

Neutral Citation Number: [2024] EAT 192

Case No: EA-2023-000843-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 December 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER
MRS RACHAEL WHEELDON
MR MARTIN PILKINGTON

Between :

SADIA SHAKIL

Appellant

- and -

SAMSONS LIMITED

Respondent

Lydia Seymour (instructed through Advocate) for the **Appellant**
Mr M Saleem (Director) for the **Respondent**

Hearing date: 13 November 2024

JUDGMENT

SUMMARY

MATERNITY RIGHTS

The Employment Tribunal erred in law in its assessment of injury to feelings. Consideration of the correct application of the **Vento** guidelines as updated by Presidential Guidance.

HIS HONOUR JUDGE JAMES TAYLER:

The issue

1. The issue in this appeal is the correct approach to assessing injury to feelings by application of the **Vento** guidelines, as updated by Presidential Guidance.

The Judgment appealed

2. The appeal is against a judgment of Employment Judge L Mensah sitting with lay members. The judgment was sent to the parties on 20 June 2021.

Findings of fact taken from the Judgment

3. The respondent is a small property development company. Mr Saleem is a director of the respondent. The claimant commenced employment with the respondent on 5 October 2020 as an accountant/bookkeeper.

4. The claimant phoned Mr Saleem on 30 March 2021 and explained that she was feeling unwell with morning sickness. The Employment Tribunal found that the respondent knew that the claimant was pregnant from that date. The next day the respondent reduced the claimant's work to two days a week.

5. In September 2021, the respondent sent a letter suggesting that the claimant was provisionally selected for redundancy.

6. The claimant was dismissed by the respondent on 31 September 2021. She commenced maternity leave on 1 October 2021.

The claim

7. The claimant submitted a claim to the Employment Tribunal that was received on 7 February 2022. So far as is relevant to this appeal, she made a complaint of pregnancy discrimination.

The response

8. In its response the respondent asserted that it was not aware that the claimant was pregnant and suggested there were issues with her performance and conduct.

The decision of the Employment Tribunal

9. The Employment Tribunal held that the reduction of the claimant's work to two days a week on 21 March 2021 was because of her pregnancy-related illness. The Employment Tribunal rejected the respondent's contention that the claimant's hours were reduced because of a reduction in work in the business. The Employment Tribunal found that the reason for the claimant's dismissal on 31 September was her pregnancy. The respondent's assertions that there was a genuine redundancy situation and/or issues with the claimant's capability or conduct were totally rejected.

10. The Employment Tribunal did not direct itself as to the law concerning awards of injury to feelings. The totality of the Employment Tribunal's analysis was in paragraph 71:

71. In terms of her claim to injury to feelings. **There was no medical evidence** before us and no evidence of factors impacting such as health, **the Claimant did mitigate her loss by finding alternative full-time employment. We accept the emotional impact of the treatment** but balance that with the **short period of employment**, only being in her role for around 12 months, the actual period from the variation on the 1 April 2021 to her termination being only six months and **the need to separate the upset due to other factors such as the pregnancy related worries** and concerns for her health and that of her child's. We wanted to give **an award that demonstrated the importance of the protection of pregnancy and maternity rights, was not disproportionate to the circumstances of the parties and reflected the level of impact we felt the Claimant had demonstrated.** [emphasis added]

11. At paragraph 76(ii), the Employment Tribunal stated: “**£5000** injury to feeling”.

The Appeal

12. The claimant was a litigant in person when she appeared in the Employment Tribunal and when she submitted her appeal. In the grounds of appeal the claimant challenged the injury to feelings award in general terms. The matter was permitted to proceed by His Honour Judge Beard who was of the opinion that placing the award for injury to feelings at the middle of the lower **Vento** band was

arguably outside the reasonable range of awards that an Employment Tribunal might make.

13. In preparation for the appeal the claimant, while acting in person, submitted a skeleton argument. The respondent did not submit a skeleton argument. Shortly before the hearing the claimant obtained representation, through the pro bono scheme Advocate, and submitted further documents including a supplementary skeleton argument and an additional bundle of authorities. The skeleton argument particularised the challenges to the decision of the Employment Tribunal and, for the first time, suggested that the EAT should substitute an award of injury to feelings. The claimant also submitted the claimant's witness statement and schedule of loss both of which were before the Employment Tribunal. Mr Saleem, the director who acted for the respondent, did not object to the claimant relying on the supplementary skeleton and other documents.

