**Case Number:2300584/2016**

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# EMPLOYMENT TRIBUNALS

BETWEEN

| **Claimant** | | **Respondents** |
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| **Mr G White** | **and** | **Coastal Amusements Ltd (1)** |
| | | **Mr H Symonds Senior (2)** |

**Held at Ashford on 3 March 2017**

| **Representation** | | |
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| | **Claimant:** | **Mr D Massarella, Counsel** |
| | **Respondent:** | **Mr K Squire, Counsel** |

**Employment Judge Wallis**
**Members: Mr C Wilby**
**Mr A Brown**

# REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Respondents are ordered to pay the Claimant £23,049.84, calculated as set out below;

2. The Respondents are liable for any tax to be paid on this award;

3. The Respondents are liable to pay this award of compensation on a joint and several basis.

# REASONS

Oral reasons were given at the end of the hearing. The Claimant requested written reasons.

ISSUES

1. At a hearing on 12, 13 and 14 December 2016 the Tribunal had found in favour of the Claimant in respect of the claim that he had suffered detriments because

of making a protected disclosure. The Claimant had suggested that he had suffered six detriments. The Tribunal had found that he had suffered only three detriments out of the six upon which he relied. This was a remedy hearing to consider the appropriate remedy in respect of those detriments.

DOCUMENTS AND EVIDENCE

2. We had some additional documents to add to the original bundle. In particular, we had an addendum psychiatric report from Dr Simon Wilson, Consultant and honorary senior lecturer in forensic psychiatry. He had produced a report for the liability hearing.

3. We had written submissions from both representatives together with copies of ***Melia-v-Magna Kansei Limited [2006] IRLR 117; McPherson-v-BNP Paribas [2004] IRLR 558; Prison Service-v-Beart (2) [2005] ICR 1206***; ***Virgo Fidelis Senior School-v-Boyle [2004] IRLR 268; Vento-v-Chief Constable of West Yorkshire Police [2002] ICR 318; Commissioner of Police of the Metropolis-v-Shaw [2012] IRLR 291; Balmsley Council-v-Yerrakalva [2012] IRLR 78***; ***Arrowsmith-v-Nottingham Trent University [2012] ICR 159***. We also had an extract from a handbook on psychiatric injury, stress and harassment; an extract from the JC Guidelines in respect of psychiatric and psychological damage (13th edition). We had an updated schedule of loss.

4. We also had witness statements from the Claimant, the Claimant's wife Mrs Theresa White and from a family friend Mrs Cherry Cornforth. We heard from both of those witnesses and we also heard from the Claimant himself Mr Gary White.

5. On behalf of the Respondent we heard from Mr Stephen Hustwayte in respect of the alleged incident in January 2017.

FINDINGS OF FACT

6. The facts of the matter are set out in the reasons attached to the Judgment on liability.

7. There was a dispute at the remedy hearing about whether the Claimant had been well enough to return to work on 6 January 2016. In his witness statement to the liability hearing he had said that he had felt well enough to return to work. In evidence at the remedy hearing, the Claimant told us that he had not returned to his GP at the expiry of his medical certificate on 5 January 2016 and had simply decided to return to work because "he wanted an end to the redundancy issue". He also told us, initially, that he had not known, when he returned to work on 6 January 2016 that he would be required to work at Rockys. However, he did subsequently accept that he had known that this was the position and indeed we had found that the Respondent had written to him in December 2015 to say that when he was well enough to return to work he would be required to return to Rockys. That was one of the detriments that we had upheld.

8. We had to consider whether the Claimant's ill health had in fact continued, despite him returning to work. There was no dispute that he had been suspended by the Respondent on 7 January 2016 and he had gone on sick leave again on 22 January 2016. The Claimant argued that the subsequent period of sick leave from 22 January 2016 was as a result of an ongoing condition which had been caused by the three detriments that the Tribunal had upheld.

9. The Tribunal noted that Dr Wilson in his addendum report was quite clear in his opinion that the three detriments that the Tribunal had upheld had caused Mr White psychiatric injury; in other words, they were the cause of his sick leave from 16 November 2015 until his return to work on 6 January 2016. Dr Wilson explained that the Claimant had a diagnosis of recurrent depressive disorder and he had had two previous episodes of depression in 2001 and in 2017. He considered that the most recent episode in November 2015 "appeared to have been precipitated by the problems at work". Dr Wilson noted that the Claimant had first consulted his GP in November 2015 "in other words following two of the acts found to be unlawful (the redundancy proceedings and the suspension from work in September 2015)." He added "the transfer to Rocky's in January 2016 is also likely to have contributed an additional stressor, maintaining his depression."

