RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant: **Ms Annie Morgan**

Respondent: **NGE Music Ltd**

Heard at: **East London Hearing Centre**

On: **20 July 2018**

Before: **Employment Judge Scott**

Members: **Ms Edwards**
Mrs Fuller-Smyth

Representation

Claimant: Mr Brown (Solicitor)

Respondent: Ms White (Counsel)

REMEDY JUDGMENT

The Respondent is ordered to pay to the Claimant the sum of £5,672.62 within 14 days.

REASONS

1. The reserved liability decision was sent to the parties on 9 January 2018. We concluded that the respondent had discriminated against the claimant contrary to section 15 of the Equality Act 2010 ('EqA'). The claimant's dismissal was unfavourable treatment arising in consequence of her disability (the dismissal was for sickness and some of the claimant's sickness absences were related to disability); we concluded that the respondent had a legitimate aim (having someone in the position to complete the work required) but that the respondent could not show that the dismissal was a proportionate way of achieving that legitimate aim because they had not taken any further steps to *try* to meet to discuss things with the claimant and/or ask the claimant to provide a letter from her GP, following the claimant telling the respondent that she wasn't 'up to coming in for a meeting at the moment…'

Preliminary issues

2. The respondent objected to the additional witness statements prepared on behalf of the claimant and the claimant's mother being admitted because they were served on 19 July at 15.28. We permitted the claimant to rely upon the witness statements because, in short, we concluded that one way or another we had to hear the evidence to determine remedy. However, we noted that exchange at this late stage was bad practice. Ms White also objected to Mr Brown seeking aggravated damages on behalf of the claimant. We concluded that aggravated damages are a subset of injury to feelings awards and that it is for the tribunal to determine the appropriate remedy. We indicated that our preliminary view, based on the liability judgment, was that it was difficult to see aggravating features arising from the dismissal.

Remedy issues

3. The issues for the Tribunal to determine were whether to make an award of compensation for financial loss and injured feelings and, if so, how much. The claimant produced an updated schedule of loss for the hearing. In essence, the claimant submitted that she should be awarded financial losses for the period up to and including 30 September 2017 and that she should be compensated for her injured feelings at £10,000 (the lower end of the middle Vento band) and awarded aggravated damages. Ms White helpfully indicated at the outset that her submissions would be that:

3.1 the claimant has disobeyed a reasonable instruction that she could take two weeks holiday from 14 January when she booked a 3 week holiday to India (from 7 January) on 4 December and that the claimant would therefore have been dismissed for gross misconduct, but for the discrimination;

3.2 the claimant would have been dismissed by reason of ill-health at or about the date of dismissal *even* if the respondent had taken the steps that the tribunal indicated that they should have taken to avoid the discrimination. Ms White referred to medical evidence that the claimant would not be fit for work until July (the claimant did some paid work in June) and that there was therefore no financial loss;

3.3 any award for injury to feelings should be zero or nominal because the claimant would, regardless of the unlawful act, have been disciplined and dismissed for misconduct and would thereby have suffered the same or greater distress.

Evidence

4. We reminded ourselves of our liability decision, read the witness statements and heard the evidence of the claimant, her mother and, on behalf of the respondent, Mr Nustedt. This judgment on remedy must be taken in conjunction with the findings of fact and conclusions made at the liability hearing.

Law

5. Section 124(2) of the EqA provides that the Tribunal may make a declaration as to the rights of the complainant and order the respondent to pay compensation to the complainant and make a recommendation. Our liability judgment declared that the claimant had been subjected to unlawful discrimination. The claimant now seeks compensation.

6. The amount of compensation corresponds to that which could be awarded by the County Court. Section 119 EqA provides that it may grant any remedy which could be granted by the High Court in proceedings in tort. This includes compensation for financial loss. Section 119(4) EqA provides that an award of damages can include compensation for injury to feelings.

7. Discrimination is a statutory tort. The compensation awarded should therefore put the claimant, so far as is possible, in the position she would have been in had the discrimination not occurred. In the context of discriminatory dismissals this means asking what would have happened if there had not been a discriminatory dismissal (*Abbey National plc and Hopkins v Chagger* [2009] IRLR 86). The claimant is under a duty to mitigate her losses. Recoupment does not apply but benefits received in consequence of the dismissal must, where relevant, be deducted.

