



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Mehmood

**Respondent:** Greater Manchester West Mental Health NHS Foundation Trust

**HELD AT:** Manchester

**ON:** 14 September 2017

**BEFORE:** Employment Judge Feeney  
Mrs A L Booth  
Mr W Haydock

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr J Boyd, Counsel

# JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. The claimant is awarded and the respondent ordered to pay the sum of £13,483.
2. The recoupment regulations do not apply as no compensation for loss of salary is awarded.

# REASONS

1. The hearing today was listed to determine the remedy in the claimant's claim. The claimant brought 18 race and religious discrimination claims against the respondent and was successful in one of them relating to the failure of the respondent to deal with his grievance appeal.

## Claimant's Submissions

2. The claimant submitted that has his grievance been considered he would not have been dismissed and the issues with his manager would have been resolved. It would have been clear that Ms Allen and Mr Mottram were maliciously "setting him up for dismissal" and had bullied him, and further that his depression would not have lasted as long as it did. The claimant claimed £55,760.65.

**Tribunal's Comments**

3. The Tribunal advised the claimant that he had set out his Schedule of Loss as if he had brought an unfair dismissal claim, which he had not as he had insufficient service, so he could claim salary loss if causation could be proved, injury to feelings (including personal injury) and aggravated damages. The claimant, however, had provided little information in his witness statement about injury to feelings/personal injury. He did claim an ACAS uplift in his Schedule of Loss.

**Respondent's Submissions**

4. The respondent submitted that the claimant's claim as indicated by the Tribunal concerned only injury to feelings as it had no link with his dismissal and would have made no difference to the outcome of the review of his probationary period. They stated that they felt that the injury to feelings was at the lower end of **Vento** as it related to just one incident.

**Witnesses**

5. The Tribunal heard from the claimant himself and there was an agreed bundle. References were made to the previous decision and to the original bundle.

**Findings of Fact**

6. The claimant sent an email complaint about his line manager Melissa Allen to Mr Mottram, his line manager's manager, on 7 August, and Mr Mottram sought to deal with this by holding an informal meeting with the claimant on 11 September. He felt that they had reached an agreement at the end of this as the matters had been explained of which he had complained.

7. On 12 September the claimant's probationary review was undertaken by his immediate line manager, Melissa Allen, and he was advised that she was concerned about his progress and was referring his case for a decision to be made as to whether his employment should be continued. The main issue was in relation to his work relationships, teamwork and interpersonal skills.

8. The claimant then submitted a further grievance on 18 September mainly concerning Melissa Allen.

9. On 17 October the claimant received an invitation to attend a meeting to determine whether his probationary period had been completed successfully or not for 7 November.

10. On 17 October the claimant had a grievance meeting with Daemon Mottram. It was intended there would be a second meeting but as the claimant was off sick from 20 October Mr Mottram completed this grievance and sent the outcome out to the claimant on 29 October.

11. On 10 November the claimant appealed against the grievance outcome and sent further documentation to Ruth Barker in HR who confirmed it was received on 12 November.

12. On 1 December Mr James Stone who was then dealing with the matter advised the claimant that as his grievance concerned bullying and harassment he could only appeal if “the process of investigation and subsequent action had been unfairly or inadequately conducted. There is no right of appeal against the severity of leniency of any action taken”. Mr Stone said there was little primary or independent evidence to support his allegations that the investigation was unfair or inadequate. The responses from the line manager appeared to be reasonable. He stated he was disputing the outcome of the investigation but was not saying how the process was unfairly or inadequately conducted and he had not provided any evidence as to why he asserted Daemon Mottram may not have been impartial or fair. Therefore he said it was not appropriate to refer this matter further until tangible evidence was provided regarding the process being not fair or inadequately conducted, and he invited the claimant to provide any information within seven days. The claimant was also advised to consult his union.

