# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Ta Seti

**Respondent:** British Telecommunications Plc

**HELD AT:** Leeds **ON:** 6 March 2018

**BEFORE:** Employment Judge Wade
Ms L Fawcett
Mr J Simms

**REPRESENTATION:**

**Claimant:** No attendance
**Respondent:** Mr J Crozier, Counsel

# REMEDY JUDGMENT

1 The Tribunal makes no award in respect of an act of harassment (a remark) on 21 June 2016, there being no cogent evidence that there were injured feelings or other loss arising.

2 In respect of an act of victimisation on or around 11 August 2017 the respondent shall pay to the claimant the following sums:

£6600 in respect of injury to her feelings;
££820 in respect of interest on that award.
Total £7420

3 The claimant's claim that the Equality Act contraventions found by the Tribunal caused her personal (psychiatric) injury is struck out on the ground that the Tribunal considers that it is no longer possible to have a fair hearing in respect of that part of her remedy claim.

# REASONS

Introduction and proceeding with this hearing

1. This is the remedy decision of the Employment Tribunal sitting in Miss Ta Seti's case. It arises in unusual circumstances. Miss Ta Seti, the claimant, has not attended today, the Tribunal having not granted her earlier request for postponement.
2. Those circumstances are as follows. The claimant presented Equality Act complaints of harassment, discrimination and victimisation in a lay claim form on 15 March 2017. She took part in a case management hearing on 4 May 2018, the complaints were clarified and as she remained employed as an advanced apprentice with the respondent, it was also clarified that she did not pursue constructive (or other) unfair dismissal.
3. As to remedy the claimant was directed to provide a schedule of loss by 18 May, which she did. The total sum claimed as at 15 May 2017 was £915, 225.50, of which £12,000 was identified as Injury to Feelings/Personal Injury, and £10, 000 was identified as aggravated damages. £806, 041 of the total sum claimed represented "career" lost earnings calculated over nineteen years, notwithstanding that the claimant's employment had not ended at that point.
4. The Equality Act complaints were determined by this Tribunal at a hearing lasting six days in July 2017, with an extempore decision given on 18 July 2018. Two out of twelve matters were held to amount to Equality Act contraventions.
5. On 26 July 2017 the parties took part in a case management hearing by telephone to discuss resolution of remedy; the claimant then said she had resigned from her apprenticeship. The notes from that hearing recorded:

*"On 18 July 2017 the Tribunal announced its conclusions that: "the claimant's complaints that the respondent contravened the Equality Act 2010 in two respects, a remark on 21 June 2016 amounting to racial harassment, and a decision to move her and leave a colleague in place on or around 11 August 2016, amounting to victimisation, succeed. In other respects the claimant's complaints do not succeed and are dismissed".*

*This hearing was arranged to discuss the determination of remedy and remedy issues. I asked the respondent to provide instructions on whether remedy could be determined by judicial mediation given the claimant's then continued employment. The claimant has told me today that she has taken advice from the CAB, which was not necessarily helpful, but has also resigned.*

*The respondent's position is that any financial award is best addressed by a conventional remedy hearing and given what appears to be the ending of the claimant's employment, it appears the sense of a judicial mediation falls away.*

*In those circumstances a remedy hearing can be arranged reasonably quickly save that if the claimant pursues personal injury damages, the complexity of those issues and cost and time to be spent incurring medical evidence will mean delay.*

*The claimant has indicated today she does wish to pursue personal injury damages, and I have explained to her that she has to prove both the fact of any injury and that it was caused by the two contraventions we have found (rather than the complexity of the chain of events that have impacted upon her including previous*

*bereavements), and/or that the Tribunal may consider apportioning loss between multiple potential causes.*

*In those circumstances I consider it just that the claimant have some time to try and seek professional advice, perhaps on the basis of contingent ("no win no fee") type representation either by solicitors or via a direct access barrister because the decisions she faces are complex."*