8. Awards for injury to feelings are to compensate for non-pecuniary loss and the sum is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment she has received. The purpose of an injury to feelings award is not to punish the respondent. The assessment will depend on our findings as to the particular injury suffered by the Claimant in any given case.

9. The EAT set out principles for assessing awards for injury to feelings in *Armitage and others v Johnson* [1997] IRLR 162, summarised as follows:

(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation should not be allowed to inflate the award.

(2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.

(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind.

(5) Finally, tribunals should bear in mind the need for public respect for the level of awards made.

10. We had regard to the Judicial College Guidelines for the assessment of general damages in personal injury cases, 14th edition 2017.

11. As Mummery LJ said in the leading case of *Vento v Chief Constable of West Yorkshire Police* (No. 2) [2002] EWCA Civ. 1871, [2003] IRLR 102, [2003] ICR 318:

> "Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury … Striking the right balance between awarding too much and too little is obviously not easy."

12. In *Vento* the Court of Appeal in England & Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500 to £5,000 applied in less serious cases. The middle band of £5,000 to £15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).

13. We had regard to the Presidential Guidance issued on 5 September 2017, paragraph 11:

> *In respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the Simmons v Castle 10% uplift)*:
>
> **Lower band:**
> £ 500.00 ÷ 178.5 x 269.3 (March 17) x 10% = £ 829.78
>
> £ 5,000.00 ÷ 178.5 x 269.3 x 10% = £ 8,297.76
>
> **Middle Band:**
>
> £15,000.00 ÷ 178.5 x 269.3 x 10% = £24,893.28
>
> **Higher Band:**
>
> £25,000.00 ÷ 178.5 x 269.3 x 10% = £41,488.80

14. Ms White submitted that any award for injury to feelings should be zero or nominal (£800) because the claimant would, regardless of the unlawful act (the discriminatory dismissal), have been dismissed for gross misconduct and thereby

suffered the same or greater distress in any event. She relied by way of analogy on *Moyhing v Barts and London NHS Trust* [2006] IRLR 860. Mr Brown referred us to *O'Donoghue v Redcar and Cleveland BC* [2001] IRLR 615. He submitted that the Court of Appeal held in that case that it is wrong to discount the award for injured feelings simply on the basis that the claimant would have been dismissed within a short time (were that so, which he does not accept).

15. Under the *Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations* 1996, SI 1996/2803 as amended, the Tribunal must consider whether to award interest on past loss of earnings and injury to feelings, regardless of whether or not either party has asked for interest to be awarded (which neither did). Under the Regulations, for past financial loss the interest period begins on the mid-point date (from the act of discrimination to the date of calculation) and ends on the day of calculation. For injury to feelings the interest period begins on the date of the act of discrimination and ends on the day the amount of interest is calculated, reg 6(1). The calculation date is 20 July 2018. If the award is paid within 14 days, no further interest accrues.

16. Aggravated damages are available for discrimination claims. Again they are compensatory, not punitive. In *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, the EAT regarded *a*ggravated damages as an aspect of injury to feelings. They are awarded where aggravating factors have made the claimant's injury to feelings worse. In *Shaw* the EAT said that the circumstances attracting an award of aggravated damages fall into three categories:

> *(a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to ….It gives a good general idea of the kind of territory we are in, but should not be treated as an exhaustive definition…. [A]n award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.*
>
> *(b) Motive…. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a).*
>
> *(c) Subsequent conduct. [This can] cover cases including where: the defendant conducted his case at trial in an unnecessarily offensive manner…. [or] where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously….A failure to apologise may also come in this category; but whether it is in fact a significantly aggravating feature will depend…..*

Findings of fact and conclusions

Loss of earnings

17. At the date of dismissal, the claimant was receiving SSP (£88.45pw). She was paid 1 week's salary upon termination (3 January 2017).

18. The claimant was on holiday until 29 January so could not have met the respondent (in person, at least) until her return from India in late January.

19. The claimant began looking for work in March 2017 (she also began receiving JSA in March 2017); she applied for a job with Bobbi Brown (Estee lauder) in April 2017 and attended video and face-to-face interviews in May 2017 and was offered the role but told that there were administrative steps required before she could start. She did not assert that she could not start work sooner than she did because she was still too unwell to do so. We noted during our deliberations that the GP letter at [223-4] states that the claimant told the GP in July 2017 that she was *currently* looking for work, but that we now know that she had in fact secured work by May 2017, although she did not start with Bobbi Brown until August 2017. The claimant did some 'cash in hand' work in June & July 2017 totalling £300 (she told us that she subsequently accounted to the revenue in respect of the work done). The claimant's earnings for August & September 2017 were £890.96 (her earnings with the respondent were £1299pcm net). The claimant's loss of earnings ended on 1 October 2017. The claimant received benefits in the sum of £940.40.

20. Mr Nustedt told us that the respondent would have dismissed the claimant for a breach of trust and confidence for booking and taking a 3 week holiday in January, if she had not been dismissed on 3 January. That was, he said, the final straw. In respect of the holiday that the claimant booked to India from 7 January 2017, we found in our liability judgment that the claimant had been told and understood that she could take 2 weeks from 14 January (not from 7 January or longer than 2 weeks). We said 'there was no further discussion as far as we are aware'. At the remedy hearing, the claimant told us that Mr Mallett had said orally that she could, in fact, take holiday from 7 January for 3 weeks. The claimant's mother also told us that the claimant believed she had permission to go on holiday from 7th January. Mr Nustedt said it was 'possible' that Mr Mallett had so agreed but unlikely. Mr Mallett was not at the remedy hearing so the claimant's evidence could not be put to Mr Mallett. We do not accept that such a conversation took place. We conclude that, if it had been agreed, the claimant would have told us at the liability hearing and, more importantly, that there would have been email communications confirming the same [149]. We accept Mr Nustedt's evidence that Mr Mallet would have told him, if a 3 week holiday beginning on 7 January had been agreed.

21. It is our role to, as far as possible, put the Claimant into the position she would have been if the discrimination had not occurred. In other words, determine, as best we can, what would have happened if there had not been a discriminatory dismissal.

22. Based on our collective industrial relations experience, we concluded that there is a 100% chance that the claimant would have been disciplined and dismissed following the period of authorised sick leave in January, by reason of the unauthorised

holiday leave, a non-discriminatory reason. We concluded that the respondent would have disciplined and ultimately dismissed the claimant upon her return from India, given that the respondent found out in January that the claimant had, on 4 December 2016, booked to travel to India on 7 January 2017 for 3 weeks, having been previously advised that she could take two weeks from 14 January 2017. We found in our liability decision that the claimant's GP had not advised the claimant to travel to India and we heard nothing at the remedy hearing to make us doubt that finding. We accept Mr Nustedt's evidence that booking the 3-week holiday would have been the final straw. The respondent would, we concluded, have considered that enough was enough. We take into account that the claimant had previously taken a holiday for longer than authorised in April 2016 and that the Respondent's view then was that the claimant was 'taking them for a ride' as at April 2016. Of course, the respondent was unaware of the claimant's disability at this time. We accept Mr Nustedt's evidence that the claimant 'was [as far as the Respondent was concerned] already falling short of what was required of her' (see, for example, paragraphs 19; 23, 26, 29, 31 of the liability decision).

23. We concluded that, given the respondent found out that the claimant was in India during the period she was away (see paragraph 44 liability decision), that it would have commenced disciplinary proceedings immediately upon her return to work on 29 January (the claimant told us that, but for the dismissal, she would have returned to work on 29 January). Whilst the medical evidence and, indeed, the claimant's own evidence at the liability hearing was that she was not fit to return to work until June/July 2017, we accept that if she had not been dismissed that she would have been fit to return to work, perhaps with adjustmets, on 29 January 2017, after her holiday to India). We also concluded, based on the members' industrial relations experience that those disciplinary proceedings would have taken, at most, 2 weeks. This was not a case requiring evidence to be taken from anybody else. It was not a complex case. Mr Brown submitted that the respondent had not suggested that the claimant would have been dismissed in any event when it met the claimant at the appeal meeting on 14 February 2017. Whilst we accept that the respondent did not raise this as an issue in its response or at the appeal meeting in February, we nonetheless accept Mr Nustedt's evidence before us at the remedy hearing. We are certain that the respondent would have, absent the discrimination, have 'had enough' and dismissed the claimant.