13. The claimant replied on 1 December stating that his appeal was not being taken seriously and he referred to the ten supporting documents he had submitted (to Ruth Barker). He said Daemon Mottram was not fair as he interpreted all the evidence in favour of Melissa Allen. He asked for his documents to be returned and he would send them to Andrew Maloney, Director of HR, if they were not going to deal with his grievance. There appears to have been no answer to that email

14. The claimant was advised on 21 November that his probationary review meeting would take place on 12 December and as is clear from the original decision it went ahead in his absence. An appeal was heard on 2 March which was unsuccessful as recorded in a decision of 13 March.

15. In respect of the claimant’s sickness, he was absent from in effect 17 October. He had two visits to Occupational Health: one on 5 November and one on 16 December. This said:

“I understand Arif started working for GMW in March 2014 and it is his perception that there have been difficulties in the relationship with his line manager. He feels the situation deteriorated in August after he took out a grievance against his line manager. It’s Arif’s perception he has experienced bullying and discrimination. I understand the grievance was thrown out due to insufficient evidence. Since then he feels the relationship with his line manager has deteriorated and he has become increasingly low in mood. He was off work initially at the beginning of September for five days and then again from 18 October. He has seen his GP who has diagnosed depression and has started him on antidepressant medication. In terms of his symptoms he is suffering from low mood, sleep disturbance with early morning waking, loss of interest and motivation and also cognitive symptoms such as forgetfulness and poor concentration. He has only been on medication for one week and antidepressants can take several weeks to take effect.”

16. The claimant was advised that he was unfit to work and would not be able to attend a hearing for four weeks.

17. The claimant was seen again on 16 December although the hearing had already taken place by then in his absence. The report said that the claimant had told the doctor that his symptoms affecting his mood had somewhat improved:

“...although he still has difficulty sleeping and feels some of his thought processes are slower than normal. I understand he put in an appeal regarding the grievance he placed towards his manager and he continues to have concerns about these issues. There are no stress related issues in his personal life and he relates his current symptoms to perceived issues within work.”

18. The doctor said she did not feel the claimant was fit to return to work and a successful return to work would require perceived issues to have been addressed if possible otherwise they may prove a barrier to a successful return, and she referred to the issues within the grievance. She said he was likely to be able to be fit to attend a hearing in early January.

19. The claimant also produced a letter from his own doctor, however this just recorded that he had suffered from depression from October 2014 to October 2015 when his symptoms improved.

20. The claimant also gave evidence that he believed three or four of his colleagues who had taken retirement and early retirement from the respondent had been re-employed thus establishing that there was a need for security guards and therefore that his fixed-term contract would have been renewed but for his dismissal.

21. Regarding the dismissal process, the claimant was dismissed in his absence by a panel headed by Rachel Green. At the appeal in front of Andrew Maloney the claimant's trade union official made it clear that he did not seek to re-open the matters concerning the bullying and harassment but relied solely on the fact that the claimant was absent at the hearing which he said made it unfair, and therefore although Mr Maloney gave the claimant and his representative the opportunity to re-submit some documents as none had been submitted for the appeal, that opportunity was not taken because of the tactical view taken by the claimant's trade union representative. As the appeal was adjourned and no outcome was given on the day there was time to submit this evidence before the outcome was determined.

22. The claimant in evidence made a number of statements regarding the importance of the failure to deal with his grievance. He said it was the mother of everything, that the appeal brought everything back, that the grievance was his best hope. The respondent stated these statements were self-serving as the claimant had not said this in the original hearing; this was just one of 18 things and he was more concerned with the issue of whether the dismissal panel had been given a truncated view of his performance by not including certain documents in the briefing to that panel.

### **The Law**

23. Where a Tribunal finds an employer has discriminated against an employee there are three remedies available under section 124 of the Equality Act 2010. A Tribunal may:

- (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
- (b) order the respondent to pay compensation to the complainant;
- (c) make a recommendation that the respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant or on any other person.

24. In this case the claimant only asked us to consider compensation.

25. An award of compensation in a discrimination claim is assessed on the same principles as tort in accordance with section 124(6) and 119(2). The aim is to put the claimant in the position so far as is reasonable that he or she would have been in had the tort not occurred (**Ministry of Defence v Wheeler [1998]** and **Chagger v Abbey National PLC [2010]**).

26. Causation and remoteness limit the damages available to a claimant. Only those losses caused by the unlawful act will be recoverable. So, for example where an individual would have lost their job at some point in any event the losses suffered following dismissal would not have been caused by the discrimination. Further, losses that are too remote and unforeseeable will not be recoverable. However, in **Essa v Laing Limited [2004]** the Court of Appeal held this principle does not apply to all statutory torts, including discrimination and harassment such that any loss proved to flow directly from the discriminatory act will be recoverable. Non financial losses are also recoverable. The Tribunal can also consider contributory fault, an ACAS adjustment for failure to comply with the ACAS Code of Practice for Disciplinary and Grievance Procedures and for failure to comply with a recommendation, although a recommendation was not considered in this case.

#### Injury to feelings

27. Injury to feelings are available in discrimination claims to compensate for non pecuniary loss (section 119(4) Equality Act 2010). The general principles are set out in particular in **HM Prison Service v Johnson [1997] EAT** which states that:

- “(1) Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator’s conduct should not be allowed to inflate the award.
- (2) Awards should not be too low as that would diminish respect for the policy of antidiscrimination legislation. On the other hand awards should be restrained as excessive awards could be seen as a way to untaxed riches.
- (3) Awards should bear some similarities to the range of awards in personal injury claims, not to any particular type of personal injury but to the whole range of such awards.

- (4) The Tribunal should take into account the value in everyday life of the sum they have in mind by reference to the purchasing power or by reference to earnings.
- (5) The Tribunal should bear in mind the need for public respect for the level of awards made.”

28. The leading case in respect of assessment of damages is **Vento v Chief Constable of West Yorkshire No. 2 [2003]** Court of Appeal. This stated that there were generally three bands to be considered:

- (1) The lower band of £500 to £5,000 was appropriate for less serious cases where the act of discrimination is an isolated or one-off occurrence;
- (2) The middle band of £5,000 to £15,000 should be used for serious cases which do not merit an award in the highest band;
- (3) The top band should normally be between £15,000 and £25,000 and should be awarded in the most serious cases such as where there has been a lengthy campaign of discrimination or harassment on the grounds of sex or race, but only in a most exceptional case should it exceed £25,000.

29. These boundaries were revised in **Da’Bell v NSPCC [2010]** where the EAT increased the upper band to £18,000 to £30,000; the middle band from £8,000 to £18,000 and the lower band from £6,000 to £8,000.

30. Following **Simmons v Castle [2012]** Court of Appeal and Presidential Guidance the bands are now set at a lower band of £800 to £8,400; a middle band of £8,400 to £25,200 and an upper band of £25,200 to £42,000 with the most exceptional cases capable of exceeding £42,000.

31. A Tribunal should be careful not to award double recovery and should clearly state grounds of awarding separate awards for injury to feelings and personal injury awards.

#### Aggravated Damages

32. Aggravated damages are available in discrimination claims and are awarded on the basis and to the extent that aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury to his or her feelings. They are compensatory not punitive. For example, acts could include where the act is done in an exceptional upsetting way i.e. high-handed, malicious, insulting or oppressive, where the conduct is based on spitefulness or vindictiveness with an intention to wound or subsequent conduct and where the litigation is conducted in an unnecessary and oppressive way.

#### ACAS Uplift

33. An award for compensation for discrimination can be increased or reduced by up to 25% if the employer or employee has unreasonably failed to comply with the

relevant Code of Practice relating to the resolution of disputes and this applies to grievances raised in writing (section 207A Trade Union and Labour Relations (Amendment) Act 1992). ACAS had issued a Code of Practice on Disciplinary and Grievance Procedures in 2015.

34. We had no submissions from the respondent in respect of the ACAS uplift. As the claimant was unrepresented and referred to it in his Schedule of Loss we have deemed it appropriate to consider it.

## **Conclusions**

### Compensatory award/salary loss

35. We do not award the claimant any salary loss for the following reasons:

- (1) The claimant was already suffering from depression before the respondent's decision on the grievance appeal.
- (2) The Occupational Health report notes that he was feeling better on 16 December at which point he knew his appeal had been refused.
- (3) Consequently we find the continuation of his depression arises out of the dismissal and the failure of the appeal.
- (4) We scrutinised Melissa Allen's actions in Tribunal and did not consider them bullying and harassment for discriminatory or non discriminatory reasons. Accordingly, on the balance of probabilities we find that any appeal regarding the claimant's grievance would have been unsuccessful in any event.
- (5) We find the claimant has exaggerated the role of the refusal of the grievance in this hearing, as his statements regarding it were far more emphatic than in the original hearing where his main concern was the fact that he felt the disciplinary panel had been given an incorrect picture of his performance by the failure to include certain reports in the management report to the dismissing panel.
- (6) We also find that the claimant would not have returned to work in any event on the basis of the 16 December Occupational Health report as he said that the barriers to his return related to the relationship with his manager i.e. Melissa Allen, and that unless they were removed he would not be able to return successfully to work. Due to our findings above those barriers would not have been removed and therefore we find that the claimant would not have successfully returned to work even if the respondent had not terminated his employment.
- (7) The chain of causation in any event we find is broken by the failure to raise the matters in the grievance at the appeal. The claimant had the opportunity to do so but due to a deliberate tactical decision on the part of his trade union official this did not occur.

- (8) Consequently we find that the continuation of the claimant's illness after 13 March was due to his dismissal and the failure of his appeal rather than the failure of the respondent to deal with the grievance on 1 December the previous year.

#### Injury to feelings

36. We do award the claimant injury to feelings. The claimant gave very little evidence regarding how he felt but we find it is self evident that his feelings were hurt and that contemporaneous documentation reflected this, for example the reference to not taking it seriously and the references in the Occupational Health report of 16 December.

37. We consider it was a serious issue and place it at the top end of the lower band of **Vento** or the bottom of the middle band of **Vento** as revised. It was a matter which had ramifications up to the appeal when the opportunity to resolve the matter was missed by the claimant and his representative.

38. We therefore award the claimant £8,400. Interest is awarded at 8% a sum of £672. The total injury to feelings therefore is £9072.

#### Personal injury

39. We have assessed personal injury separately on the basis that the claimant had depression up until October 2015. However, his depression started before his grievance was refused and therefore it cannot all be related to that. Further, we have made findings above that the continuation of his illness after 13 March was due to his dismissal and the failure of his appeal.

40. Accordingly we have taken the view that we would award the claimant a proportion of a reasonable amount for personal injury for the period 1 December to 13 March i.e. 3.5 months out of 12 months. We have consulted the Judicial College Guidelines and would place the claimant's illness in the moderate band with a 10% uplift of £5,130 to £16,720. We have taken the mid point of that band, which is £10,925, and apportioned it resulting in £3,186.

#### Subtotal

41. The subtotal at this point, therefore, is £12258.

#### Aggravated damages

42. We find that the respondent's actions do not meet the test for aggravated damages. We explained from our original decision we did not find the respondent acted maliciously or in a high-handed way. The claimant was given full opportunity to argue any points at his appeal but he failed to raise these matters due to a tactical decision by his trade union officer. There was nothing in the conduct of the case otherwise which would give rise to an aggravated damages award.

#### Failure to follow the ACAS Code of Practice



43. We were concerned on reflection that the respondent and the claimant had not fully addressed this issue, although it was raised in the claimant's Schedule of Loss. We do find that by failing to hold an appeal the respondent did breach the ACAS Code of Practice and we make an award of 10%, the maximum being 25%, as the respondent did have reasons for refusing this and the claimant failed to get back directly to James Stone with full reasons, only referring to the documentation; further that this could have been decided at the appeal but was not. This therefore is an award of £1225.

**Overall total**

44. The overall total of the award is **£13,483**

45. The recoupment regulations do not apply as no compensation for loss of salary is awarded.

---

Employment Judge Feeney

Date 5<sup>th</sup> October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
10 October 2017

FOR THE TRIBUNAL OFFICE



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2407583/2015

Name of case: Mr A Mehmood v GMW Mental Health NHS Foundation Trust

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 10 October 2017

"the calculation day" is: 11 October 2017

"the stipulated rate of interest" is: 8%

For the Employment Tribunal Office