Case Number: 3401473/2016
3325075/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr D MacQueen	**v**	(1) Aromatic Flavours & Fragrances Europe Limited; (2) Herbs & Spices Natural Europe Limited; (3) Miss C Fanous

Heard at: Bury St Edmunds **On:** 22 August 2018
Discussion day: 28 August 2018

Before: Employment Judge GP Sigsworth

Members: Mrs L Daniels and Mrs L Gaywood

Appearances
For the Claimant: Mr G Powell, of Counsel
For the Respondent: Mr E Hatfield, Solicitor

RESERVED REMEDY JUDGMENT

1. The unanimous decision / judgment of the Tribunal in this case is set out in the conclusions below.

RESERVED REMEDY REASONS

1. At this remedy hearing, the Tribunal heard oral evidence (based on the Claimant's original witness statement and a second witness statement) from the Claimant, on which he was cross examined by the Respondents' solicitor. No further oral evidence was called by either side. There was an agreed small bundle of relevant and other documents. In addition, the Claimant provided the Tribunal with a large bundle containing job applications that he had made since his dismissal by the Respondents. At

the remedy hearing, the Claimant's counsel provided a written skeleton argument, and both representatives made oral submissions. However, an up to date schedule of loss and counter schedule of loss were not provided to the Tribunal by the parties. There was little or no indication from them of agreed arithmetic as to gross and net earnings, and no joint agenda on how the Tribunal should approach any question of the exact calculation of loss and the grossing up issue. In the circumstances, and with the agreement of the parties, the Tribunal decided that they would decide on principles under the different heads of claim, and leave the parties to agree the figures on the basis of these findings and conclusions. Further to assist the Tribunal, after the hearing and before or on the Tribunal's discussion date, the representatives were asked to and did provide the Tribunal with a detailed schedule of loss and a counter schedule of loss, which documents also contained further argument and submission.

2. Essentially, the Claimant claims by way of compensation:

2.1 Loss of earnings to date of this hearing and into the future by up to five years (at least) – but taking into account the Tribunal's conclusion in the liability decision that there was a 50% chance of a non-discriminatory dismissal or resignation within one year of the effective date of termination of employment.

2.2 Stigma damages, on the basis that the Claimant remains likely to be unable to obtain a job for the foreseeable future as a result the stigma of bringing these proceedings – see Chagger v Abbey National Plc and Small v Shrewsbury and Telford NHS Trust. This, the Claimant argues, should be calculated as an annual loss or by way of a one-off lump sum payment akin to a Smith v Manchester award in a personal injury case.

2.3 An injury to feelings award in the upper band - £35,000 is claimed.

2.4 Aggravated damages, in accordance with the case of Commissioner of Police for the Metropolis v Shaw. £10,000 is claimed.

2.5 An uplift for breach of the ACAS Code - some 20%–25% is claimed. It is common ground that the ACAS uplift applies to all aspects of the award, for the Respondents' failure to comply with the Code of Practice relating to capability dismissals.

The Claimant also claims costs. However, that is not a matter that was listed or can be determined at this remedy hearing. If the Claimant's application for costs is pursued, it must be made in writing with an opportunity allowed to the Respondent to respond to it. As necessary, a further hearing will be listed to determine such costs application.

