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EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Wenlock**
Respondent:	**Marks and Spencer Plc**
Heard at: Birmingham	**On: 23 July 2018**
Before:	**Employment Judge Dean**
MEMBERS:	**Mr R S Virdee** **Mr M P Machon**
Representation	
Claimant:	**Mr P Keith (Counsel)**
Respondent:	**Miss L Banerjee (Counsel)**

JUDGMENT ON A REMEDY HEARING

The decision of the Tribunal on remedy is:

1. The respondent shall pay to the claimant compensation for the unlawful discrimination ending on the termination of his employment on 31 August 2016 in the gross sum of £81,688.78. being the grand total sum of his net loss of £65,100.77 which includes:
    a. compensation in the net sum of £34,563.75, together with
    b. interest thereon of £2,278.09
    c. award for injury to feelings £24,542.00 together with
    d. interest thereon in the sum of £3,716.93
2. The parties agree that the compensation which is subject to tax over and above the tax exempt sum of £30,000 which the respondent shall pay in the

gross payment of £81,688.78.

REASONS

1. The Employment Tribunal determined that the claimant in this case had been subject to unlawful discrimination, in respect of the events of which he complained, that post-dated 18 August 2016. All the complaints that related to matters prior to that time, were presented out of time. Although it is not evidence to lead us to consider it was just and equitable to extend time to consider those complaints, we have taken into account that evidence and findings we have made in relation to the events which pre-date 18 August 2016, in leading us to reach any adverse inferences in reaching our final decision. We refer to that fact because although in his submissions Mr Keith was referred to events that clearly pre-date 18 August 2016 we have not brought them into the focus of our injury to feelings award in respect of the dismissal.

2. The claimant was a commercial manager for the respondents; the rehabilitative duties that he had been given prior to the termination of his employment had been ones for which he had not been given the training that was required for the role of commercial manager and we draw inferences from that fact only. We consider therefore, the dismissal and the events surrounding it. Our findings of fact have identified that Mr Bennington without reasonable cause, sought to suggest that the claimant had lied to his doctor to enable him to get a fit note to return to work. We have found Mr Bennington made a misrepresentation of the claimant's circumstances to the claimant's GP's. Mr Bennington made no reasonable enquiries into the claimant's side of the matters that led ultimately to his dismissal and he did not inform the claimant of the identities of the two individuals who made the assertion that the claimant had been drinking at work, had been self-harming at work and had to be removed from contact with the members of the public. Events led to the termination of the claimant's employment on notice. However, sadly immediately upon receiving the decision that his employment was to be terminated, the claimant self- referred to doctors as he was suicidal and was referred to the crisis team. The circumstances which led to the escalation of the claimant's already fragile mental health were such that this tribunal has concluded that

injury to feelings has been sustained by the claimant which place the award at the very top of the middle band of the so called Vento bands.

3. We are grateful to Miss Banerjee for confirming the somewhat convoluted revisiting of the Vento bands and applying the 10 per cent uplift to those bands to comply with Simmonds v Castle [2012] EWCA CIV 10 39 and then applying the formula advocated by the Employment Tribunals Presidential Guidance in September 2017 with which Mr Keith agreed. The middle band as it is revisited on that basis based upon the date when the claim was presented on 12 January 2017 would be between £8,180 to £24,542. We assess that this case is one which we assess to be at the extreme top of the middle band and we award a sum for injury to feelings of £24,542.

4. We turn to compensation for loss of earnings of the claimant and found that because of the manner in which his employment was terminated, and the repercussions it had on his mental health he was not in a position to take steps to begin to look to mitigate his loss until January 2017 when he began a job search. Not unexpectedly the claimant's immediate reaction was that he did not wish return to a retail environment in which he had latterly been employed. The claimant began a job search although somewhat naively he had hoped to build upon his skills with a view to try to move out of the retail environment into Human Resources. Sadly, the claimant found quickly, as any objective advice might have counselled him earlier, that without a CIPD qualification his on the job personnel experience meant that he was not best qualified for a personnel job within a Human Resources role. To his credit the claimant has since begun study to acquire his CIPD qualification and we commend him for that.

5. The claimant by his own admission has not included in the bundle of remedy documents that had been presented to us any significant record of his online searches, however we accept that he undertook online searches and registered with the usual online recruitment agencies. Miss Banerjee for the respondents has sought to convince us that in January 2017 and until the present day there has been a plethora of jobs that would be suitable for the claimant. She has produced print outs of online search engines as at

17 July 2018, 4 jobs within the retail market within the HR Market and within in the range of operation managers' jobs. We do not have any relevant evidence to support the suggestions that during the period from January 2017 until the claimant did find alternative employment in October 2017, there was an abundance of suitable positions for which the claimant could have applied that he did not.

