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EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Ms N Shifferaw		Hudson Music Co Limited

Heard at: London Central **On**: 10 August 2017

Before: Employment Judge Auerbach
Mr M Simon
Mr I McLaughlin

Representation

For the Claimant: Mr Simret, counsel

For the Respondent: Ms L Robinson, counsel

REASONS

Introduction

1. Following a liability hearing in this case the Tribunal found that the Claimant had been constructively unfairly dismissed and wrongfully dismissed and that she was entitled to an award in respect of holiday pay.

2. At a remedy hearing on 2 June 2015 the Tribunal made an award of damages of £3011.34 for wrongful dismissal. In respect of unfair dismissal, it declined to order reinstatement. It made a basic award of £1862.37 and a compensatory award of £8868.06. The compensatory award included an ACAS Code uplift[1] of 20% and an enhancement with respect to section 38 of the Employment Act 2002 of two weeks' pay. The Tribunal also made an award of five days' holiday pay in the gross amount of £413.86. The Respondent was also ordered to pay the Claimant £250 costs in respect of the issue fee.

3. The written remedy judgment was promulgated and written reasons were also requested which were subsequently promulgated when complete. The Claimant appealed the remedy decision to the EAT on a number of distinct points.

[1] Pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

This led to a full hearing before Her Honour Judge Eady sitting alone, which resulted in a reasoned decision handed down on 30 August 2016.

4. The appeal succeeded on three specific points. There were other points of appeal which failed.

5. This further remedy hearing was convened to consider the successful appeal points that had been remitted to the Tribunal. As one of the original members of the Tribunal (Mr Grant) was no longer available to sit on the case, but the Claimant's solicitors had indicated in correspondence that a three-person panel was still desired, a substitute (Mr McLaughlin) was empanelled to sit with the Judge and Mr Simon, who had been the other Tribunal members at the liability and original remedy hearing.

6. After hearing argument, and deliberating, we gave an oral reasoned decision. The Claimant's counsel requested written reasons, and these are now provided. We then heard applications for costs on both sides. We made an order for costs in favour of the Respondent but rejected the Claimant's costs application. Written reasons for the costs decision were not requested.

7. The three points that fell to be considered by us at this hearing were as follows.

8. Firstly, the approach that the Tribunal had taken to loss of remuneration flowing from dismissal was to allocate loss flowing from the two months following the effective date of termination to the wrongful dismissal award and then to allocate loss flowing from the end of that period to the compensatory award. The ACAS Code uplift had been applied to the compensatory award, but not to the wrongful dismissal award.

9. The EAT concluded that it was, in principle, open to the Tribunal to choose to deal with the potential overlap between the wrongful dismissal and compensatory awards in the way it had done, but, in a case where an ACAS uplift was to be applied to the compensatory award, this was a factor which the Tribunal needed to take into account in deciding what approach to take to the overlap between these awards. In the present case, concluded the EAT, it was unclear whether the Tribunal had intended the uplift to apply only to the unfair dismissal award in respect of the period of loss arising from the end of the notice period. The EAT therefore remitted the point to the Tribunal for it to specifically address it (see paragraph 38 of the EAT's decision).

10. The context for the second and third successful points of appeal was as follows.

11. In calculating the compensatory award, the Tribunal had postulated that, had she not been dismissed, the Claimant would probably have remained in employment on full pay until she went into hospital for an operation (as she in fact did) on 27 December 2013, but would at that point have been put on SSP, which she could then potentially receive for a maximum 28-week sickness period. The Tribunal had concluded that it was just and equitable that the period of lost

remuneration covered by the compensatory award should end on the last day of that 28-week period. It therefore included in the compensatory award an amount to reflect the SSP that would have been paid during that 28-week period.

12. Against that background, the second successful point of appeal was that the Tribunal had failed to take into account that, during the 28 weeks in which she would hypothetically have been off sick, the Claimant would have been accruing, but not taking, further holiday entitlement. Over that period, it was calculated, she would have accrued 15.08 days, and would then have been entitled to be compensated in respect of that unused holiday entitlement on termination. The EAT held that it was an error by the Tribunal not to have taken this into account, and directed it to make the appropriate calculation (if not agreed) and adjust the compensatory award accordingly (see paragraph 43 of the EAT's decision).

