

Compensation under the Discrimination Law

UPDATE

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The Jersey Employment and Discrimination Tribunal (JEDT) recently issued its first judgment where it considered the level of compensation which could be ordered under the Discrimination (Jersey) Law 2013 (the Discrimination Law), in particular, in relation to hurt and distress and the levels of apportionment between respondents.

The case is of great importance for both employers and employees as the JEDT stated that the maximum award of compensation under the Discrimination Law would be £10,000 per head of claim rather than as a maximum total amount of compensation under the Discrimination Law. This therefore increases both personal and vicarious potential liability under the Discrimination Law.

In *Mr R Flanagan v Island Greetings Limited*, the case concerned comments made in the workplace by fellow employees during the Gay Pride march last year including that 'they should burn all the gays' and 'throw napalm from the roof' onto them. The applicant was gay and subsequently reported the behaviour to his supervisor and his employer. The employer investigated the matter and issued the second and third respondents with written warnings and instructed them to send letters of apology to the applicant. The applicant lodged a grievance following which his hours of work were cut and he was subsequently made redundant.

The applicant lodged a claim with the JEDT complaining that he had been directly discriminated against as well as victimised, harassed and unfairly dismissed. The JEDT dismissed the complaints in relation to direct discrimination, as the JEDT was satisfied that the employer's actions were not motivated consciously or subconsciously by any prejudice against the applicant based on his sexual orientation.

However, the JEDT did find that the applicant was treated less favourably by the employer when he was selected for redundancy and when his working hours were reduced because he told his employer that he was seeking advice in respect of his position under the Discrimination Law. Accordingly, the JEDT held that such treatment constituted victimisation under the Discrimination Law. In addition, the JEDT found that the applicant's complaints of harassment by reason of his sexual orientation were all well founded. The JEDT was satisfied that the applicant believed that his dignity had been violated by the second and third respondents' actions and that they had committed the unwanted conduct with the intention of violating the applicant's dignity and the behaviour had the effect of creating an intimidating, humiliating and offensive environment for the applicant. The JEDT also upheld the claim for harassment against the employer. The employer was vicariously liable for the acts of its employees as the comments were made during the course of employment. Finally, the JEDT was satisfied that the applicant was victimised by his employer when he was selected for redundancy. The JEDT therefore found that the applicant had been unfairly dismissed.

Under the Discrimination Law, a respondent can be required to pay compensation for financial loss, in an amount not exceeding £10,000, and hurt and distress, in an amount not exceeding £5,000, but in aggregate the total compensation for both financial loss and hurt and distress cannot exceed £10,000. The JEDT remarked that the Discrimination Law treats victimisation and harassment as two distinct acts of discrimination and therefore compensation could be payable in respect of each act of discrimination (ie up to £10,000 per head of claim). The JEDT stated that there would be three bands of compensation for hurt

and distress depending on the level of severity. The Discrimination Law also authorises the JEDT to apportion compensation between respondents. In terms of apportionment for the successful harassment claim in this particular case, the JEDT considered it just and equitable to split the compensation between the three respondents, with the employer only being required to pay 10 per cent of the award. The JEDT held that the employer was responsible for the hurt and distress suffered by the applicant because the actions took place in the course of employment and the employer had not taken steps to avoid the harassment taking place.

This case serves as a helpful reminder to employers of the importance of having appropriate policies and procedures in place in respect of equal opportunities and the Discrimination Law. Employers should not only have policies in place but should educate and train their employees in respect of appropriate behaviour to prevent an act of discrimination arising and to avoid a discriminatory culture and/or environment. The JEDT suggested that such steps would have gone some way to ensuring that the employer had taken reasonably practicable steps to prevent an act of discrimination taking place at work and to managing the behaviour of employees to avoid such exchanges becoming commonplace. The case is also of great significance in terms of determining the level of compensation which may be awarded under the Discrimination Law.

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