

THE INDUSTRIAL TRIBUNALS

CASE REF: 2238/15

CLAIMANT: John Ferguson

RESPONDENTS: 1. Concierge Practitioners NI Limited
2. CPNI Ambulance Services Limited

DECISION

The decision of the tribunal is that the claimant suffered discrimination in the form of harassment on grounds of sexual orientation and is entitled to the sum of £16,600.00 compensation for injury to feelings.

Constitution of Tribunal:

Employment Judge Murray

Mr J Hughes
Mr I O'Hea

Appearances:

The claimant was represented by Mr J Tay who has finished the Bar training course in England but is not yet qualified as a Barrister.

The respondents were represented by Mr N Duncan, Director in the respondent companies.

THE CLAIM

1. By the date of the tribunal hearing the claimant's claim had narrowed to a claim of discrimination in the form of harassment on grounds of sexual orientation.
2. The respondents defended that claim in the response form, provided an unsigned written statement from Mr Stuewe to rebut the claimant's claim but, in the event,

called no evidence to rebut the claim at tribunal and Mr Duncan declined to question the claimant and his witnesses despite being given the opportunity to do so.

THE ISSUES

3. The issues for the tribunal were as follows:
 - (1) Was the claimant subjected to homophobic bullying and harassment by Mr Stuewe throughout his time with the respondent companies;
 - (2) Were the alleged acts of harassment linked together to form a continuing act or were they discrete acts meaning that there was a time point in relation to some or all of them;
 - (3) Was the claimant's claim lodged one day late and if so should time be extended on just and equitable grounds;
 - (4) If the claimant is successful, what level of injury to feelings compensation should be awarded to the claimant?

SOURCES OF EVIDENCE

4. The tribunal had written statements and oral evidence from the claimant on his own behalf together with Mr Coyle and Mr Carlin. The tribunal had written statements from the witnesses.
5. The tribunal also had written statements from Ms Meenan for the claimant and an unsigned statement from Mr Stuewe for the respondent. The tribunal gave no weight to those statements because neither witness attended to give evidence. We were told that Mr Stuewe had not responded to Mr Duncan's attempts to contact him. As Mr Stuewe currently resides outside Northern Ireland, the tribunal unfortunately had no power to compel him to appear before it.
6. Mr Duncan indicated that Mr Stuewe had gone to live in Gibraltar and no contact had been established with him. Mr Stuewe's unsigned statement outlines that he is on a break from his post as a Clinical Support Officer/Paramedic in the Northern Ireland Ambulance Service as it appears that he was separately employed by that organisation at the time relevant to these proceedings and was also the Secretary for the NIAS in the GMB union at one point.

THE LAW

7. Harassment on grounds of sexual orientation is rendered unlawful by the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003.

Ongoing acts

8. In ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 CA*** the issue for the tribunal was whether the acts constituted a continuing act whereby the relevant three month time-limit would not begin to run until the date of the last act.

The principle established by the Court of Appeal in the **Hendricks** case is outlined in Harvey Division L paragraph 562 which states as follows:

*“In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to: (a) the nature and conduct of the discriminatory conduct of which the complaint is made, and (b) the status or position of the person responsible for it. Certain types of discriminatory insults, for example, will by their nature indicate that they have a continuing effect and are properly seen as part of a general regime of discrimination; so too discriminatory acts by a person of authority may be more likely to create a regime of discrimination than similar conduct by a person of lower authority within an organisation. Where there is evidence of numerous instances of discriminatory acts by different people over time the focus of the enquiry should not be on whether there is something that can be characterised as policy, rule, scheme, regime or practice - instead what is important is whether there is an ongoing situation or a continuing state of affairs in which the group discriminated against (be it defined by sex or race) and including the claimant was treated less favourably: **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 CA...***

The claimant was held entitled to pursue her claim on the basis that the burden was on her to prove, either by direct evidence or inference, that the numerous alleged instances of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of “an act extending over a period”.

