Case No: 3302040/2014

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Mohamud	**v**	**JJ Food Service Limited**

Heard at: Watford **On:** 13 November 2017

Before: Employment Judge Bedeau
Mr P Jackson
Ms S Johnstone

Appearances:

For the Claimant: In person
For the Respondent: Mr B Watson, Employment Consultant

RESERVED JUDGMENT ON REMEDY

1. The respondent is ordered to pay the claimant, in accordance with the compensation schedule herein, the sum of £35,717.70 for having been victimised.

2. The claimant is entitled to a preparation time order and the respondent is ordered to pay his costs in the sum of £330.

REASONS

1. This case was listed for a remedy hearing on 7 August 2017 but had to be postponed following a successful application by the respondent.

The evidence

2. The tribunal heard evidence from the claimant. The respondent did not call any witnesses. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 146 pages. At the hearing on 7 August 2017, further documents were adduced by the claimant in a small bundle numbering 147 to 159. He amended the information he had previously given in respect of the state benefits he received and also amended his schedule of loss claiming, in total, £268,366.40 (pages 33, 42-43 in the remedy hearing bundle).

3. Although the case was adjourned to enable the respondent to obtain a psychiatric report, none was before the tribunal.

Findings of fact

4. The claimant was born on 27 August 1966 and is 51 years of age.

5. In 2008 he was employed by Snowick Ltd, as a book-keeper and, after 8 months, his employment was terminated. Following his termination, in 2008 he was diagnosed as suffering from stress and depression. He later obtained employment as a finance officer with Collingham Tutors Ltd from 2009 to 2010. From March 2011 to February 2012, he worked for Strand Palace Hotel as a credit controller. Thereafter, he obtained employment on a part-time basis with a company called A2Z Solutions where he worked for nine months from March to November 2012. This was followed by his employment with the respondent from December 2012 to his termination on 13 August 2014.

6. Prior to the claimant's disciplinary hearing, at his return to work meeting on 30 July 2014, he answered the following question on the Return to Work form: "Was the absence a result of an injury at work or work-related illness?" to which he replied: "Yes". This means that he cannot rely on any pre-dismissal treatment in support of either his personal injury or injured feelings claims. (82 of the liability bundle)

7. After his dismissal he visited his doctor in September 2014 and was issued with a fit note dated 2 September 2014, diagnosing "anxiety with depression". He told us he was prescribed Amitriptyline 10mg per day. In October 2014 the dose was increased to 25mg to be taken twice at night.

8. From the fit notes supplies the diagnosis changed to "stress and anxiety", "work stress", "poor sleep pattern", "anxiety state", and by 7 April 2015, to "depression". He said that in January 2015 he felt suicidal and contacted his doctor who asked him to complete a PHQ-9 and GAD-7, depression and anxiety questionnaires on 3 February and 13 March 2015 respectively. From what he stated on the forms, he told us that his general practitioner was of the view that he was suffering from severe depression but there is the absence of any medical evidence in support of this opinion. He was not referred to a consultant psychiatrist for examination and treatment nor to a community psychiatric nurse. (Remedy bundle 21-22)

9. He was prescribed Citalopram 10mg a day which was later increased to 20mg in March 2015. (Remedy bundle 19)

10. His general practitioner, Dr A K Shah, wrote on 19 March 2015, the following:-

> "We undertook a formal depression and anxiety questionnaires. He scored high on both of these questionnaires. His diagnosis was changed to a diagnosis of depression in February this year and he was started on antidepressant drug Citalopram in the dose of 10mg daily. He was reassessed on the 17 March when he reported some benefit from his antidepressant medication. His depression and anxiety scores (PHQ-9 and GAD-7) also showed some improvement. His

> antidepressant medication dose has been increased to 20mg daily and he will be reviewed again in due course. It is likely that he will remain on this medication for the next 6-8 months and this will require regular follow up.
>
> He does have a history of episode of anxiety and depression in 2008 but has experienced no mental health issues during the intervening period. It is highly likely that his recent employment issues have provoked a trigger for the relapse of his symptoms of anxiety and depression. On talking to him, it does come across that he is deeply upset and aggrieved by what he perceives as very unfair treatment from his employers." (RB 23)

11. The above is the most recent medical report produced by the claimant. His doctor is not a psychiatrist and does not explain in medical terms what were and how the "recent employment issues" were highly likely to have provoked a trigger for the relapse of the claimant's anxiety and depression. By the date of the report the claimant had been dismissed for seven months and his medical diagnosis changed over time.

