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EMPLOYMENT TRIBUNALS

Claimant: **Mr J Chepinski**

Respondent: **David Phillips Furniture Ltd**

Heard at: **East London Hearing Centre** **On: 8 June 2018**

Before: **Employment Judge Brown (sitting alone)**

Representation

Claimant: In person

Respondent: Did not attend and was not represented

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The Claimant's claim for race discrimination succeeds under Rule 21 Employment Tribunal Rules of Procedure 2013 in default of a response from the Respondent and the Respondent having been debarred from defending the claim.

(2) The Respondent shall pay the Claimant £4,309.12 compensation for race discrimination comprised as follows:-

(i) Injury to feelings: a total of £3,174.90, made up of £3,000 injury to feelings award and £174.90 interest; and

(ii) Economic Loss: a total £1,134.22, made up of £1,108.71 loss of earnings plus £25.52 interest.

(3) In addition, the Respondent shall pay the Claimant £760 for preparation time costs. The Respondent has conducted the proceedings in an unreasonable manner and it is appropriate that it should pay the Claimant's preparation time costs.

REASONS

The Facts

1 The Claimant has succeeded his claim for race discrimination. The Respondent failed to present a Response and has been debarred from defending the claim.

2 In his claim form, the Claimant said that he was bringing a claim in relation to a one-off act of race discrimination and that he would be seeking compensation for it. The relevant act was that, on 13 September 2017, the Claimant's team leader called the Claimant "my slave" in front of other employees.

3 The Claimant is a white Polish man. He compares his treatment with the treatment of white Hungarian, Romanian or British people.

4 The Claimant told me that he receives, in a normal working week, £468 gross basic pay, plus £30.96 overtime, plus a £25 bonus. That is a total of £523.96 gross per week, £421.31 net per week. The Claimant told me that he was off work for three weeks due to stress and anxiety caused by the incident. Over those three weeks he would have earned £1,263.93 net. However, he received only £155.22 statutory sick pay in total. I calculated his loss over the three weeks to be £1,108.71. I accepted that that loss was caused by stress and anxiety arising out of the comment made to him.

5 The Claimant told me that he felt that his dignity had been violated by the comment and that he had been harassed by it. He told the Tribunal that he had brought grievances in respect of the comment, which were eventually upheld by the Respondent on 24 November, at an oral grievance hearing. However, he said that the Respondent did not tell the Claimant what action they would take against the team leader, because that was a confidential matter. It appears that the Claimant was invited to one investigatory meeting and one outcome meeting.

6 The Claimant told the Tribunal that he was not satisfied with the outcome and felt that the Respondent had not redressed the action. In the witness statement he prepared for the Employment Tribunal, he said that he envisaged that perhaps dismissal was an appropriate sanction for the comment made to him.

Relevant Law

7 The Tribunal is guided by the principles set out in *Prison Service v Johnson* [1997] IRLR 162 in relation to assessing injury to feelings awards. 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 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. Awards should bear some broad general similarity to the range of awards in personal injury cases.

8 It is helpful to consider the band into which the injury to feeling falls – see *Vento*

v Chief Constable of West Yorkshire Police [2003] IRLR 102. The bands have been increased pursuant to Presidential Guidance, so that, in respect of claims presented on or after 11 September 2017, taking into account *Simmons v Castle* and *De Souza v Vinci Construction UK Ltd*, the *Vento* bands are now as follows: a lower band of £800 to £8,400 for less serious cases; a middle band of £8,400 to £25,200 for cases that do not merit an award in the upper band; and an upper band of £25,200 to £42,000 for the most serious cases; with the most exceptional cases capable of exceeding £42,000.

9 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, sex or other protected characteristic. The middle band should be used for serious cases which do not merit an award in the highest band and the lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated, or one off, occurrence.

10 In *Kemeh v Ministry of Defence* [2014] IRLR 377 EWCA Civ. 91 the Court of Appeal reduced an Employment Tribunal's award of injury to feelings in respect of a one-off racial slur. The Employment Tribunal had seen the case as one falling within the middle band of *Vento,* but the Court of Appeal disagreed and reduced the award to £5,000. Without wishing to minimise the offence, the Court of Appeal felt that a one-off slur such as this, with no lasting employment consequences, would normally only qualify for the lower *Vento* band.