10. The Tribunal accepted Dr Wilson's clear opinion about that. The Tribunal also accepted the Claimant's evidence that from the time that he had been told that his post was to be made redundant he became extremely anxious and in particular he was worried that he and his wife would not be able to afford the mortgage on their house. They knew, because of other reasons, that Mrs White's job might end fairly soon and without both incomes they would be in financial difficulties. They therefore decided to sell the house and bought a much smaller house. They found that this had impacted on their lifestyle as it limited the number of family or friends who could visit.

11. The Tribunal accepted Mr White's evidence that his anxiety and worry caused him to have difficulty in sleeping, precipitated his depression and put extreme strain on his marriage.

12. However, the Tribunal found that, with the assistance of treatment, the Claimant felt well enough to return to work on 6 January 2016. We noted that he said to us at the remedy hearing that he had not returned to his GP and simply wished to get the redundancy situation over with; however, we found that his ability to return to work, knowing that he was to report to Rockys, indicated that the period of depression had improved sufficiently to allow him to return to work.

13. Mr Masseralla pointed out that the Tribunal had to consider whether any psychiatric injury before 6 January 2016 was indivisible from any injury thereafter. We noted that the Claimant was signed off sick again on 21 January 2016. We noted that Dr Wilson had been asked to express an opinion about the impact of the suspension and disciplinary charges in January 2016 on the Claimant. Those were the matters that the Tribunal had found were not unlawful,

in as much as they did not happen as a result of his making a protected disclosure. Dr Wilson expressed his reluctance to speculate about this. He said "if I understand the question correctly, I am being asked to speculate as to whether the disciplinary matters in January 2016 would have an impact on Mr White's mental state in the absence of the previous matters – the protected disclosure, redundancy proceedings, the suspension from work in September 2015 and the transfer to Rockys. I think this is probably a counter factual beyond the bounds of my ability to offer an expert opinion. Mr White developed a third episode of depression in the context of the series of stressful work events. I think, from his perspective, they were probably all experienced as part of the same ongoing difficult situation and were all contributing to maintaining his feelings of helplessness, hopelessness, and depression."

14. Dr Wilson was also asked to confirm whether the acts which the Tribunal had found were not detriments would have caused psychiatric injury to Mr White on their own. He answered "again, if I have understood the question correctly, I am being asked whether Mr White would have had an episode of depression in response to being suspended from work in January 2016 in relation to (the allegations made at that time). I think, again, that this is beyond the bounds of psychiatric expert evidence to answer. I would observe, that on the face of it, it would seem to be a less stressful event than being suspended and threatened with redundancy as a result of making a protected disclosure. However, whether Mr White would have actually experienced it that way I am unable to answer, and I think I am on firmer ground as an expert witness deal with what actually occurred rather than offering a Judgment about what might have been."

15. Dr Wilson went on to comment that the circumstances of the events in January 2016 "appear less serious and one might therefore expect the psychological response to have been less severe. However, I think this is closer to speculation than expert opinion for the reasons already outlined."

16. We noted that 'where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisable…'

17. Taking all of that into account, the Tribunal concluded that the psychiatric injury suffered by Mr White in respect of the three unlawful detriments was limited to the period from November 2015 to his return to work on 6 January 2016. We noted that he had said that he felt well enough to return to work at that point and had not returned to his GP. We noted that when he returned to work on 6 January 2016 he was aware of the three unlawful detriments. We noted that Dr Wilson was unable to speculate on the period after 6 January 2016 and in particular about the causation in respect of the next period of ill health thereafter.

18. We concluded that the Claimant's loss between 1 December 2015 when his company sick pay expired and 5 January 2016 were causally linked to the three unlawful detriments. We concluded that any loss after that date could not be thus linked.

19. The Claimant, his wife and Mrs Cornforth told us about an incident that Mrs White and Mrs Cornforth had witnesses on 13 January 2017.

20. A group of friends including the Claimant and his wife were walking past the Respondents' premises at around 11.45pm on that evening and saw Mr Hustwayte standing outside smoking a cigarette. There was a dispute about whether the Claimant said good evening to Mr Hustwayte and whether or not Mr Hustwayte responded to the Claimant. Mrs White and Mrs Cornforth told the Tribunal that as the Claimant walked past Mr Hustwayte, Mr Hustwayte flicked his cigarette towards the Claimant's back and went inside the building. Mr Hustwayte told the Tribunal that he simply flicked his cigarette to the ground as had finished it and returned inside as he did not want to engage with the Claimant and his friends in case there were difficulties.

