middle band of Vento, but the EAT reduced the award to £6,000. The Court of Appeal considered that a one-off slur such as this, with no lasting employment consequences, would normally only qualify for the lower Vento

### Discussion and Decision

20 The Employment Tribunal bears in mind that it has not found that all of the Respondents' behaviour, about which the Claimant complained, was discriminatory. The Claimant has told the Tribunal that she believes that she will build up her own company through self-employment within 12 months of the Tribunal remedy hearing and she does not seek loss beyond that date. The Tribunal considers that she will be building up, and therefore earning money, in that 12-month period. It accepts that it is reasonable for the Claimant to estimate that she will take 12 months to earn as much as she was earning in the Respondent's employment. The Tribunal is confident that the Claimant will be able to earn at that level in 12 months' time. She is clearly a very capable individual, with considerable skills, and is pleasant and personable. She has many attributes which will contribute to her success. The Tribunal considers that the dedication the Claimant has shown in her previous work, in addressing her health issues and in presenting her Tribunal claim, all indicate she will be successful in her future career. 12 months would be a reasonable period for future loss. However, the Tribunal needs to reflect that the Claimant will be earning money at an increasing rate during the 12 month period. The Tribunal considers that it is appropriate to award full loss for a further 6 months period and none thereafter.

21 Regarding injury to feelings, the Tribunal takes into account that the Claimant has lost job which she valued and that she has been unable to work for more than a year and will take some time to build up her earnings to previous levels. The Claimant has suffered significant feelings of anxiety, low self-esteem, fearfulness and isolation. She fears the judgment of others. While this case did not involve a lengthy campaign of harassment, but an essentially short period of discriminatory treatment, nevertheless, its effects have been particularly severe on the Claimant, who was vulnerable due to her pre-existing anxiety. The Tribunal considers that the appropriate award is in the middle band of Vento. The Tribunal takes into account that the Respondent was not responsible for all the Claimant's injured feelings; the Claimant had a pre-existing anxiety condition and felt wounded by some actions which were not discriminatory. Therefore, the Tribunal assesses the appropriate award at £14,000, within the middle band of Vento.

22 The Tribunal does not make an ACAS uplift under *Section 207A TULRCA 1992*. The Tribunal considers that the Respondent did offer the Claimant grievance hearings and an appeal, albeit that it had not resolved her grievance. The Tribunal considers that the Respondent complied with the provisions of the Acas Code of Practice paragraphs 33 – 45. In so far as there were any limited failings in relation to the procedure, the Tribunal takes into account that the Respondent is a relatively small employer and therefore it does not find that it was guilty of any unreasonable failure to comply with any provision of the Code of Practice.

23 The Tribunal therefore makes the following awards.

24 It awards the loss of earnings calculated from the date of sick leave until the date

of resignation,  $33 \text{ weeks} \times \text{£}375.01 = \text{£}12,375.33$ . The Tribunal deducts both invoices from that on, the basis that the  $\text{£}1,200$  likely to be paid very soon. A total of  $\text{£}1,590$  deducted from the figure gives  $\text{£}10,785.33$ . The Tribunal accepted the Claimant's evidence that she was not eligible for social security benefits because of the size of the equity that she holds in the property and also because of her partner's income.

25 The Tribunal has accepted that it is reasonable for the Claimant to undertake the expense of equipping an office so she will be able to mitigate her loss and work on a self-employed basis. It awards the cost at  $\text{£}2,377.34$ .

26  $\text{£}10,785.33 + \text{£}2,377.34 = \text{£}13,162.67$ . The total economic loss to date is  $\text{£}13,162.67$  (loss since resignation) +  $\text{£}10,011.34$  (loss before resignation) =  $\text{£}23,174.01$

27 The Tribunal also awards 6 months' loss future loss:  $26 \text{ weeks} \times \text{£}375.01 = \text{£}9,750.26$  future loss.

28 It awards interest from the mid point of the period of loss. From 26 May until the date of the remedy hearing is 470 days. The calculation is  $470 \div 365 \times 0.08$  (8%)  $\times \text{£}23,174.01 = \text{£}2387.24$ .  $\text{£}2387.24 / 2 = \text{£}1,193.50$ .

29 The Tribunal awards injury to feelings of  $\text{£}14,000$ . Interest is awarded for the whole period from the date of the discriminatory act until the remedy hearing. The date of the discriminatory act was around 7 March 2017 and therefore interest is to be awarded for a year and a half.  $548 \text{ days} \div 365 \times 14,000 \times 0.08 = \text{£}1,681.53$ .  $\text{£}14,000 + \text{£}1,681.53 = \text{£}15,681.53$ . No interest is awarded on future loss.

30 For grossing up purposes, the parties agreed that  $\text{£}2,469.86$  needs to be added to the award. The element of the award which is taxable is  $\text{£}9,799.32$  and the gross figure which would result in a net award of  $\text{£}9,799.42$  is  $\text{£}12,249.28$ .  $\text{£}12,249.28 - \text{£}9,799.32 = \text{£}2,469.86$ .

Employment Judge Brown

17 September 2018