9. In the **Vento** case the Court of Appeal gave guidance on the assessment of damages for injury to feelings. In the decision the Court of Appeal cited with approval the summary of the general principles on compensation for non pecuniary loss which were outlined in the case of **Prison Service v Johnson [1997] ICR 275 by the EAT.**
10. The guidance by the Court of Appeal in **Vento** states as follows:

“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.

- (1) *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...Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.*
- (2) *The middle band between £5,000 and £15,000 should be used for serious cases which do not merit an award in the highest band.*
- (3) *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 the risk being regarded as so low as not to be a proper recognition of injury to feelings.

There is of course within each band considerable flexibility allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. The decision whether or not to award aggravated damages and if so what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for no pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each case.”

11. The **Vento** bands were reconsidered by the EAT in **Da’Bell v National Society for the Prevention of Cruelty to Children EAT 0227/09**. The current middle and upper bands are £6,000 to £18,000 and £18,000 to £30,000.
12. The claimant claimed aggravated damages. Aggravated damages may be warranted in a discrimination case where there is a link between exceptional or insulting conduct or motive on the employer’s part and the claimant’s injury to feelings. In exceptional cases an award of aggravated damages may be made where the respondent has conducted proceedings in such a way as to aggravate the harm caused by the original act of discrimination.

FINDINGS OF FACT AND CONCLUSIONS

13. The tribunal found the following facts proven on a balance of probabilities and reached the following conclusions after an assessment of all the evidence and the application of the legal principles to the facts found.
14. It is important to note that the claim form contained very wide-ranging allegations most of which were outside the jurisdiction of the tribunal. The claimant sought to amend his claim to include a detailed claim for discrimination on grounds of sexual orientation and the amendment application was heard at a Pre-Hearing Review (PHR) by Employment Judge McCaffrey. A decision issued following that hearing the net effect of which meant that the claimant’s claims of unfair dismissal, unlawful deduction from wages and breach of contract (holiday pay) were dismissed. The claim was amended to include allegations of harassment on grounds of sexual orientation which we summarise as follows:
 - (1) Multiple homophobic comments and gestures directed to the claimant by Mr Stuewe.
 - (2) An incident in June 2014 when Mr Stuewe implied that the use of needles by the claimant carried a risk of the transmission of HIV because the claimant is gay. The allegation was that Mr Stuewe brought this up again in September 2014 which forced the claimant to remind Mr Stuewe that he complied with

the St George's Hospital policy in relation to annual testing.

- (3) That daily throwaway negative comments were made by Mr Stuewe regarding homosexuality with particular reference to the claimant's body hair and followed by hand and verbal gestures mimicking nausea and vomiting and shivers across his spine whilst commenting on homosexual acts in a negative way.
15. At hearing therefore the scope of the claimant's harassment claim related to adverse comments made by Mr Stuewe to the claimant and in his presence which related to the claimant's sexual orientation.
16. The claimant was a director and shareholder in both respondent companies from 2012 until September 2015 when he left the companies. The claimant had a shareholding of 15% whereas Mr Stuewe was the majority shareholder with a shareholding of 51%. Mr Stuewe was a director in both companies and was effectively in control of them.
17. The circumstances of the claimant leaving the companies related to matters which involved claims and counterclaims of irregular conduct by the directors against each other. The circumstances of the claimant leaving the companies do not form part of the claim before us.
18. We considered carefully the evidence given by Mr Ferguson and his witnesses and find that the following acts of harassment in the form of homophobic comments and actions occurred.
 - (1) Mr Stuewe made unnecessary reference directed at the claimant on a number of occasions to the HIV risk involved with the use of needles by gay staff. This meant that the claimant felt that he had to reassure colleagues that he underwent yearly testing in accordance with hospital protocols.
 - (2) Mr Stuewe on numerous occasions made intrusive enquiries in relation to the claimant's personal life and in particular as to whether or not he was in a relationship with a named male.
 - (3) Mr Stuewe on a number of occasions made reference to the claimant's previous partner who was by then in a relationship with a woman and mocked the claimant for "turning" him from a gay man to a heterosexual man.
 - (4) Mr Stuewe made comments describing homosexual sex acts in an adverse way whilst commenting on aspects of the claimant's personal appearance in an offensive and intrusive way.
 - (5) Mr Stuewe on numerous occasions made vomiting and gagging gestures and gestures of shivers when referring to the claimant in an effort to show disgust for the fact that the claimant was homosexual.
 - (6) Mr Stuewe referred to the claimant on a continuing basis as "gay boy" and used that term instead of using the claimant's name when addressing him.
 - (7) Mr Stuewe made an offensive comment about "bum fun".