Findings of Fact

3. Since his dismissal, the Claimant has attempted to find alternative employment in a number of different areas, although he asserts that they were all jobs for which he was qualified. Other than obtaining a freelance tutor position in July 2018, teaching autistic children, which has provided him with a very limited income, he has not been able to obtain any other employment since September 2016. He has made over 400 job applications for roles within counselling and psychotherapy, executive management and hospitality management. He has used the internet to search and apply for jobs and contacted recruiters and head hunters. He has registered with at least a dozen employment / recruitment agencies. To improve his chances of employment, he has undertaken additional studies and training in company law and project management, and he is currently enrolled on an HR and payroll management course and an employment law course. He was informed by a recruitment consultant who he went to see in London in October 2017, that she would have very significant difficulty in placing him because of this litigation. She told the Claimant that employees who took legal action against their employers were seen as problematic and that employers were uncomfortable and reluctant to take them on. Another recruitment specialist known to the Claimant told him that the litigation and the judgment would significantly reduce his chances of employment. Then, speaking to recruitment consultants over the last couple of years or so, and having to explain to them the circumstances surrounding the termination of his employment with the Respondents, has meant that the Claimant has not been subsequently contacted by those recruiters in relation to job opportunities. The Claimant is concerned that the Employment Tribunal judgment is online and could be accessed as a public document by any potential employer or recruiter. He cited to us his experience with St. John's Seminary, where he had worked previously. He has not been offered further work by the Seminary and does not think it likely that he will receive any work in the future. The Claimant also believes that his career prospects in psychotherapy and as a psychologist have been severely damaged by the complaints made by the Respondents to the professional bodies with which he is accredited and registered, in particular the UKCP – whether these complaints are justified or not. Since being dismissed by the Respondents, he has only had three telephone interviews. One for an operations manager role in June 2018, one for a lead facilitator role in December 2017, and one for a chief operating officer role in April 2017. He was not offered a job as a result of those interviews. He has had two face to face interviews, one for a theatre operations manager role in March 2018 which he did not get, and one for the freelance tutor position referred to teaching autistic children, in July 2018, where he will be working as a freelance tutor from September / October 2018 during term time, at £35 an hour. Although the Claimant is not prevented from working as a psychotherapist while the Respondents' complaint to the UKCP is being determined, it is difficult for him to have supervision from a clinical supervisor while that complaint is hanging over him – possibly because the

supervisor does not believe he can continue to practice until the complaint is determined. The UKCP has indicated to the Respondents that the Claimant is not prevented from continuing to work while the complaint remains outstanding.

4. We have been through the detail of the Claimant's job applications and the associated correspondence. Although there are applications for senior roles in HR and operations – by mid to late 2017, the Claimant was also applying for lower level jobs. These included office management, business assistant, receptionist, car dealership roles, rater roles, experience and events management roles, front of house and marketing roles, as well as roles associated with mental health counselling and business psychology. In June 2018, there were more lower level applications - in HR, customer services and as an approved mental health practitioner. By 2018, the Claimant applied for a support role, counsellor roles, a welfare management role, two roles of lecturing counselling, and as a specialist mentor. Indeed, between May and August 2018, the Claimant has made more applications in the therapist area. After the conclusion of this remedy hearing, the Respondent produced a list of recently advertised psychotherapist roles, some 15 in all, all over the country and dated August 2018, in psychotherapy and psychology. The Claimant was not cross examined on these, and we do not know whether they would have been suitable for him. He told us that he was willing to work abroad, for example in the charity sector. For his part, after the hearing, the Claimant provided us with his CV and his qualification and training record, but he also could not be cross examined on it by the Respondents' solicitor. Prior to his training as a psychologist / psychotherapist, the Claimant spent six years as a front of house and marketing manager in the theatre world, between May 1994 and September 2000 when he was aged 18 – 24 years old.

5. The Claimant stresses in his witness statement the degree of worry and distress he has had to endure as a result of his traumatic employment and termination thereof with the Respondents. He believes that the staff, many of whom he had previously good relationships with, came together as a gang and decided to speak negatively and misleadingly about him, although this is not what we found about their evidence – see our liability decision. The Claimant emphasises his view that he was a valued and well-liked member of staff and played a significant role in stabilising the Respondents' family business. Again, this is not necessarily what we found in our liability decision. We do not accept, either, other aspects of the Claimant's witness evidence to us. He repeats the allegation that the offer to drop the complaint against him to his professional body in return for his dropping the Tribunal proceedings offended against public policy and morality and was illegal. We found otherwise. It was these factors that the Claimant additionally relies upon as supporting his claim for injury to feelings and aggravated damages. As a result of the discriminatory dismissal, the Claimant has suffered exhaustion, disturbed sleep and loss of appetite. He has not, however, provided us with any medical evidence in support of these symptoms. He has earned a total of £11,133 in the last

22 months since his dismissal from his psychology work. However, that work would have continued in any event, as he was working as a psychologist with the permission of the Respondents when he was employed by them. We find that discovering that those senior managers with whom he was friendly on a personal level, such as Mr Guyard and Mr Nassif, went behind his back and complained about him to be particularly hurtful for him.

6. Other findings of fact that may be relevant to the remedy issues can be found in our liability decision. We do not repeat them here.

The Law

7. There is little dispute between the parties about the law to be applied in this case. As we found in our liability decision, the Respondents treated the Claimant less favourably under section 26(3)(c) of the Equality Act 2010 by dismissing him – because he had refused Miss Fanous's *'offer of marriage'*. This harassment is made unlawful in the context of employment by section 40(1)(a).