21. The Tribunal did not disbelieve the evidence of Mrs Cornforth and Mrs White, but noted that it was a minor event that was capable of different interpretations.

SUBMISSIONS

22. The Tribunal read the written submissions provided by the representatives. We then heard from the representatives.

23. On behalf of the Respondent, Mr Squire submitted that any pecuniary loss should flow from the particular detriment. He drew our attention to the Claimant's first witness statement in which he said he had felt well enough to return to work on 6 January 2016. He knew at that stage that he was to work at Rockys. He knew about the three detriments by that point. He submitted therefore that those detriments did not cause the later absence.

24. He noted that Dr Wilson suggested that it would be speculative to say what had been the cause of the absence later in January 2016.

25. As far as the award for injury to feelings was concerned, he suggested that it should be at the top of the bottom band or the bottom of the middle band at a round £6000. He suggested that the redundancy situation and the suspension was one and the same so it was in reality one single detriment. The Claimant had only worked at Rocky's for one day and so there was no basis for a large award.

26. He suggested that there had been redundancy meetings the Claimant was not made redundant and had been offered other jobs. So, in his submission, there had been some procedure followed.

27. As far as the award for personal injury was concerned, he noted that the Tribunal should not overlap awards for personal injury and injury to feelings. He suggested that a personal injury award should be nominal if made at all.

28. With regard to the application for aggravated damages, he submitted that it was not appropriate because the Respondents had not made the Claimant's life difficult and had engaged with him. Things at work has not been terrible.

29. As far as costs were concerned, he submitted that the application by the Claimant was unfounded. The Tribunal had said that the public interest part of the protected disclosure test had given them pause for thought and so it was not unreasonable for the Respondent to argue it. There was little guidance on it at the moment. He pointed out that the Respondents had been successful in respect of three of the detriments upon which the Claimant relied. They had not therefore been untruthful throughout the proceedings.

30. He submitted that the Claimant's victimisation claim had no reasonable prospect of success, the Claimant should have known that but only recognised it at the eleventh hour.

31. On behalf of the Claimant, Mr Masserrala submitted that the period of absence from work which started on 21 January 2016 had caused the Claimant significant loss. He said that going to Rockys had maintained the Claimant's state of depression. Although the Claimant knew that he was to attend work there, he did not know that his management responsibilities would be removed until he saw a colleague carrying out his role for him. He said that the Claimant had been taking antidepressants since November 2015 and so when he said he was well enough to return to work that did not mean that he had fully recovered.

32. The Claimant's representatives had asked questions of Dr Wilson that in fact the Respondents should have put. Dr Wilson was unable to answer all of those questions but he submitted that that showed that the illness was an indivisible injury which had been caused by the three detriments upheld by the Tribunal.

33. He submitted that Dr Wilson was unable to unpick the cause of the depression and therefore, in accordance with the Munkman case, the cause was indivisible. The Respondent had not brought any medical evidence to counter that.

34. He submitted that the Tribunal had to decide whether the injury was indivisible, and he submitted that Dr Wilson suggested that it was; the Tribunal then had to consider whether the Respondent contributed to it and that was also clear from Dr Wilson's report. The Tribunal should note that there was no need for the injury to be reasonably foreseeable in discrimination claims.

35. As far as the injury to feelings award was concerned, he submitted that this was a very serious case and that the Claimant's career had been shot down. He had suffered from a serious mental illness, he had sold his house, his marriage had suffered, his social life had suffered, and he was fearful of returning to work. That was the ongoing consequence of the Respondent's acts, which had been devastating for the Claimant. He suggested the award should be at the top of the top band.

36. He submitted that the award for personal injury should be within the moderate category. He accepted that there should be no double recovery so it would be up to the Tribunal to assess each of those awards and balance them out.

37. With regard to aggravated damages, he submitted that £6,000 was the appropriate award. The Tribunal should have regard to the demeanour of Mr Hustwayte as a witness. He was arrogant and dismissive. He had no credibility and contradicted himself often in the same sentence. In January 2017 he had done something arrogant and high handed which had caused distress to the Claimant.

38. He also submitted that there had been no apology from the Respondents to the Tribunal.

39. He noted that the award had to be grossed up.

40. With regard to the application for costs, he noted that Claimant had been successful on a significant part of his claim. The Second Respondent had not given evidence at all. Only he could give the material evidence in respect of the redundancy situation. If he was not to give evidence then the Respondents should have accepted that they would be unable to show that there had been a genuine redundancy situation. That was a key part of the case and so it should not have been defended because, as the Tribunal had found, there was simply no evidence of any redundancy situation. That issue took at least half of the hearing and half of the preparation. The Respondent should have conceded that and focused on the public interest point of the protected disclosure if that was their real argument. The Claimant therefore sought half of the costs in the cost schedule and suggested that the Tribunal do a summary assessment. He submitted that the Claimant should not be put to further costs for a detailed assessment.

41. He submitted that the award should be against the Respondents on a joint and several basis.

42. With regard to withdrawing the victimisation claim, and the Respondents' costs application, he submitted that the Claimant had made a sensible litigation decision and that had saved time. He suggested that it involved minimum costs. He also suggested that the Respondents' application for costs was out of time as the victimisation claim was dismissed on 12 December 2016 and they only had 28 days to apply for costs. In addition, they had not produced a costs schedule.

43. He submitted that it was not appropriate to query whether the Claimant had means to fund his own legal team.

A BRIEF SUMMARY OF THE LAW

44. The Judicial Studies Board has produced Guidelines for the assessment of general damages in personal injury cases. There is a specific section relating to psychiatric injury which sets out the factors to be considered and the bands of severity that might be appropriate, and we considered that in some detail.

45. With regard to injury to feelings, in the case of Armitage and Others v Johnson [1997] IRLR 162, the Employment Appeal Tribunal set out principles for assessing awards for injury to feelings which are still relevant today. They were summarised as follows:-

    (i) 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 at the tortfeasor's conduct should not be allowed to inflate the award.

    (ii) Awards should not be too low as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

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

    (iv) In exercising their discretion in awarding a sum, tribunals 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.

    (v) Tribunals should bear in mind the need for public respect for the level of awards made.

46. In the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102, the Court of Appeal identified three broad bands of compensation for injury to feelings. The top band should normally be between £18,000 and £30,000 (all bands have now been updated by the decision in Da'Bell v NSPCC 2010 IRLR 19 and those figures are used). 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 for feelings exceed £30,000.

47. The middle band of between £6,000 and £18,000 should be used for serious cases which do not merit an award in the highest band.

48. Awards of between £600 and £6,000 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 £600 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

49. In Vento the Court of Appeal also commented upon the difficulty of 'translating hurt feelings into hard currency'; they suggested that this is 'bound to be an artificial exercise' and urged employment tribunals to do the best they can on the available material to make a sensible assessment.

50. Aggravated damages are not specifically mentioned in the Equality Act 2010, but the power to make an award derives from the general principles applicable to the award of compensation for other torts where the conduct of the defendant may aggravate the injury caused to the plaintiff. In Alexander v Home Office 1988 ICR 685 the Court of appeal suggested that conduct in connection with the relevant act that was 'high-handed, malicious, insulting or oppressive' could attract an award. In other words, where the manner in which the wrong was committed was particularly upsetting, or the subsequent conduct adds to the injury.

51. There must be a causal link between the conduct and the loss. Aggravated damages are compensatory, not punitive.

52. Rule 76(1) of the 2013 Rules provides that a Tribunal shall consider making a costs order against a paying party where, in the opinion of the Tribunal, the paying party has in bringing or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success.

53. Rule 78 sets out the provisions in respect of the amount of a costs order that may be made. There is a limit on the specific sum of £20,000. Alternatively, the parties may agree on a sum to be paid by the paying party or the Tribunal may order the whole or a specified part of the costs be determined by way of detailed assessment, either by the county court or an Employment Judge.

54. Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay when considering whether it shall make a costs order or how much that order should be.

CALCULATIONS

55. Having announced the findings set out above, there was agreement that the Claimant's loss of earnings for the period 1 December 2015 to 5 January 2016 was £1797.84, a net figure. We decided that if there were to be any tax liability for that sum, it would be the Respondents' responsibility.

56. When we announced the decision we asked the parties whether the Employment Tribunals (Interests on Awards in Discrimination Cases) Regulations 1996 were applicable to the compensation that we were calculating. Compensation for detriment suffered for making a protected disclosure is calculated in a similar way to a discrimination award and includes injury to feelings. The parties were

agreed that the Regulations did not apply and so we have to amend the figure that was announced at the end of the hearing. The parties were aware that we would have to recalculate those figures.