6. A hearing was listed for 3 October, with orders made and a list of issues identified. The claimant was also directed to present an **updated** schedule of loss setting out the financial loss or damage which she said was caused to her by the **two contraventions** upheld by the Tribunal, including any amounts sought in respect of injury to feelings or psychiatric injury. The need for medical evidence was also discussed in this remedy management hearing.
7. In mid August 2017 the claimant asked for a transcript of the five day hearing (one day was allocated a reading day). That was understood to be a request for written reasons and refused as out of time (there being no transcribing of tribunal proceedings in this region). The respondent made a similar request (also out of time and also refused).
8. The claimant subsequently provided three names of psychiatrists she would wish to instruct, but made no further attempts to pursue permission for expert medical evidence and neither did the respondent.
9. The updated schedule of loss as at 23 August 2017 presented total losses of £924,681.98. The increase of £9000 or so was made up of approximately £3000 (May, June and July lost salary in the past lost earnings section), an increase of £3000 in the personal injury/injury to feelings section (from £12,000 to £15,000), and an increase of £2000 in the aggravated damages section (from £10,000 to £12,000), and ACAS uplift multiplier. There was no reduction, as we might have anticipated, to recognise that two out of twelve complaints had succeeded and those two complaints were relatively early in a lengthy chain of events.
10. On 6 September the respondent applied for the claimant's personal injury claim to be struck out; or put another way, her seeking of personal injury damages arising from Equality Act contraventions be struck out. The respondent said this:

    "The respondent's view is that such a head of loss is unsustainable. The medical evidence already before the Tribunal and the Claimant's witness evidence do not support a personal injury claim based on the two contraventions of the Equality Act 2010 found in this case. Nor has the Claimant served any further evidence in accordance with the [case management orders] to support such a claim.

    In this case, the Claimant had complained of symptoms of psychiatric injury before any of the allegations of discrimination (whether successful or dismissed) occurred, and attributes further deterioration to a range of acts which were found not to contravene the Equality Act 2010. It is submitted there is no prospect of the Claimant establishing on evidence that the two isolated contraventions of the Equality Act 2010 had any material impact on her psychiatric condition (if there is indeed such a condition). In the alternative, any contribution to a psychiatric disorder by the two contraventions of the Equality Act 2010 is at best minimal and properly compensated by an injury to feelings award." The respondent went on to articulate the costs and complexity of the expert medical evidence required for the trial of the issue.

11. The hearing on 3 October (at which that application would have been decided) had to be postponed for reasons unconnected with the parties. It was re-listed for December. Miss Ta Seti, the day before that December hearing, presented a fit note from her GP saying she was unfit to work for four weeks for "work related issues" and "anxiety issues", and sought a postponement. That was not opposed by the respondent. A postponement was granted by the Tribunal.

12. The remedy hearing was re-listed for today. In mid-February the claimant sought a further four week adjournment for reasons that appeared to relate to recovery from a potential domestic violence incident. The claimant said that further information about that incident would be available shortly, and she was asked to provide that further information, and, by the respondent, to confirm she sought the adjournment on medical grounds. Nothing further was provided by the claimant. The respondent opposed the postponement; it was not granted.

13. The claimant said further by email yesterday that a previous GP had not been authorised to provide a sick note, but she was attending her GP today. Enquiries were made by telephone at 10.45 and at around 10.50 the claimant emailed a fit note which advised she was unfit for work for four weeks, the reason being "anxiety/depression.

14. The orders that the Tribunal had made on a previous occasion included that the parties would engage in any further disclosure necessary to determine remedy, and that they would exchange any statements on which they sought to rely, with time in the timetable for the claimant to seek legal advice.

15. Aside from providing psychiatrists details the claimant took no further steps to comply with any of the orders in relation to this remedy hearing, notwithstanding some contact from the respondent concerning documents, we were told. The only other steps taken were towards the two postponement applications. The claimant has said she has found it hard to engage with daily duties due to her mental health.

16. As to today's hearing we directed ourselves as to three possibilities: granting a postponement; dismissing the remedy claim pursuant to rule 47, or proceeding with the hearing in the claimant's absence. The respondent's position was that we should proceed; it did not seek dismissal of the remedy claims, other than on the basis of its submissions as to their merit, and it conceded that there fell to be awarded sums in respect of injury to feelings. It resisted further postponement, not least because neither the interests of justice, nor potentially the claimant's health, would be served by her being further delayed in a remedy to which she is entitled, nor by the respondent and the Tribunal being put to the further costs of delay and relisting.