The law

14. Section 124(2)(b) **Equality Act 2010** ("**EQA**") permits an Employment Tribunal to make an award of compensation where there has been a contravention of a relevant provision of the **EQA**. Section 124(6) **EQA** provides that the amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the County Court. The award that may be made by the County Court is provided for by section 119 **EQA** which includes compensation for injured feelings.

15. The key authority about assessing injury to feelings remains **Vento v Chief Constable of West Yorkshire Police** [2002] EWCA Civ 1871, [2003] I.C.R. 318. The Court of Appeal gave general guidance on awards for injury to feelings from paragraph 50 onwards.

16. There are a number of general propositions about the assessment of injury to feelings that can be derived from **Vento** and the other key authorities:

16.1. an award of injury to feelings compensates for "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on": **Vento** par 50

- 16.2. the purpose of the award is to compensate the claimant rather than to punish the respondent or deter them from particular courses of conduct; see for example: **Ministry of Defence v Cannock** [1994] I.C.R. 918
- 16.3. the actual impact upon the individual must be assessed because unlawful discriminatory behaviour may affect different individuals differently, which must be assessed and analysed from the evidence: **Vento**
- 16.4. overt discrimination is likely to heighten the level of injury to feelings: **Taylor v XLN** [2010] I.C.R. 656
- 16.5. feelings of indignation and outrage towards a respondent should not inflate the award: **Corus Hotels plc v Woodward and Anr** UKEAT/0536/05/LA
- 16.6. equally, as the award is compensatory, concern about the respondent's ability to pay is not relevant to assessing injury to feelings: **Evans v Oaklands Nursing Home Group Ltd** (1999) EAT/331/99
- 16.7. the conduct of the respondent, including defending the claim in an inappropriate manner, can increase the level of injury to feelings: **Commissioner of Police of the Metropolis v Shaw** [2012] I.C.R. 464
17. In cases of pregnancy discrimination, concern for an unborn child can increase the level of injury to feelings suffered as a result of the discriminatory conduct: **Miles v Gilbank & Anr** [2006] EWCA Civ 543, [2006] ICR 1297.
18. In **Vento** guidelines were set for the assessment of injury to feeling:
65. Employment tribunals and those who practise in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury. (i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000. (ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band. (iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
19. The guidelines are regularly updated by Presidential Guidance. The relevant guidance was the

fourth addendum that applied to claims presented on or after 6 April 2021:

the Vento bands shall be as follows: a **lower band of £900 to £9,100** (less serious cases); a **middle band of £9,100 to £27,400** (cases that do not merit an award in the upper band); and an **upper band of £27,400 to £45,600** (the most serious cases), with the most **exceptional cases capable of exceeding £45,600**.

20. Application of the **Vento** guidelines (as updated by the relevant Presidential Guidance) generally require that the Employment Tribunal:

- 20.1. identify the discriminatory treatment for which an award of injury to feelings is to be made
- 20.2. hear evidence from the claimant about any injury to feelings caused by the discriminatory treatment
- 20.3. make findings of fact about the injury to feelings suffered by the claimant because of the discriminatory treatment
- 20.4. identify the relevant guidelines applicable to the award
- 20.5. state the band the injury to feelings award falls within
- 20.6. explain why the injury to feelings falls within that band
- 20.7. explain where within the band the injury to feelings award falls and why the specific award was made

21. It is not necessarily an error of law for an Employment Tribunal to fail to expressly consider each of these matters, but it will usually be helpful to do so, and will minimise the risk that the Employment Appeal Tribunal will conclude that the Employment Tribunal did not properly identify and apply the correct legal principles.

22. An Employment Tribunal may also wish to consider whether any assistance can be obtained from the comparable awards in reported cases.

23. In appropriate circumstances, an Employment Tribunal may also need to consider an award for personal injury and/or for aggravated damages, which are not considered in our judgment.