By sections 120(1) and 124(1)&(2), where a Tribunal has found a contravention of section 40, we may (among other things) order the Respondents to pay compensation to the Claimant.

Section 124(6) provides that the amount of compensation which may be awarded corresponds to the amount which can be awarded by the county court.

Section 119(4) provides that an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

If the Tribunal decides to award compensation, then it must be calculated in the same way as damages in tort. The aim, as the EAT put it in the Ministry of Defence v Cannock & Others [1994] ICR 918, is that *"as best as money can do it, the applicant must be put into the position she (or he) would have been in but for the unlawful conduct."*

The calculation of loss under the law of tort is limited by the principle of foreseeability. Loss is foreseeable – and therefore recoverable – only if a reasonable person would have foreseen that loss of the type in question would have resulted from the wrongful act. However, in discrimination cases this rule does not apply in the same way as it does to claims in tort. In Essa v Laing Ltd. [2004] ICR 746, a majority Court of Appeal confirmed that compensation for an act of direct discrimination (here, contrary to the Race Relations Act) should cover all harm caused directly by the act of discrimination, whether or not it was reasonably foreseeable.

8. The Claimant claims stigma loss. In Abbey National Plc & another v Chagger [2010] ICR 397, CA, it was held that an employer who discriminated against an employee by dismissing him or her could be liable for the consequences of the stigma that is likely to be attached to the employee as a result of taking legal action for unlawful discrimination. The fact that the immediate cause of the employee's loss was the action of a third party did not relieve the original employer of liability for that loss. It could be difficult for a claimant to prove victimisation or discrimination and so he or she should not be criticised for being reluctant to expend time, money and stress on a further claim. It was doubtful that Parliament, in passing the victimisation provisions, intended to curtail the protection a victim of discrimination would have against his or her employer. It was also relevant that a third party employer could lawfully refuse to recruit an employee who had brought unfair dismissal proceedings against his or her former employer. The calculation of the loss would be a factor for the tribunal to consider in determining the future period during which the claimant suffers loss of earnings, rather than a separate head of loss. A mere assertion to the effect that the claimant will suffer stigma loss is normally insufficient. However, where there is extensive evidence of a claimant's unsuccessful attempts to find new employment, the tribunal would be entitled to conclude that, for whatever reason, the claimant is unlikely to find further employment in his or her chosen industry.

   The Court of Appeal in Small v Shrewsbury and Telford NHS Trust [2017] IRLR 889, held that, in the circumstances of that case, the tribunal should also have considered whether the claimant had a Chagger claim to effective loss after the date on which the tribunal concluded his engagement the Trust would have ended.

9. In Armitage, Marsden & HM Prison Service v Johnson [1997] IRLR 162, EAT, the EAT summarised the relevant principles for assessing awards for injury to feelings for unlawful discrimination, as follows:-

   9.1 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 about the tortfeasor's conduct should not be allowed to inflate the award.

   9.2 Awards should not be too low as that would diminish respect for the policy of the anti-discrimination legislation. On the other hand, awards should be restrained as excessive awards could be seen as the way to untaxed riches.

   9.3 Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to a whole range of such awards, rather than to any particular type of award.

9.4 In exercising their discretion in assessing a sum, the tribunal should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

9.5 The tribunal should bear in mind the need for public respect for the level of awards made.

We are, of course, aware of the well-known bands first set out in the case of Vento v West Yorkshire Police (2) [2003] IRLR 102, CA. These have been updated from time to time, most recently by the recent Presidential guidelines. Mid-band Vento is now £8,600 - £25,700. The top band goes up to £42,000.

10. The Claimant claims aggravated damages. The principles relating to such are set out in the case of Commissioner of Police of the Metropolis v Shaw [2012] ICR 464, EAT. Aggravated damages are not a different creature from injury to feelings compensation. Rather, they refer to the aggravation of the injury in feelings caused by the wrongful act as a result of some additional element. There are three categories identified by the Law Commission. First, the manner in which the wrong was committed – the phrase *"high handed, malicious, insulting or oppressive"* is often referred to. Second, motive, and whether this was based on prejudice or animosity or which is spiteful or vindictive or intended to wound, as this is obviously likely to cause more distress than the same acts would cause if they had been done without such a motive. Third, subsequent conduct, including the conduct of the proceedings, such as where the respondent conducts the case at the hearing in an unnecessarily offensive manner.

11. The uplift for breach of the ACAS Code.
Section 207A of Trade Union and Labour Relations (Consolidation) Act 1992 provides that where there is a failure to comply with the relevant Code of Practice – here the Code on Disciplinary and Grievance Procedures 2015 – then in a case for unfair dismissal or discrimination, if the employer fails to comply with the Code in relation to a matter to which the Code applies and that failure was unreasonable, then the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

The ACAS Code of Practice on Disciplinary and Grievance Procedures applies to culpable disciplinary and performance matters and dismissals – see Holmes v Qintiqi Ltd. [2016] ICR 1016, EAT. It is not open to the tribunal to deny an employee such an uplift on the basis that he or she contributed to his dismissal – see Lund v St Edmunds School Canterbury [2013] ICR digest, EAT.

The Respondent accepts that the ACAS uplift applies in this case. However, it is pointed out that there is clear guidance that in high value cases, which this has the potential to be, the tribunal can and should limit

the uplift, awarding a percentage significantly below the maximum 25%. In such a case – Michalak v Mid Yorkshire Hospitals NHS Trust EAT 2008 - the uplift was limited to 15%. In Credit Agricle Corporate and Investment Bank v Wardle (No 2) [2011] IRLR 819, CA, it was held that the size of the award is a relevant factor for a tribunal to have regard to when considering whether to increase compensation, and even when an employer fails to comply with the procedure altogether this would not justify increase to the maximum level.

Conclusions

12. Having regard to our relevant findings of fact, applying the appropriate law, and taking into account the submissions of the parties' representatives, we have reached the following unanimous conclusions:

    12.1 The Claimant has not failed to mitigate his loss. He has registered with a dozen or more employment / recruitment agencies, and applied for in excess of 400 jobs. These were applications for suitable roles in counselling and psychotherapy, executive management and hospitality management. He has undertaken further study and training. However, he has only obtained one freelance position. He has had a handful of interviews only, none of which led onto successful recruitment except in that one instance. Further, on the basis of the evidence that we have heard and read, we conclude that the Claimant has established a stigma loss, pursuant to the cases of Chagger and Small. A recruitment agency would be obliged to tell the employer client that the Claimant had brought a tribunal claim, which would mean that he would not be likely to be put on a short list for interview. We accept the Claimant's evidence that no such agency is going to put this sort of evidence in writing. Further, it is difficult to understand why the Claimant has not been able to find a job, or even reach the interview stage on most occasions, given his experience and qualifications, unless there is a bias against him on the part of recruiters and potential employers because of these tribunal proceedings. The Claimant has provided extensive evidence of his efforts to find employment, and we are entitled to conclude that because of his Tribunal proceedings he is going to find it very difficult to find a job (per Chagger). On the other hand, there is, of course, also stigma associated with a fair dismissal for performance reasons (see below), in that employers would be put off a candidate for a job because of their capability failings. This would potentially limit any award under this head.

    12.2 Further, and importantly, we have revisited and completed our conclusions on the Polkey issue – see our liability decision. In that decision, we found that there was a 50% chance of a fair dismissal / resignation within one year of the actual effective date of termination of employment. We now go further, and our conclusion

is that the chance of the Claimant being fairly dismissed within two years of the EDT for performance / capability reasons was 100%. He would by then have had three and a half years of employment with the Respondents, and so benefit from protection against unfair dismissal under Employment Rights Act 1996. We find that there would therefore have been a formal, or informal, performance improvement plan put in place for him by the Respondents, but that he would not have successfully improved his performance to the requisite standard required. In reaching such a conclusion, we have in mind the evidence of the Respondents' staff which we heard at the last hearing, which would undoubtedly have been taken into account against him. The job description as COO was set out at paragraph 3.10 of our original 'Findings of Fact'. In the context of his relationship with Miss Fanous, rejecting her advances, he would have found it difficult to continue to offer her advice and support. Further, he was not capable of fulfilling the requirements to develop organisational efficiency and effectiveness, and to help improve the business's profitability. The performance procedure would have begun on Miss Fanous's return to work from her sickness absence, in September 2015. For someone at the Claimant's level, chief operating officer, it would have taken six months at least and probably longer to work through that improvement plan. The Claimant may have made some progress, but we conclude not sufficient, especially since the employment of a strong team of managers at the level below him meant that the Respondents had no real need of his (limited) contribution to the business, particularly as he was so expensive to employ.

12.3 So far as the Vento award is concerned, then we have in mind the Claimant's evidence on this, but we have had to separate out the evidence of injury to feelings he felt as a result of the complaint to the UKCP, which has no bearing on any award we make for injury to feelings. That is because, of course, such complaint may be perfectly legitimate and non-discriminatory. As we have said before, only the UKCP can determine that. Nevertheless, the Claimant must have felt shocked and upset by what he regarded as the back stabbing of Mr Guyard and Mr Nassif, who on a personal level treated him as one of them, but clearly had doubts which they voiced to the Fanous family about his competence to do his job. It is clearly a case that is not in the top band. This was undoubtedly a difficult and embarrassing situation for the Claimant, and possibly also for Miss Fanous. It was not a case, however, of blatant or serious sexual harassment, such as with a male manager and a younger more junior female colleague. However, Miss Fanous's feelings for the Claimant continued for a considerable period of time which must have put pressure on him. In particular, she refused to take no for an answer, as we concluded, and in June 2016 when he again spurned her advances to him, she later dismissed him. Those feelings of hurt and distress for legitimate discriminatory reasons would have been relatively short lived, because there

would have been a dismissal for non-discriminatory reasons anyway in due course. It is, of course, the dismissal that is the discriminatory act in this case, on the basis of which we award Vento compensation. We conclude that the appropriate level of the Vento award is in the middle of the mid band - £20,000.

12.4 We turn to the question of aggravated damages. We find that the Claimant's dismissal, which is the discrimination complained of, was not an event that was high handed, malicious, insulting or oppressive. It was no doubt instigated to some extent by Mrs Fanous, trying to protect her daughter's best interests, as she saw it. It was a difficult and embarrassing situation for all concerned. We find that there was no intent to be spiteful or vindictive on Miss Fanous's part, and she had a genuine and longstanding emotional attachment to the Claimant. She was also ill, or just recovering from illness, at the date of dismissal and to some extent under the influence of others, we conclude. The conversation in June was a long one, as the Respondent says, and gentle and affectionate. The Claimant would not have been surprised by Miss Fanous's repetition of her continued feelings for him – if he was, it shows lack of judgment for a therapist, we would have thought. The motive for bringing the UKCP complaint is not something we can consider, because it may be perfectly legitimate for all we know, and we therefore say nothing further about it. An apology would simply not work, given our judgment only partially in the Claimant's favour, and a failure by the parties to settle compensation. No other aggravating conduct has been identified by the Claimant, and there was none in the defence of the proceedings. An award of aggravated damages is not appropriate.

12.5 Clearly, the breach of the uplift of the ACAS Code applies here. The Claimant should have been taken through a capability process, even without two years' service, as required by the Code, if this was, as the Respondents assert, a capability dismissal. However, to award 25% would give the Claimant a disproportionately high up lift on what is already a substantial award of compensation – given his high salary and the substantial Vento award. That is a factor that we can and do take into consideration here. We further have regard to the fact that the Respondents have or had a relatively unsophisticated HR department, and of course the Claimant was himself a leading functionary in that department. We think that an up lift of 12.5% is appropriate.

12.6 We thus set out the heads of loss, as follows. The loss of earnings is limited to two years. One year at 100% and one year at 50% of net earnings and other benefits, if there were any. It is not understood that there is any pension loss claim in this case. The Claimant would have received three months pay in lieu of notice whenever he was dismissed, so such does not fall to be deducted

from that two year period. Stigma loss we assess at a lump sum payment representing six months net pay, as the Claimant would have been fairly dismissed anyway, which carries its own stigma - an employee fairly dismissed for performance failings is always going to find it hard to get another job. The Vento award is at £20,000, and the ACAS uplift to be applied to all claims should be 12.5%. There would then be interest to be added at the appropriate statutory rate and from and to the appropriate date of calculation for each head of award – see Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

13. It is now to be hoped that the parties can reach agreement on the figures to be applied to these heads of claim on which we have made our findings and conclusions. If no agreement is possible, then the parties should notify the Tribunal within 28 days of the date of the decision being sent to them, and indicate to the Tribunal their view on the way forward, and whether another hearing is required.

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Employment Judge Sigsworth

Date: …5 October 2018……..

Sent to the parties on: .....

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For the Tribunal Office