17. In all of these circumstances the Tribunal has proceeded with the hearing in Miss Ta Seti's absence. We exercise our discretion in this exceptional way, notwithstanding that justice almost always includes the right to attend and present your case, and not withstanding that we were presented with a sick note that was emailed to the Tribunal and to the respondent this morning indicating the claimant was unfit for work.

18. We do so unanimously in very unusual circumstances, but including that the Tribunal decided in July of last year that two out of twelve matters were Equality Act contraventions, in respect of which the claimant may be entitled to a remedy; and the remainder of the allegations of contraventions did not succeed, and there

are therefore limits to her remedy case, a matter which she appears to be unwilling to confront in her schedule of loss.

Issues

19. A short bundle before us today contained the orders sent to the parties on 27 July. We have today numbered those as follows:

1. Is it just to make any recommendations in relation to the two successful complaints?

2. What is the extent of any injury to feelings (that is emotional wellbeing and equilibrium) sustained by the claimant as a result of the two successful complaints?

3. What sum justly compensates for that injury taking into account Vento/Da Bell bands and 10% uplift?

4. Did the claimant suffer any loss of earnings as a result of the two contraventions?

5. Was subsequent ill health caused by those contraventions resulting in lost income?

6. Is it just to apportion any lost income if there were multiple causes of ill health absence?

7. If pursued, did the claimant sustain any psychiatric injury because of the two contraventions or was any injury pre-existing?

8. If pre-existing, was any psychiatric injury exacerbated and to what extent if so?

9. What sum taking into account judicial studies board guidelines justly compensates the claimant for any injury found (or exacerbated)?

10. Is this a case which meets the criteria for aggravated damages and if so why, and what is the appropriate award?

11. To what sum by way of interest is the claimant entitled?

20. They were the issues for determination. They were fixed for determination on 3 October. The claimant had confirmed she wished to pursue the personal injury damages identified in her previous schedule of loss. That was in the context of the following entry that she made when presenting her complaint in Box 9.2 of the claim form presented on 15 March 2017:

*"Compensation for my life career as I believed and was working towards this being a job for life. I also want compensating for my health physically and mentally as this has suffered greatly for a 20 year old young woman. I believe that based on my previous work and input to the team and company I would have at least achieved managerial role. I feel that my career has been ruined within and outside of the company because of me speaking up to wrong doing I now have a reputation. I find it hard to work as it compounds my anxiety further. I have sleepless nights, nightmares, palpitations, headaches, very bad skin, tinnitus, stomach ache."*

Evidence

21. We have proceeded with this hearing. We have reviewed the evidential material that is available to us in the claimant's original statement concerning the two contraventions that we found, the contemporaneous evidence in the original bundle (to which we were directed by Mr Crozier) and the claimant's narrative in her schedule of loss, which we have treated as her evidence about these matters. We also reviewed our notes of her original evidence but could discern nothing from those notes which would assist (or counter Mr Crozier's submission concerning the lack of evidence of hurt feelings arising from the first contravention).

Our previous findings

22. A short summary of our previous is as follows. The claimant started as an advanced apprentice with BT in September 2015. On 15 March 2017 she presented complaints of discrimination, harassment and victimisation against her manager Mr Franklin, during the period April 2016 to August 2016, and other managers or colleagues in the period after that until as late as 2 March 2017.

23. The allegations concerning Mr Franklin included his making of grossly offensive Facebook posts concerning those of the Islamic faith, which the Tribunal held were not acts of harassment on the part of the respondent, essentially for reasons of not being carried out in the course of Mr Franklin's employment.

24. The claimant's allegations arose in the context of the claimant identifying herself as black and a Muslim. We upheld one complaint of harassment concerning an offensive remark of Mr Franklin's which we accepted that the claimant heard, concerning Indians and curry smells on 21 June 2016 ("the first contravention").

25. We upheld a second contravention as an act of victimisation when the claimant was moved from her team on 11 August 2016, and Mr Franklin was left in place, following, and influenced by, her complaint about Mr Franklin's conduct towards her, and his Facebook posts, which we found was a protected act.

26. In our extempore decision we found that the claimant had an absolutely justified sense of grievance in relation to her move of team. We said that there were a number of factors which influenced the decision to move her. Those factors included: preventing strain on her (without perhaps any insight into the impact on a complainant of the person about whom they complain being able to continue at work, despite the overwhelming gravity of that person's conduct); workloads at the time; the pressure on the team at the time and the astonishing advice to line management that Mr Franklin's Facebook posting was not serious.

27. Those were the conclusions that we reached at the time in upholding that complaint of victimisation. We did not uphold it as a complaint of direct discrimination for reasons we explained at the time.

28. The evidence that we have reviewed in relation to the claimant's assertion of injury to her feelings, and also of damage to her health and the findings that we have made about that are as follows.

Further findings and conclusions

29. There was no contemporaneous evidence at all that the claimant's feelings or health were injured by the curry comment. At the time of that comment she had already previously discussed her emotional state with Mr Franklin, her manager, not least because she had suffered two bereavements that year. She described

herself then as having suicidal thoughts following those life events, and she described that in texts to him. She made no complaint and there was no contemporaneous documentary evidence of any injury to her feelings at all by caused by that single remark. There is no evidential basis on which we can make findings that her feelings were injured, or indeed her health was injured, by overhearing that comment (see Esporta Health Clubs an another v Mr L Roget UKEAT/0591/12RN. We make no award for injury to feelings in respect of the first contravention.

30. In relation to the second contravention, there was contemporaneous evidence following the claimant's complaint and the move on 11 August 2016 that she was very upset: she was crying and unable to remain at work the next day - the day after she had been informed of that move of team and it had been carried out. She had recognised on the day of the move that part of the reasoning was her own welfare.

31. It is not surprising to the Tribunal (and inherently likely) that having returned home, accepting the contemporaneous evidence that she did not have proper work to do, that she felt isolated from her team and then became very upset, and indeed unwell, or more unwell, when in her own words: "I appreciate now I am being safeguarded from Tony but I still feel it is very unjust that I am [not]sic separated but Tony returns at work."

32. The unfairness and injustice of being separated from her team in circumstances where Mr Franklin, the clear wrong doer, continued at work were very keenly felt by the claimant, who had previously had a great deal of optimism about her future career with the respondent.

33. On the basis of those findings it is clear to the Tribunal that there was considerable injury to the claimant's feelings, and it was not coincidence that the next two weeks were characterised by a period of absence for ill health. It was the longest period of ill health absence from work that the claimant had, to that point, suffered. Undoubtedly, in our judgment, the act of victimisation had caused injured feelings at that time.

34. As to the Vento band in which this injury comes to be assessed, we have assessed it in the lower band. We take into account that this was a single act of victimisation, which at the time, albeit in the context of a very unwise decision not to do anything about Mr Franklin, the move of the claimant was done with a motive of protecting her, which she recognised. Incredibly, there was no insight into the impact of the injustice on the claimant, but the purpose was not to victimise her.

35. We also take that into account in assessing the seriousness of the act, as we are required to do for the purposes of applying Vento, that a move of team is not as inherently injuring, applying common sense, as other acts of victimisation, dismissal or other retaliatory conduct.

36. For those reasons we assess it properly to fall within the lower band but having said that, in our judgment the degree of injury to the claimant is such that it properly comes to be assessed at the top of that lower band because that sense of injustice at the outset of her career, and the fact of injury to her feelings is such that we are satisfied it properly comes to be compensated by a significant award and not an award at the lower end as the respondent contended.

37. For those reasons and taking into account submissions that we have heard about the latest Presidential Guidance on the uprating of the Vento bands, and taking into account the **Simmons** decision, we consider that a permissible approach for this Tribunal is to reflect the injury to the claimant by an award of £6,000 uprated by 10% to £6,600 which reflects the top of the band at the time that the claimant sustained that injury (August 2016).

38. We have also taken into account that the claimant's net pay was approximately £1500 per month when being paid for her apprentice role and from that we draw also consider that in terms of the value to her of compensation, our award is a just one in respect of the contravention we have found, and taking into account that it did not result in the ending of her employment directly (and which occurred after the main hearing).