19. We are satisfied that the homophobic comments and gestures were made to the claimant on a daily basis for a lengthy period of time until the claimant tried to minimise his contact with Mr Stuewe so that for a period he had weekly contact with him. We are satisfied that the comments and gestures were grossly offensive. The claimant at one point complained to another director and nothing was done to deal with the matter.
20. The claimant left the respondents on 25 May 2015 and presented his claim form to the tribunal on 26 August 2015. The claim form was therefore one day late. At the PHR Employment Judge McCaffrey granted the amendment and extended time to enable the allegations set out at paragraphs 11-16 in the document attached to that decision to be included as part of the claim. The only issue in relation to time therefore is whether or not the incidents were joined together to constitute a continuing act in the **Hendricks** sense. If we are wrong in this and there is an issue of the claim being one day late, we hereby extend time on just and equitable grounds.
21. We have no hesitation in finding that the incidents were joined together so that they constitute one continuing act. It was clear from the evidence before us that the homophobic bullying took place on an unrelenting regular basis and we find that they continued until the claimant left and are all therefore in time.
22. We are satisfied that the claimant is covered by the relevant legislation either as an employee or as a worker or as someone contracted personally to carry out services. We are satisfied that the companies are liable for the acts of Mr Stuewe as the majority shareholder as he effectively was the company and/or he was an employee or agent of the company and therefore the company is also vicariously liable for the discriminatory acts.
23. The claimant is therefore entitled to compensation for injury to feelings.

COMPENSATION

24. We have assessed carefully the level of damages to be awarded and regard the following factors as being relevant to the assessment of compensation:
 - (1) The comments and gestures were clearly offensive and took place in front of colleagues.
 - (2) The behaviour went on on a daily basis and only reduced in frequency because the claimant took strenuous steps to avoid contact with Mr Stuewe.
 - (3) The period in issue is just over three years.
 - (4) The behaviour made the claimant feel useless and worthless and affected his self-esteem.
 - (5) The claimant however was a director in the company and it was open to him to challenge the behaviour more robustly. There was no medical evidence before us to indicate that there were any medical consequences from the behaviour and it was not part of the case that the reason for leaving the companies related to the behaviour.

25. Taking the above factors into account we have decided that this case falls within the mid-Vento range and have decided to award £15,000.00 for injury to feelings.
26. The claimant claimed aggravated damages for two reasons as follows:
- (1) That the respondents through their solicitors conducted proceedings in an inappropriate manner by sending a **Calderbank** letter. We reject the point made in this regard given that three of the four claims outlined in the **Calderbank** letter were actually dismissed at the PHR. There was nothing in the **Calderbank** letter which amounted to highhanded or oppressive behaviour.
 - (2) That false and malicious allegations were made against the claimant in the witness statement by Mr Stuewe which was unsigned and served by the respondent. It was the claimant's case that the allegations in that statement meant that he was referred for a Fitness to Practice Procedure (FTP) by his University medical course in London and he now has been expelled from that course. Some extracts of a report by the University were shown to the tribunal and it is clear from those that there were several reasons for the claimant's referral for FTP. We reject the claimant's point in this regard as any loss in that regard is too remote from the acts of discrimination, the claimant volunteered Mr Stuewe's statement to the University and there were a number of other reasons for the FTP referral.
27. The calculation of damages is therefore as follows:
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|---|--------------------------|
| Injury to feelings: | £15,000.00 |
| Date claimant left : 25 May 2015 | |
| Date of hearing : 27 September 2016 | |
| Interest at 8% per annum for 16 months: | <u>£ 1,600.00</u> |
| TOTAL | <u>£16,600.00</u> |
28. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 27 September 2016, Belfast.

Date decision recorded in register and issued to parties: