Tribunals must operate within guidelines set in case law

In the case of Cadogan Hotel Partners v Ozog, the EAT found that the employment tribunal had made too high an injury to feelings award.

Facts

Ozog, a waitress, brought a series of claims, including claims of sexual harassment and sex discrimination. The head waiter had kissed her on the hand, had subsequently taken off his belt, and approached her asking “Do you want this body?” The employment tribunal found that his having kissed Ozog on the hand was a “mild form of sexual harassment" which had made her uncomfortable. The belt incident was held to be direct sex discrimination and harassment which made her “very uncomfortable”. However, the tribunal noted that neither incident had particularly traumatised her. The tribunal made an award of £10,000 for injury to feelings on the basis that there had been more than one incident, the belt incident was particularly unpleasant and serious, the other incident was relatively mild, and there was no evidence that Ozog’s complaint had been seriously investigated.

Case law

It can be difficult to gauge the right level of award for injury to feelings in discrimination cases. The Court of Appeal in a leading case on this issue accepted that “translating hurt feelings into hard currency is bound to be an artificial exercise” as it requires tribunals to apply a value to the distress caused to a claimant, the intensity of which cannot really be measured in monetary terms (see Vento v Chief Constable of West Yorkshire).

A number of principles have emerged from case law, which tribunals have to keep in mind when calculating injury to feelings awards. They should be:

- compensatory, not punitive, and any feelings of indignation on the part of the tribunal over the conduct in question should not inflate them
- not so low as to diminish respect for the policy of anti-discrimination, but not excessive either
- at a level that reflects both the range of awards made in personal injury cases and everyday values.

The Vento case identified three broad bands for injury to feelings awards. Awards in the bottom band are for less serious cases of discrimination, often isolated incidents. The middle band is for cases which are serious but do not warrant an award in the top band, which is reserved for the most serious cases, for example, where there has been a long campaign of harassment. These bands have been used consistently by tribunals ever since, and the level of the awards within each band was adjusted for inflation recently (see Da’Bell v NSPCC) and are now as follows:

- £600-£6,000
- £6,000-£18,000
- £18,000-£30,000

EAT

In the Ozog case, the Employment Appeal Tribunal held that as the tribunal had found that the harassment and discrimination had merely made Ozog uncomfortable or very uncomfortable, the case only justified an injury to feelings award in the lower bracket. The EAT stated that the key question was the impact on the employee. The tribunal had incorrectly focused on the acts of discrimination and on its disapproval of the hotel's response. The EAT, therefore, substituted an award in the lower band.

Comment

Employers may be reassured to know that the key consideration in such cases will be the impact on the employee, rather than how objectionable the conduct in question was. However it's worth remembering that an employee, who can demonstrate that he or she has been badly affected by something, may well receive a higher award than expected. Employers should, therefore, take particular care with vulnerable employees.

Natalie Razeen
Associate solicitor
+44 (0)20 8394 6432
Natalie.Razeen@russell-cooke.co.uk

www.russell-cooke.co.uk