39. We have taken into account the presidential guidance which permits us then to apply a further uprating for inflation in the band or the band boundaries, but we consider that in this context it is not in the interests of justice to engage in a complex and disproportionate exercise for an award of this amount. We take that into account in exercising our discretion to award interest, which because of the difference between the court rate and the national prevailing rates, inevitably addresses any injustice in an inflationary adjustment. The days' interest that comes to be awarded are the days between 11 August and today's date, which we have calculated to be 573 days, which at 8% produces an award of interest of £820. So the amount that we award for injury to feelings is in total, inclusive of interest £7,420 (£6,600 plus £820 in interest).

40. Of the remaining issues that we identified in previous orders, I simply take them in the order in which they appear:

40.1**: Issue 1:** We asked ourselves is it just to make any recommendations in relation to the two upheld contraventions; we invited the claimant to let the Tribunal know and let the respondent know if she sought recommendations; she did not do so; the respondent has been frank in its admission of a serious error concerning Mr Franklin and later took disciplinary action. We therefore make no recommendations.

40.2 **Issues 2, 3 and 11:** We have addressed the extent of the injury to feelings and a have decided upon a just sum of £6,600 plus interest. That also deals with issue 11 on that issue list.

40.3**Issue 4:** In relation to the question did the claimant suffer any loss of earnings as a result of the two contraventions, it is apparent from her schedule of loss that she received full pay after the contraventions, and until January of 2017; she has not proven that she suffered any lost of earnings arising from those two contraventions.

40.4 **Issue 10:** As to aggravated damages, we have considered whether or not the respondent's actions are such that it would be just to make an award of aggravated damages. We have considered that by reason of the benign motive in moving the claimant, the claimant cannot meet the requirement for an aggravated damages award, namely that there is some extra damage or injury that she has suffered to be compensated as a result of malicious, high handed, or oppressive conduct on the part of the respondent, and so we make no aggravated damages award. We also take into account in the round that the claimant originally sought £22,000 in respect of injury to feelings, personal injury and aggravated damages; and in her updated schedule of loss that figure had

increased to £27,000. In the round we consider the sum we have awarded for injury to feelings to be a just sum to compensate her for the loss caused by the August contravention, and as with injury to feelings, there is no evidence of any additional injury caused by the June contravention.

41. The remaining issues (5, 6, 7, 8 and 9) concern the assertion of personal injury damages arising from the two contraventions we have held and on that we have the respondent's application which is pursued.

42. We consider it now in the interests of justice to strike out that claim, or assertion, because we consider it is not now possible to have a fair hearing of that part of the claimant's remedy case, and, it would not be in the interests of justice to do so, putting the parties, as it would to great expense to debate complex issues and gather evidence, without any likelihood that it would be worthwhile.

43. Our consideration of this matter includes our conclusion that the claimant has not pursued the assertion in any of the ways in which she was invited, or ordered by previous case management orders to do, save for providing the names of three potential psychiatric expert witnesses to the respondent, after which it made its application to strike out for the reasons set out above, and to which she did not respond.

44. We also take into account the claimant's original claim form in which she asserted a multiplicity of ill health, both physical and mental, said to be caused by a multiplicity of alleged contraventions. There is therefore an inherent complexity in unravelling the types of ill health from the alleged contraventions not upheld, and the two that were upheld, for causation purposes.

45. Both schedules of loss then assert psychiatric injury, and that appears to be the basis on which she wished to concentrate any efforts personal injury related efforts. The psychiatric investigation and evidence to be gathered, should the matter be permitted to be heard and determined, would have to take into account not only the inherent complexity in the physical and mental ill health assertions and the multiplicity of complaints alleged, but also the life events and complexity in those that are known to have impacted the claimant, the last of which is said to have happened in February of this year and concerns domestic violence we are told (or at least we infer that from the claimant's words). The inherent difficulty in untangling these matters is so overwhelming in this case, and unusually so, that we consider it appropriate to strike out that part of the claimant's remedy claim at this stage.

46. It follows that these proceedings are finally disposed, subject to any further applications that the claimant may wish to make. For the sake of clarity these reasons will be typed and sent to the parties together with the substantive decision. There will not be a separate Judgment and the claimant will have the reasons for these decisions alongside the decisions that we have reached.

Employment Judge JM Wade

Date 21 March 2018