Injury to feelings and the need to focus on the particular Claimant

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Base Childrenswear Limited v Otshudi UKEAT/0267/18/JOJ[1]

(HHJ Eady QC J - Judgment published on 16 May 2019)

The Facts

1. C was employed as an in-house photographer for a little over three months. C brought claims in respect of seven acts of racial harassment. Six were dismissed on the grounds that they were out of time. The ET did however uphold the final complaint in respect of C's dismissal on 19 May 2016.

2. C was told that she was being made redundant by R's Managing Director. This was a lie. C questioned why she was being dismissed and whether it was to do with her race. This led to the Managing Director (who was already accompanied by another manager) calling in C's line manager. Surrounded by three of the most senior managers in the business, C began to cry. The Managing Director effectively challenged C to say that this was a discrimination case and he told her to collect her belongings and leave immediately.

3. The ET found that C's dismissal amounted to unwanted conduct for the purpose of section 26 Equality Act 2010 and that the way the decision was communicated was intimidatory and further evidence of the violation of C's dignity.

4. The ET made awards for loss of earnings and interest. There was no appeal against those awards.

5. The ET also awarded:

[1] Unless otherwise indicated, references to paragraphs below are to paragraphs of this judgment.

a. £16,000 for injury to feelings;

b. £5,000 in respect of aggravated damages; and

c. £3,000 as damages for personal injury.

6. The ET also applied a 25% uplift under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA') due to R's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ('ACAS Code').

The relevant legal principles

7. It is trite law that the ET must keep in mind that the intention is to compensate not punish and it must be astute neither to conflate different types of awards nor allow double recovery and any feelings of indignation or outrage on the part of the ET must not inflate the award.[2]

8. Awards for injury to feelings should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation (*Armitage Marsden and HM Prison Service v Johnson* [1997] ICR 275).

9. In *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, the Court of Appeal held (at paragraphs 65-68) that:

> [There shall be] three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury. (i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000. (ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band. (iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of

[2] Paragraph 18

> less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
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> There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.
>
> The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.
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> Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case.

10. In *Da'Bell v NSPCC* [2010] IRLR 19 (EAT), it was held that appeals against inadequate or excessive compensation for injury to feelings are more likely to succeed if it is demonstrated that the wrong band is chosen; disputes about placement within a band are likely to be about fact and impression (see paragraph 46).

11. In Commissioner of the Police of the Metropolis v Shaw [2012] IRLR 291 (EAT), Underhill P held (at paragraphs 21) that:

> Aggravated damages are thus not, conceptually, a different creature from 'injury to feelings': rather, they refer to the aggravation – etymologically, the making more serious – of the injury to feelings caused by the wrongful act as a result of some additional element.

12. The ET has jurisdiction to award compensation in respect of psychiatric and/or physical injury to victims of unlawful discrimination subject to the requirements of causation being satisfied (see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170 (CA).

ET's Decision

13. The ET held that:

> "10. … The dismissal on 19 May 2016 came out of the blue. The Claimant at the time of the dismissal was given a patently false reason - that she was being made redundant – the veracity of which she challenged at the time. The Respondent's response at the time was to call into the meeting what we loosely refer to as 'Management reinforcement' against her. It was clear that the Claimant was very aware that she was the victim of wrongdoing, and that she was being put under pressure not to question it. She had to deal with the sudden loss of her job in a career which she had chosen and invested time and study in developing."

14. The ET also took into account the fact that C promptly submitted a letter of grievance and appealed against her dismissal and that R had repeated its false statement that C had been dismissed by reason of redundancy when responding to C's ET claim and R failed to provide the evidence sought by C or provide any significant disclosure.[3]

15. The ET also took into account the following matters:[4]

    a. the finding of harassment was confined to a one-off isolated incident;

    b. generally an employee is likely to be more severely affected if they have worked for an employer for a number of years before being subjected to a discriminatory dismissal;

    c. C was good at her job and had expected to remain in R's employment for the foreseeable future;

    d. C had invested time and money into her career;

    e. C's dismissal had come out of the blue;

    f. although C had raised other allegations of race discrimination arising from early interactions with work colleagues, she had not suffered any depression or disorders during the course of her employment

[3] paragraph 10
[4] paragraph 11

16. The award of £5,000 in respect of aggravated damages was based on R's post-dismissal conduct; in particular, its failure to deal with C's grievance or appeal and the initial presentation of an unsubstantiated defence (R belatedly changed its case to allege suspected theft by C as the reason for dismissal).[5] The ET noted that the allegation of theft was seput into a public forum and C was cross-examined about it. The ET also noted a lack of an apology. [6]

17. The unchallenged medical evidence was that C was medically depressed for a period conservatively estimated at three months after the termination of her employment and it was common ground that her injury fell within the less severe bracket under the Judicial College Guidelines.[7]

18. In applying a 25% uplift because there had been a failure to follow the ACAS Code, the ET noted that there had been a failure to comply with any proper process – either grievance or disciplinary – and that this was unreasonable.[8]

Grounds of Appeal to EAT

19. R appealed on five grounds:

    (1) The ET had placed the injury to feelings award in the wrong *Vento* band.

    (2) No account had been taken of the overlap between awards for non-pecuniary losses.

    (3) Sums awarded for injury to feelings and aggravated damages included compensation for matters compensated by the ACAS uplift, such that the combined awards made under those heads contained an element of double- or even treble-counting.

    (4) The total award for non-pecuniary losses was manifestly excessive

    (5) The ET had taken into account matters that were irrelevant, specifically the Claimant's pursuit of ET proceedings.