57. We deducted the amounts that we had calculated for interest on the loss of earnings and the injury to feelings award. We increased the loss of earnings award by 2.5% in accordance with the case of ***Melia*** as we considered that it was just and equitable to do so given that this was in effect decelerated receipt. We calculated the interest at £52.

58. Next, we turned to injury to feelings. We noted that the sham redundancy situation, about which the Respondents could not give us any clear information, had caused a great deal of anxiety for the Claimant in respect of his financial situation. He had even taken the step of selling his house and buying a much smaller house. Sending him to Rockys was demeaning. Suspending him in September 2015 had marginalised the Claimant and prevented him from taking part in activities at work. We accepted that all of this had had an impact on the Claimant and had put his marriage under great strain.

59. Having considered the Vento guidelines and having also noted that there must not be a duplication of award where there is an order for personal injury, we concluded that £7000 was the appropriate award.

60. Turning to the claim in respect of personal injury, as set out above we were satisfied that the Claimant had suffered psychiatric injury as a result of the three detriments that we had identified. The Claimant himself had suggested that the award fell into the "moderate" category, and we agreed. We considered the contents of the guidelines and the factors to be taken into account in valuing claims of this nature. We considered that the Claimant's ability to cope with life and work were damaged during the period that we are considering and it was only in January that he felt able to return to work. We considered that there had been a significant effect on the Claimant's relationship with family, friends and those with whom he came into contact, in particular his wife at that time. We noted that the treatment was to a large extent successful in that he felt able to return to work on 6 January 2016. As far as future vulnerability was concerned, it appeared from Dr Wilson's report that the Claimant was vulnerable to future episodes, but this was because he had a diagnosis of recurrent depressive disorder and unfortunately he was therefore predisposed to episodes of depression. There was no evidence that this vulnerability had originally been caused by the Respondent.

61. Having weighed up all of those matters, we consider that £5000 was the appropriate sum, taking into account the award in respect of injury to feelings.

62. The Claimant made an application for aggravated damages. We noted that the second Respondent had not engaged with the Tribunal process at all, and sent a witness, Mr Hustwayte, who was not a senior manager within the first Respondent's organisation and who was unable to help the Tribunal to any real

extent. We noted that the Respondents had failed to contact the Claimant or to apologise to him when the judgment was available. We did not consider that the incident on 13 January 2017 added anything to this application. We did however conclude that the Respondents' approach to the proceedings was at best off hand and at worst disrespectful. That approach could only have caused further upset to the Claimant as he sought to establish his claims.

63. We considered that £2000 was the appropriate amount to award.

64. The Claimant made an application for costs and provided a schedule of costs. The Respondent also made an application for costs in respect of the withdrawal of the victimisation claim at a late stage.

65. The Tribunal rejected the application by the Respondent. They gave no details of any work done about the victimisation claim, or about any witnesses that they might have planned to call, or indeed of any costs incurred at all. We noted that most of the work in the case appeared to have been done by the Claimant rather than the Respondents. We considered it unlikely that the Respondent had been put to any additional cost and in any event we could not say that it was unreasonable for the Claimant to withdraw the claim that he no longer wished to pursue.

66. As far as the Claimant's application for costs was concerned, we had to consider whether there was any unreasonable conduct by the Respondent. They had denied all of the points raised by the Claimant in respect of his claim, but having heard the evidence it was clear that they had very little foundation in terms of evidence for that denial. In essence, the Respondents made the Claimant prove his case even though they had little or no evidence to contradict his own evidence.

67. The Tribunal considered that there were grounds for making the order. We then had to consider whether we should exercise our discretion to make an order. Costs are still relatively rare in the Tribunal. We considered that the Respondents' approach arguably increased the length of the hearing and the preparation for the hearing. The Respondents were under no obligation to concede matters, but given that the Second Respondent played no part in the proceedings it was difficult to see how they thought that they could argue against the Claimant's evidence.

68. We concluded that this was a case where it would be appropriate for the Respondents to make a contribution towards the Claimant's costs. The Respondent had suggested a detailed assessment was appropriate, but we considered that that would simply add to the cost of the matter. We considered that £6000 was the appropriate contribution.

69. The Claimant had also paid Tribunal fees in the sum of £1,200 and the Respondent should reimburse those.

70. We therefore added together the sums of £1797.84, £52, £7000, £5000, £2000, £6000, and £1200 in order to arrive at the total of £23,049.84. We accepted the Claimant's suggestion that the Respondents should be jointly and severally liable for the payment of this compensation.

Employment Judge Wallis
23 March 2017