24. We have accepted the claimant's evidence that, if she had not been dismissed, she would have been able to return to work at the end of January. The medical evidence and the claimant's evidence that she was not fit until later in the year was written on the basis that she had been dismissed. The loss suffered by the claimant in February should therefore be based on her earnings (£299.76 pw net), as opposed to SSP. The claimant has already been paid 1 week's notice pay but we have concluded that it would have taken about 2 weeks for the respondent to follow proper process, prior to giving notice to the claimant. We think that the respondent would have paid notice, even if it had concluded that taking the unauthorised leave was gross misconduct. Given that the respondent paid the claimant notice pay, we do not add that to the sum calculated below. The claimant's loss of earnings is therefore:

January: SSP (£88.45pw) x 4 weeks = £353.80 (January);
plus
£299.76 net (for the 2 weeks that we estimate it would have taken to investigate

and discipline the claimant, after her returning to work on 29 January) = £599.52 (February)

TOTAL: £953.32.

25. In relation to those past financial losses, we apply interest to the loss and do so in accordance with Regulation 6; we start to calculate interest (at 8%) from the mid-point date between the date of discrimination and the date of the remedy hearing. In this case that is the midpoint between January 2017 (dismissal) and the remedy hearing in July 2018 (18 months). The mid-point is October 2017. We are therefore awarding interest on losses accumulated between October 2017 and July 2018 (9 months) = £57.20. That gives a total sum for loss of earnings of **£1010.52**. We do not deduct benefits or sums for monies earned as the claimant did not receive benefits in March 2017 and she did not start earning until June 2017.

Injury to Feelings

26. The claimant put the level of award for injury to feelings at £10,000 (the lower end of the middle Vento band). It is, of course, a matter for us to determine the appropriate level of award, having regard to the parties' submissions, based on the evidence and findings of fact

27. The respondent submits that the award for injury to feelings should be zero or nominal because the claimant would, had the discriminatory dismissal not occurred, have been dismissed for gross misconduct and thereby have suffered the same or greater distress. We have concluded that the claimant would have been dismissed for misconduct, had the discriminatory dismissal not have occurred. We are not aware of any authority that awards for injury to feelings can be discounted where a respondent can show that a claimant's feelings would have been hurt regardless of the unlawful act. Mr Brown referred us to *Redcar*. The Court of Appeal held in that case that it was wrong to discount the award for injured feelings simply on the basis that the claimant would have been dismissed within a short time. We are bound by that authority. There is, we think, a distinction between the two scenarios but, in the end, we do not accept Ms White's submission. We conclude that it would be wrong to discount an award for injury to feelings where it is shown that a claimant's feelings would have been hurt *regardless* of the unlawful act. The unlawful act did take place. What we have to assess, therefore, is the hurt that *was* suffered by *that* unlawful act.

28. The claimant was suffering from anxiety and depression pre-dismissal. The GP records at [223-4] that the claimant '*experienced mounting anxiety around work [in December 2016] and felt anxious even about contacting her work to arrange a phased return or discuss an altered work environment, for example working at home….*' The respondent was not aware that the claimant suffered from depression prior to November 24th. Following the claimant's email of November 24th the respondent told the claimant that it would sit down with her '*to work out how we can work around this situation to go forward'* [para 36 liability decision]. The fit notes dated 2 December and 16 December [39/215 & 39/214] did not suggest adjustments. However, having advised the respondent that she suffered from depression and anxiety in November, the claimant was then dismissed in January, when she declined to meet with the respondent on 5 January. The claimant had been dealing with depression and anxiety/panic attacks for some 4 years prior to her dismissal (we found in our liability decision that the respondent had not caused the claimant's anxiety prior to dismissal). She was therefore perhaps

more vulnerable at the date of dismissal and the respondent must, of course, take the claimant as it finds her; the so called 'egg-shell skull rule'. The claimant told us that she felt guilty following her dismissal; she felt that it was her fault and felt worthless and lost confidence in herself and stopped socialising for a little while. She said that she felt bad before the dismissal but that her mental health was made worse by it. The claimant's mother said that the claimant was upset by the dismissal and felt guilty and that she avoided social situations following her return from India. We accept that the claimant suffered these feelings. We also take into account that the claimant felt unable to return to the music industry. The claimant considers that the respondent was contemptuous of her mental health and had no sympathy (we think that contemptuous is what she meant to write (not 'contentious')). We do not accept that the respondent was contemptuous of the claimant's mental health but it is the claimant's feelings that we must assess. The discrimination was an omission; a failure to do something. The claimant told us that she was in two minds about whether to travel to India until the day before she left, but that she was persuaded by her mother and grandmother to go. She also told us that her Doctor encouraged her to go too. There is no record of the conversation with the claimant's doctor taking place [39] and we do not accept that it did. We noted in our liability decision that the claimant booked the flight to India on 4 December 2016, due to travel on 7 January 2017, before she was signed off for the period 16 December 2016-28 January 2017. The claimant told us that she suffered from low self-esteem and lack of confidence until the tribunal hearing. We do not accept that the claimant's feelings were injured until the hearing (see paragraph 29 below).