[5] paragraph 12
[6] paragraph 12
[7] paragraph 13
[8] paragraph 15

EAT Decision

20. Before turning to the grounds of appeal, at paragraph 34, Her Honour Judge Eady QC stated that:

> As the Respondent had acknowledged, the discrimination found by the ET in this case was serious. The Claimant had invested time and money studying for, and developing, her career. She had obtained a job in her chosen vocation and had worked hard and she justifiably expected to remain in her employment for the foreseeable future, with a reasonable prospect of a pay rise to reflect her hard work. The ET found that losing all this had a real impact on the Claimant. Her dismissal came out of the blue. At the meeting informing her of her dismissal, she was given a patently false reason for why her employment was being terminated. When she sought to challenge this reason, she was subjected to a degree of managerial intimidation that she manifestly found upsetting. Not only did she start to cry during the meeting, but she evidenced the strength of her feelings by her prompt submission of a letter of grievance and her subsequent approach to ACAS and pursuit of ET proceedings.

Grounds 1 and 5

21. Grounds 1 and 5 were dealt with together. In respect of ground 5, R argued that the ET had wrongly had regard to the fact that C had approached ACAS and subsequently commenced proceedings; it was argued that these features will be present in any complaint of discrimination: an ET would not be considering making an award for injury to feelings had proceedings not been brought and in order to bring such proceedings ACAS must be contacted.[9] HHJ Eady QC held that:

> The ET had regard to the approach to ACAS and the commencement of proceedings as evidencing how the Claimant responded to the discriminatory treatment in question; these were not irrelevant factors in assessing the impact of the discriminatory conduct on the Claimant.[10]

22. Later in the judgment, HHJ Eady QC explained that:

> the ET had regard to post-dismissal events – the issuing of the grievance/appeal, the contact with ACAS and the pursuit of ET proceedings – only in a limited sense, as a

[9] paragraph 35
[10] paragraph 35

way of testing what was claimed to have been the impact on the Claimant. As I have already observed, that was a permissible approach.[11]

23. More generally, in relation to whether the ET had made an injury to feelings award in the wrong *Vento* band, HHJ Eady QC made the following observations:

> it is right to say that, in deciding whether the case should fall within the low or middle *Vento* bands, an ET might think it relevant to have regard to whether the discrimination in question formed part of a continuing course of conduct (perhaps a campaign of harassment over a long period) or whether it was only a one-off act. That said, each such assessment must be fact and case specific. It is after all, not hard to think of cases involving one-off acts of discrimination that might well justify an award falling within the middle or higher *Vento* brackets, or other cases involving a continuing course of conduct that are properly to be assessed as falling within the lower band. Simply describing discrimination as an isolated or one-off act may not provide the complete picture and I do not read the *Vento* guidance as placing a straightjacket on the ET such that it must only assess such cases as falling within the lower band. The question for the ET must always be, what was the particular effect on this individual complainant?[12] [Emphasis added].

24. Ultimately, the EAT held that the ET had reminded itself that it must have regard to the effect on the complainant, it had not erred in its approach and the award for injury to feelings was not manifestly excessive.[13]

Grounds 2 and 3

25. Having found no error in relation to the ET's award in respect of injury to feelings, the EAT held that the ET had been careful not to fall into the error of double-counting when assessing aggravated damages; it had been looking at what happened after C's dismissal.[14] The ET was satisfied that the initial injury was aggravated by R's continuation of the falsehood in its initial defence to the ET and this was further aggravated by R's failure to respond to C's grievance. The ET was also entitled to take into account the way in which R had conducted the litigation including belatedly changing

[11] paragraph 39
[12] paragraph 36
[13] paragraph 37
[14] paragraph 40

its case to allege attempted theft as the real reason for dismissal and R's failure to make any apology.[15] The EAT took the view that the sum of aggravated damages was not excessive.[16]

26. The EAT also found that there was no element of double-counting in the awards for injury to feelings and aggravated damages and that together the sum of £21,000 was not excessive.[17]

27. In respect of the award for personal injury, the ET 'expressly considered whether it might be said that the Claimant had suffered any depression or other disorder as a result of those earlier incidents – allowing that the incidents might have occurred but giving rise to no liability on the Respondent's part – but found that there was no evidence of that'.[18] The ET was entitled to make an award for personal injury in the sum of £3,000.

28. The EAT did, however, accept that R's failure to respond to C's grievance was taken into account by the ET both in the award for aggravated damages and in its decision to apply an ACAS uplift, albeit that it was only one of four factors identified by the ET in respect of the aggravated damages award.[19] HHJ Eady QC stated that, on any case, 'the double counting in question is not great'.[20] But the conclusion was that the ET did fail to have regard to the issue when considering the overall award made for non-pecuniary loss and the appeal was allowed to that limited extent.[21]

Ground 4

29. Looking at the overall award for non-pecuniary loss (£24,000), HHJ Eady QC held that given 'not just the injury to feelings and aggravation of that injury but the medical depression suffered by the Claimant… I am unable to say that this was manifestly excessive'.[22]

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[15] paragraph 40
[16] paragraph 42
[17] paragraph 43
[18] paragraph 45
[19] paragraph 47
[20] paragraph 47
[21] paragraph 47
[22] paragraph 46

Comment

30. This decision highlights the principle that in assessing injury to feelings (and indeed aggravated damages), it is essential to focus on the subjective impact of the discriminatory treatment on the particular Claimant. There is no rule that a one-off act can only result in an award in the lower *Vento* band. Both Claimants and Respondents should avoid relying on generalised assumptions about how a particular discriminatory act would be likely to affect a (hypothetical) reasonable person or placing too much weight on whether a particular case involves a one-off act or course of conduct.

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