The appeal – generally

24. The Employment Tribunal did not:

- 24.1. identify the evidence given by the claimant about the injury to feeling she suffered as a result of the discrimination (the claimant set out detailed evidence in a witness statement)
- 24.2. make any findings of fact about the injury to feelings suffered by the claimant
- 24.3. refer to **Vento**
- 24.4. refer to any statutory provision or authority relevant to assessing injury to feelings
- 24.5. identify the relevant bands for this claim in Presidential Guidance
- 24.6. state which band the injury to feelings fell within
- 24.7. explain why the award was set as it was within the band

25. The Employment Tribunal accepted that the claimant had her hours of work reduced without notice, was subject to a sham redundancy process and false assertions of lack of capability and misconduct. This is not a case in which there was one-off treatment that would be likely to result only in limited injury to feelings. It is implausible that the Employment Tribunal was unaware of the **Vento** guidelines. The Employment Tribunal placed the injury to feelings in the lowest band. There is no reference to the fourth addendum to the Presidential Guidance. The Guidance is of vital importance as it is now over 20 years since **Vento** was determined and inflation has resulted in a substantial increase in the bands. The Employment Tribunal placed the claimant's award about in the middle of the lowest band, but did not explain why. It is hard to see how the injury to feelings would not come within the middle band having regard to the period over which the treatment occurred and the effect the claimant said the treatment had on her, unless her evidence should be rejected for some proper reason.

26. Regrettably, the analysis of the Employment Tribunal is wholly inadequate and the appeal must be allowed.

27. We will go on to consider the additional specific matters raised by Ms Seymour in her supplementary skeleton.

28. The claimant asserts that the Employment Tribunal erred in seeking to separate the claimant's circumstances from the injury to her feelings when it referred to "the need to separate the upset due to other factors such as the pregnancy related worries and concerns for her health and that of her child's." While it is correct that the award was to compensate the claimant for the injury to feelings caused by the respondent's discriminatory treatment, the Employment Tribunal should have considered whether the injury to feelings was exacerbated by the fact that the claimant was pregnant and was concerned about her unborn child. The pregnancy was correctly to be regarded as a component of her individual circumstances.

29. The claimant asserts that the Employment Tribunal inappropriately took account of the circumstances of the respondent when it referred to making an award that was "not disproportionate to the circumstances of the parties". It appears that the Employment Tribunal considered that the small size of the respondent and its possibly limited resources were relevant to assessing the injury to feelings suffered by the claimant. The resources of the respondent were not relevant to this assessment. If a claimant suffered a loss of earnings it obviously would not be appropriate to reduce the award of compensation for loss of earnings to take account of the limited resources of a respondent. The loss suffered by a claimant is the same however rich or poor a respondent may be. Similarly, an award of injury to feelings should not be reduced because the means of the respondent may be limited.

30. The claimant asserts that the Employment Tribunal failed to have regard to the respondent's conduct of the litigation, including false assertions in the response and a message sent to the claimant threatening publicity if the claimant pursued the claim. These were factors that the Employment Tribunal should have considered.

31. Accordingly, we allow the appeal.

Disposal

32. Ms Seymour contends that we should substitute an award for that made by the Employment Tribunal. We do not consider it is appropriate to do so in circumstances in which the Employment Tribunal made no significant findings of fact about the injury to feelings suffered by the claimant. We do not accept that the statement at paragraph 71 that the Employment Tribunal “*accept the emotional impact of the treatment*” means that the Employment Tribunal accepted everything said in the claimant’s witness statement. We also consider a reference in paragraph 20 to the claimant being a “*consistent witness*” related specifically to the evidence about holiday pay considered in that paragraph. Furthermore, while Mr Saleem agreed to the claimant relying on the skeleton argument produced by Ms Seymour, we note that the argument that the Employment Appeal Tribunal should substitute an award was first raised in the skeleton argument that Mr Saleem received a day before the hearing. The respondent may wish to consider the possibility of obtaining professional advice (which could include the possibility of settlement) and representation. Accordingly, we have decided to remit the assessment of injury to feelings to the Employment Tribunal.

33. Having regard to the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, we have concluded that the remission should be to a different Employment Tribunal because the decision was totally flawed and because remission to the same Employment Tribunal will not result in a significant saving of expense as the award for injury to feelings must be assessed again. Case management will be a matter for the Employment Tribunal, including consideration of any application to amend to claim aggravated damages.