6. We find that the claimant made reasonable attempts to find alternative employment. He revised his desire not to return to a retail environment and he reduced his sights, including in some circumstances too low, as he was prepared to countenance jobs on cash desks as well as jobs at a level that he had previously undertaken in the retail environment as well as that of commercial manager the position in which he was employed finally with the respondents even though it was a role in which he had not been fully trained. We commend the claimants for his efforts.

7. Our industrial experience leads us to conclude that the claimant, who had taken steps to pay for someone to assist him in rewriting his CV to improve his employment prospects, was blighted in no small degree by the fact that he had been dismissed by the respondents. Until the claimant received a judgment of an employment tribunal confirming the discriminatory circumstances of his dismissal a number of agencies who he had previously engaged with indicated that they were not prepared to countenance putting him on their books and recommending him to their clients until a tribunal judgment had been given. We find that the claimant successfully mitigated his job loss as soon as reasonably he might have been expected to do when he gained employment with Debenhams albeit working in Coventry as opposed to his home base in Bearwood, Birmingham.

8. Miss Banerjee suggests that the claimant ought not to have been content in gaining employment with Debenhams which he began in 1 October 2017, but he ought to have then continued to look for alternative employment that would fully mitigate his loss. We disagree. The claimant has done well to mitigate his loss in the position that he has gained with Debenhams albeit is gross annual salary is £30,000 compared to that which he enjoyed with

the respondents in the region of £40,000 per annum. The claimant has given persuasive evidence that he would like to get 12 months' stable employment with Debenhams under his belt before looking to either improve his position within that organisation or, by setting his sights higher and mitigating his loss further with another employer.

9. If we gaze into a crystal ball and speculate on the reasonable course of mitigation of the claimant's loss we are of the view that it is reasonable for the claimant to establish a period of continuous employment with Debenhams for a period of one year and then begin the search for an improved remuneration whether with Debenhams or elsewhere. We are of the view that by March 2019; that is 18 months after he had began working with Debenhams, it is foreseeable that the claimant will find employment that would entirely mitigate his loss against that which he would have continued to receive had he remained in the employment of the respondent. We heard evidence from Mr Fruin that he had found the claimant to be a competent and ambitious manager and we have heard nothing to compel us to the view that an employee who had secure employment with Marks & Spencer's, who might be described as a prestigious employer, would have left that employment voluntarily. We do not accept the suggestion by Miss Banerjee there was only a 55 per cent chance that the claimant would have successfully return to the respondents and continued in their employment. We find there is nothing to compel us to the view that the claimant, but for his dismissal by the respondents, would not have continued in their employment despite hearing that the claimant's position was not filled until January 2016. Nothing suggests to us that the claimant, had he remained in employment and been allowed to undertake rehabilitative duties, would not have continued in that post on his existing terms and conditions.

10. Miss Banerjee reminded us that the tribunal found that it was more likely than not that the claimant would return to work and but for his dismissal continue working with the respondents and she suggests that even if the tribunal did not accept her suggestion that there was only a fifty-five percent that the claimant would return and remain in the respondent's employment then some deduction by a lower percentage should be made to assess the

likelihood that the loss that had been found would not have been incurred. The tribunal considered that with the benefit of hindsight, having seen that the claimant has shown resilience having recovered his good health and found alternative employment which he has continued without relapse; the prospect of him having returned to Marks & Spencer's and continued in employment we assessed to be a ninety percent certainty that he would return. We make only a 10 per cent discount on the award we make for compensation for loss of earnings as a result of the termination of the claimant's employment.

11. We have applied the formula to the assessment for loss to the date of assessment and for future loss and the injury to feelings award and are grateful to the parties who have agreed the arithmetic of the compensation payable to the claimant based on that formula which is reflected in the award that we have made. We have attached to this judgment a schedule of compensation including, as requested by the parties, a reference to the breakdown of compensation for past and future loss by reference to the date of assessment and injury to feelings and interest that is payable thereon and the grossing up of the award for taxation.

Employment Judge Dean
1 November 2018

SCHEDULE

Compensatory Award

i) Past loss of earnings to date of assessment

£30,490.43

10% reduction £27,441.41

ii) Past loss of benefits in employment

££2983.95	
10% reduction	£2685.56
iii) Interest on loss to date of assessment	£2278.09
iv) Future loss of earnings from date of assessment to 31 March 2019 35 weeks @ £121.84	
£4264.40	
10% reduction	£3837.96
v) Future loss of pension contributions £665.35	
10% reduction	£598.82
vi) Injury to feelings award	£24,542.00
vii) Interest on injury to feelings award	£3716.93
Grand total net award	£65,100.77

Grossing up

Net award £65,100.77	
Nil tax rate £0 - £30,000.00	£30,000.00
20% tax on £16,350.00	£20,437.50
40% tax on £18750.77	£31,251.28
Grand total gross award	**£81,688.78**