11 The Court of Appeal said that it was important that awards should not be too low, thereby trivialising harm, but that it was also equally important that they should not be too high, since that would risk creating the impression that victims of discrimination are over compensated and are given unfairly generous treatment when compared with victims of personal injury. In *Kemeh,* the racial slur in question was, "Shut up you dumb black bastard". The Court of Appeal considered that such a one-off racial slur, with no lasting employment consequences, should be compensated in the region of £5,000.

Discussion and Decision

12 The Claimant was off work sick with stress from 13 October 2017 to 5 November 2017, but he then returned to work and has since worked successfully. He has told me that the team leader in question has not worked for the Respondent since Christmas 2017, although the Claimant has not been told the reason why the team leader has left the Respondent's workplace.

13 Taking into account the relevant facts and the relevant law, I considered that this was, as the Claimant described in his ET1 claim form, a case of a one-off comment. According to *Kemeh*, it would normally fall to be compensated in the lower band of *Vento*. I noted that, in *Kemeh,* the Court of Appeal awarded £5,000 for a racially abusive comment which contained swear words and related specifically to race and skin colour. In present case, the comment that the Claimant was the team leader's slave contained neither swear words, nor an insulting reference to his skin colour. I considered that the words, in themselves, were significantly less offensive than those which were considered in *Kemeh*.

14 The Claimant considers that the Respondent has not offered any substantive redress. It appears that the Respondent did uphold the grievance orally, at a hearing, but told the Claimant that the action to be taken against the team leader was confidential. I accepted that the Claimant was off work for three weeks, but I noted that he has returned to work successfully since then for the same employer.

15 I considered that the Claimant was off work for a short period of time, similar to the period which a victim of a minor road traffic accident, with no lasting sequelae, might take off work.

16 The Claimant has not produced any medical evidence to show any lasting sequelae after his time off work.

17 *Kemeh* was decided in 2014 and, since then, the Vento bands have been increased, both as a result of *Simmons v Castle* and as a result of *De Souza*. In 2014, I would have considered that the appropriate compensation for this one-off insult, with no swear words and no direct reference to race or colour, and no lasting employment consequences, would have been appropriately compensated in the region of £2,500. Taking into account the appropriate uplifts and the fact that the lower Vento band has now increased to £800 - £8,400, I consider that the appropriate award now is £3,000.

18 I award interest at 8% since 13 September 2017. Interest is to be calculated over 266 days. The calculation is 8% x £3,000 x 266 ÷ 365 = £174.90.

19 I also award the Claimant's loss of earnings in the sum of £1,108.71. The date of the relevant payslip is 10 November 2017. 210 days have passed since then. Economic loss interest is awarded from the mid-point of the date of the loss to the date of the hearing; the mid point of 210 days is 105 days. The calculation is £1,108.71 x 105 ÷ 365 x 8% = £25.52. So the total economic loss is £1,134.22.

20 I do not apply any uplift for a failure to comply with the ACAS Code of Practice. I find, on the Claimant's evidence, that the Respondent did conduct a grievance hearing and did uphold the grievance, although the Claimant was not satisfied by the fact that no redress was offered to him and he was not told what consequence the line manager would suffer. It appears that the Claimant wanted the line manager to be dismissed, but whether that would have been a reasonable outcome for a one-off insult with no direct race connotations must be in some considerable doubt. I find, therefore, there was no breach of the ACAS Code and I do not make any recommendation that the Respondent makes any further redress, other than the compensation which I have ordered.

21 The Claimant makes an application for the preparation time costs that he has incurred in this case. I consider that the Respondent has acted unreasonably in the way that the proceedings have been conducted, in that the Respondent has not put in a response to the claim, despite having required the Claimant to attend hearings about its response and despite having been given an extended opportunity to put in a response. It has neither defended the claims, nor has it resolved the claim without requiring the Claimant to come to this final remedy hearing. I consider that the Claimant is right in saying that the Respondent has been unreasonable throughout its conduct of this litigation. I conclude that it is appropriate to make a preparation time

costs order.

22 The Claimant has claimed for 35 hours preparation. I think that that is excessive. I do accept that he has spent time preparing witness statements, communicating with the Tribunal and getting his documents together, but I assess that 20 hours is the appropriate preparation time to allow for that work.

23 Therefore I award 20 hours at £38, the appropriate hourly rate for preparation time. I award the Claimant £760 preparation time costs. The Respondent shall pay this in addition to the other sums I have ordered.

Employment Judge Brown

19 June 2018