29. The claimant did not attend her GP following dismissal until February 2017. When the claimant saw her GP in March 2017, the GP recorded: 'feels a lot better in self with increased dose' (that dose had begun prior to dismissal) and in May 17, the GP recorded 'feels better wanted further supply [of anti-depressants]'. At [223-4], the GP report dated October 2017 states that the Claimant 'felt a lot better [in March 2017] on an increased does of [anti-depressant medication],...denied any suicidal ideation or ideas of self -harm' and the GP records that the claimant told her that she was currently looking for a job and that she felt fit to work. We note however, that the claimant told us at the remedy hearing that she began looking for work in March 2017, applied for a job with Bobbi Brown in April 2017, attended video and face to face interviews in May 2017 and was offered the role but told that there were administrative steps required before she could start the job in August 2017. The claimant did not say that she was not able to start work earlier. The GP does not refer in the report at [223-4] to how the dismissal affected the claimant, for example, whether it exacerbated the claimant's depression. The GP records how the claimant feels but there is no indication that the claimant's symptoms were exacerbated by the dismissal. Of course, medical evidence is not required for us to make an award for injury to feelings (and there is no separate personal injury claim). We also note that the claimant's GP recorded that she 'felt a lot better' in March 2017 on the same drug dosage that she was on pre-dismissal. Doing the best we can we have concluded, on the balance of probabilities, that the claimant's hurt feelings arising from the dismissal were relatively short-lived and that the period of hurt and upset was from January 2017 until March/April 2017. The GP records indicate that, by now, the claimant was feeling much better and we also know that the claimant felt confident enough to apply for employment elsewhere in March 2017 (she was interviewed in April 2017, for the role that she was subsequently offered).

30. Dismissal is a one off act but it is, of course, serious. It is, in our experience, fair

to say that awards for injury to feelings for dismissal will often (but not always) fall in the middle *Vento* band. However, we remind ourselves that what we are looking at is the impact of the unlawful act upon the claimant. It is her 'hurt feelings' we must award compensation for. We have considered the value of money when we have reached the level of our award and the need for public respect in the level of award. We have to fix our award by reference to the findings of fact we have made about the Claimant's injured feelings. Taking into account our findings of fact about the injured feelings and the likely period of them and having regard to the Judicial College guidelines (see, for example, personal injury awards for minor psychological damage being up to £5,130) and the value of money and the need for public respect in the level of award, we have concluded that the starting point in this case, notwithstanding that the claimant was dismissed, is the lower *Vento* band and we think that the mid-point of that band would reflect the injured feelings suffered by the claimant. That is a sum of £4,150. We have applied interest to that award according to the Regulations because we consider it just and equitable to do so from the start date of those injured feelings, namely the dismissal to the date of the hearing, i.e. 563 days at 8% (£4,150.00 x 0.08 ÷ 365 x 563) = £512.10. That gives a total injury to feelings award of **£4,662.10**.

31. We have been asked to increase the injury to feelings award to take into account the way in which the Respondent conducted itself in respect of the dismissal and in this remedy hearing. We have concluded that there is nothing high-handed, malicious, insulting or oppressive manner about the way the respondent conducted itself in the period of the claimant's employment or dismissal. Quite the opposite, in fact. When the respondent found out that the claimant was suffering from anxiety and depression, it sought to meet with her to 'work out how we can work around this situation as we go forward.' We also conclude that the Respondent was entitled to put its defence to the claim as it did and we find that its conduct of the proceedings was not aggravating. We do not award aggravated damages.

32. The sum payable to the claimant by the respondent, within 14 days, is £5,672.62.

Employment Judge Scott

17 August 2018