12. In July 2015, he was referred to a consultant in relation to his haemorrhoids. In January 2016, he had a recurrence of plies and haemorrhoids and was prescribed Lidocaine ointment which did not resolve his problems. He saw a consultant on 11 March 2016, who diagnosed anal fissure and advised that he should take Rectogesic ointment. On 29 July 2016, he had surgery to resolve the pain when passing stool. He said that it took three months to recover. Although he said that his anal fissure and haemorrhoids were caused by stress occasioned by victimisation by the respondent, there was no medical evidence in support of that assertion.

13. He told the tribunal and we do accept his evidence, that with the medication he was taking, by May 2015 he felt much better in himself and it stopped altogether in January 2016. He got married in November 2015. His wife works as a part-time carer.

14. He started looking for work in June/July 2015 and was able to secure employment in January 2016 covering for someone who was on maternity leave. He worked as a bookkeeper but that employment ended in February 2017. His current employment commenced in March 2017 as a financial analyst on a salary of £26,000 gross per annum. He is on contract for one year and had been told that at the expiry of the year, his position would be reviewed. There is the possibility that his employment may be made permanent subject to him achieving good performance record.

15. His pre-dismissal salary with the respondent was £21,000 gross per annum. He was in a pension scheme in which the respondent contributed 2% of his gross weekly salary of £403.85.

16. He has been ACCA qualified in England since 2003.

17. He said that during the disciplinary process Mr Larkin did not provide him with copies of witness statements and he did not receive Ms Agnieszka Binek's, human resources coordinator, third witness statement and her minutes of the meeting on 23 July 2014. He could have called Ms Binek but did not. Although he alleged that in so doing he was denied the opportunity

of calling relevant witnesses, in cross-examination he said that he did not have any witnesses he wanted to call. He said that the respondent should have adjourned the grievance meeting but instead conducted a further investigation after it.

18. He was on Employment Seekers' Allowance from 5 September 2014 to 11 June 2015 of £2,860.53. Thereafter, he received Jobseekers' Allowance from 14 July 2015 to 12 January 2016 of £2,118.72.

Submissions

19. We have taken into account the submissions by the claimant and by Mr Watson, on behalf of the respondent. We do not repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. In addition, we have taken the claimant's amended compensation schedule.

The law

20. In relation to injury to feelings, section 119(4) Equality Act 2010, states, "An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis.)"

21. We have taken into account the general principles in the award for injury to feelings as set out in the race discrimination case of Prison Service and Others v Johnson [1997] ICR 275, a judgment of the EAT and the three bands of injury to feelings award in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, a judgment of the Court of Appeal updated to take into account the effects of inflation since 2003 in the case of Da'Bell v NSPCC [2020] IRLR 19. The EAT held in that case that the lower band should be £600-£6,000; the middle band, £6,000-£18,000; and the top band, £18,000-£30,000, applying a 20% increase to each of the Vento bands.

22. Following the cases of Simons v Castle [2013] I All ER 334 and Beckford v London Borough of Southwark [2016] IRLR 178, the 10% uplift applies to injury to feelings awards.

23. The Employment Appeal Tribunal has subsequently stated that the bands and awards for injury to feelings can be adjusted by individual Employment Tribunals where there is cogent evidence of the rate of change in the value of money: AA Solicitors Ltd v Majid (2016) UKEAT/0217/15. See also Bullimore v Pothecary Witham Weld (2010) UKEAT/0189/10, [2011] IRLR 18 at para 31.

24. In De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 the Court of Appeal also ruled that the 10% uplift provided for in Simmons v Castle should apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales.

25. Following the De Souza case the Presidents of England and Wales and Scotland issued a joint Presidential Guidance on the award of injury to feelings on 4 September 2017. The salient part states as follows:-

> "In respect of claims presented on or after 11 September 2017, and taking account of Simmons v Castle and De Souza v Vinci Construction (UK) Ltd, the Vento bands shall be as follows: a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do 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."

26. The Guidance does not apply in this case as the claim was presented before 11 September 2017.

27. In relation to the award of aggravated damages, we have also considered the cases of Alexander v Home Office [1988] ICR 685, a judgment of the Court of Appeal in which it was held that such damages can be awarded in a discrimination case where the respondent has behaved in a "high-handed, malicious, insulting or oppressive manner in committing the act of discrimination" and in Commissioner of Police v Shaw [2012] ICR 464, a judgment of the Employment Appeal Tribunal, Mr Justice Underhill, President, held that a tribunal can increase an injury to feelings award to reflect certain aggravating features or award aggravated damages where the manner in which the wrong was committed was particularly upsetting; where there was a discriminatory motive; or where the subsequent conduct adds to the injury.

28. As regards exemplary damages, in the case of Rookes v Barnard [1964] AC 1129, the House of Lords held that such damages can awarded where the conduct by Government servants is oppressive, arbitrary or unconstitutional; or the conduct of the respondent is designed to be self-profiting, for example, not taking disciplinary action against alleged discriminator because he or she is a valuable employee; or where such damages are specifically authorised by statute.

29. An employment tribunal has jurisdiction to award compensation for personal injury caused by the unlawful discriminatory act, Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170, a judgment of the Court of Appeal. The Court held that a claimant can claim for personal injury arising from the statutory tort of discrimination. The test is not reasonable foreseeability but causation, that is, did either the physical, psychological or psychiatric injury arose naturally and directly from the discriminatory act?

30. The tribunal must be careful not to award double recovery as injury to feelings and personal injury awards are distinct, HM Prison Service v Salmon [2001] IRLR 425, a judgment of the EAT.

31. In the case of Holmes v Qinetiq Ltd [2016] IRLR 664, EAT held that the ACAS Code in relation to the application of the uplift, only applies to dismissals involving some form of "culpable conduct."

32. Paragraph 9 of the ACAS Code of Practice – Disciplinary and Grievance Procedures state the following:

> "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible

> consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

Conclusion

33. We will limit his financial losses up to 11 January 2016 as the claimant has been in regular employment since that date. The respondent has accepted that he is entitled to be compensated for loss of earnings from 13 August 2014 to 11 January 2016, a period of 74 weeks at £334.65 net per week. This gives a figure of £24,764.10 net.

34. He is entitled to the respondent's contributions towards his pension which was 2% of his gross weekly salary of £403.85 or £8.08 per week. Over 74 weeks he has lost £597.92 by way of the respondent's contributions.

35. He is not entitled to loss of statutory employment rights as he did not have two years' minimum qualifying period of service and could not bring an unfair dismissal claim.

36. His entitlement to one week's pay is subsumed in his loss of earnings calculation from the date of his dismissal on 13 August 2014.

37. As regards injury to feelings, we accept that he suffered following the termination of his employment. He had problems sleeping. The dismissal affected him as can be seen from the fit notes. He mainly suffered from stress and anxiety. He, however, told us that from May 2015, because of the increased dosage in his medication, he began to feel much better in himself. By July 2015 he felt confident enough to apply for employment elsewhere. In January 2016, he was no longer on prescribed medication and from that point onwards he felt better in himself. He is content in his current employment and is hopeful that he will be given a permanent position. He has been married for the last two years.

38. We find that his hurt and upset was from August 2014 to January 2016, a period of one and a half years. We have taken this into account and have conclude that he should be awarded the sum of £8,000 in respect of his injured feelings.

39. In relation to aggravated damages, he submitted that the respondent was malicious and wanted to dismiss him notwithstanding the fact that after the second meeting he turned up for work not wearing jeans yet he became the subject of disciplinary proceedings. He accused the respondent of being vindictive and spiteful because he raised the issue of discrimination in his email of 21 July 2014 and at the meetings on 18 and 21 July 2014. He further submitted that Mr Larking admitted in cross-examination that the reason he dismissed his appeal was because of his persistent challenges to the smart/casual dress code policy. He was sent home on 18 and 21 July 2014 and felt humiliated and insulted. Having regard to these facts the respondent's finance managers, he submitted, acted in a high-handed, malicious and insulting way.

40. We did not conclude that the dress code was indirectly discriminatory because of sex. The respondent was entitled to enforce its dress code policy and did do so. Our judgment in the claimant's favour was in relation to victimisation. As the dress code was not discriminatory because of sex we do not conclude that the respondent acted in a high-handed, malicious or insulting manner towards the claimant nor do we find that the respondent's conduct comes within one of the categories set out in the Commissioner of Police v Shaw case.

41. In respect of exemplary damages, following the case of Rookes v Barnard, the respondent was entitled to argue that the claimant was persistent in not complying with its dress code. There was no evidence that it respondent failed to discipline the managers because it was profitable to keep them.

42. The claimant further submitted that the respondent failed to comply with the tribunal's orders issued on 3 August 2015 in respect of the serving of witness statements for the remedy hearing. The respondent, however, did not call any witnesses and this was a decision it was entitled to make. Although it did not obtain a psychiatric report as it had sought at the hearing on 27 July2015, it was eventually prepared to accept the existing medical evidence. These matters, in our view, do not bring the claim within the parameters of Rookes v Barnard for the award of exemplary damages nor for aggravated damages as set out in Shaw

43. We have, therefore, come to the conclusion that the claimant is not entitled to aggravated and exemplary damages.

44. As regards personal injury, the claimant asserted that haemorrhoids and anal fissures were caused by stress. There is no medical evidence in support of that statement. Further, he stated that he had suicidal thoughts in or around January 2015 but that is not referred to in Dr AK Shah's letter dated 19 March 2015. No reference is made to his alleged severe depression diagnosis and was not referred for specialist psychiatric treatment. We are satisfied based on the documentary evidence that the claimant did not establish that there is a causal connection between his dismissal and what he claimed were his severe depression, suicidal thoughts, anal fissure and/or haemorrhoids. He has not established and entitlement to an award for personal injury.

45. He is, however, entitled to interest at 8% at the midway point in respect of his financial losses.

46. In relation to his injury to feelings award, he is entitled to interest at 8% from the date the decision was taken to terminate his employment up to the remedy hearing. The dismissal letter was dated 13 August 2014 which, in the ordinary course of first class post, he would have received on 14 August 2014.

47. In relation to his costs, following the respondent's successful application on 7 August 2017, he told us that he spent between 12-14 hours preparing for that hearing. In the circumstances we will award him 10 hours preparation time for the aborted hearing on 7 August 2017 at the rate of £33 per hour, a total of £330.

48. With regard to the alleged breach of the ACAS Code, the issue of concern is whether or not the claimant is entitled to have sight of the statements obtained after the disciplinary hearing. More specifically, he asserted that the respondent breached the ACAS Code, in that he was not provided with the witness statements of Ms Binek and minutes written by her on 23 July 2014 with the disciplinary hearing letter. Secondly, he was denied the opportunity to call relevant witnesses and to raise points about any information provided by them. Thirdly, by not adjourning the grievance meeting for further investigation.

49. In relation to the grievance meeting, this did not form part of the tribunal's victimisation judgment. There was no requirement at the time to provide the witness statement of Ms Binek. Paragraph 9 of the ACAS Code states that, "It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification." It does not state that witness statements "shall" be provided. Our judgment was not in relation to a conduct dismissal but whether the claimant made a protected act and was dismissed as a result. Applying Holmes v Qinetiq Ltd, the ACAS provisions do not apply in this case, therefore, the claimant is not entitled to an uplift.

50. The claimant is awarded compensation as set out in the schedule below:

COMPENSATION SCHEDULE

1. Pecuniary Loss

1.1 Part loss of earnings

13/08/14 to 11/1/16 74 weeks @ £334.65 net per week	£24,764.10	
1.2 Part loss of pension contributions		
13/08/14 to 11/01/16 74 weeks @ £8.08 per week	£ 597.92	
	£25,362.02	
1.3 Interest		
8% from the mid-point – 37 weeks £39.02 per week x 37 weeks	£ 1,443.74	
Total pecuniary loss		**£26,805.76**

2. Non-pecuniary loss

2.1	Injury to feelings	£ 8,000.00	
2.2	Interest		
	8% x £8,000	£ 640.00	
	£12.31 per week 74 weeks x £12.31	£ 910.94	
	Total non-pecuniary loss		**£ 8,910.94**
	Grand Total Award		**£35,716.70**

Employment Judge Bedeau
18 February 2018
Date: ……

Judgment sent to the parties on
21 February 2018
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For the Tribunal office