13. The third, and final, successful point of appeal arose as follows. The Tribunal had considered in its remedy decision whether the Respondent would, during this same hypothetical 28 weeks' sickness period, have continued to make contributions into the private stakeholder pension scheme to which it and the Claimant had been contributing when she had been at work. At paragraph 59 of its decision the Tribunal concluded that it did not have sufficient evidence to support an inference that it would have done so.

14. On appeal, however, it was submitted that a potentially significant piece of evidence before the Tribunal had been that during an actual period of sickness absence of one week during the Claimant's actual employment, the Respondent had continued to make such pension contributions. The EAT considered that it was unclear whether the Tribunal had had regard to that evidence in coming to its view on whether such contributions would have been paid during the 28-week period. If the Tribunal had not done so, it should consider that evidence, and take it into account, in its evaluation of this issue. This was point was, therefore, also remitted for further consideration by the Tribunal (see paragraph 56 of the EAT's decision).

<u>Scope of this Hearing</u>

15. Where a Tribunal has given a decision, such as our original remedy decision, a party who believes that the Tribunal has, on some point, erred in law or reached a perverse decision (in the legal sense) may appeal to the Employment Appeal Tribunal. Under a separate process, application, may, in certain types of case, be made to the Tribunal itself for a reconsideration. But, generally, where the nub of the complaint is that the Tribunal has made an error of law, the proper course is not to seek reconsideration but to appeal.

16. Where an appeal has, on a particular point, succeeded, and the matter has been remitted to the Tribunal for further consideration, the Tribunal must accordingly reconsider that point in accordance with the EAT's decision. However, such a remission hearing is *not* an opportunity to invite the Tribunal to give further consideration to other points of its original decision, be they points on which there was an unsuccessful appeal or points which were not the subject of prior appeal at all. The further hearing must be confined to consideration only of those points

which have been the subject of successful appeal and remission. This is an established principle of jurisdiction, and serves the interests of fairness and finality.

17. Accordingly, the task of the Tribunal at this further remedy hearing, was, solely, to address the three points that we have just identified. We were not only not obliged, but had no power to do more than consider those points.

18. Mr Simret, however, invited us to revisit two other particular aspects of our earlier remedy decision. Firstly, he invited us to revisit the underlying approach that we had taken to the valuation of pension loss. In this case, during the employment, both parties had paid periodic amounts into a private stakeholder's scheme. In our remedy decision, we explained why, in all the circumstances of this case, we considered that a fair measure of the underlying pension loss for any given period, was the value of the employer's contributions.

19. One of the grounds of appeal had been that our approach to this had been wrong in law. But that ground of appeal failed. Nevertheless, Mr Simret sought to argue at this further hearing, that the EAT had merely said that it was not wrong to take *a* simplified approach to the pension loss calculation. He sought to argue that we should, nevertheless, revisit at this hearing, the approach that we had taken, and whether it was the right approach or conformed to what he would, if allowed, seek to argue that a simplified approach should necessarily involve. He specifically wished to argue that we should adopt the approach set out in a calculation that had been made using an online final salary pension loss calculator.

20. However, it was not open to the Claimant to seek to reopen the approach that we had taken to valuation of pension loss. The EAT plainly understood the actual approach that the Tribunal had taken. It had our remedy decision before it and it describes in its own decision at paragraph 53 the approach we had taken. It describes that as being effectively the simplified loss approach, and it said in paragraph 54 that we had taken an appropriate approach that we were entitled to take in this case. The EAT has not said in its decision that the actual approach that we took was wrong or that we must apply some different approach (whether one that might also be described as a simplified approach or not).

21. In short, the Tribunal had made a reasoned decision about the methodology it would apply to pension loss valuation in this case, and that had not been overturned or interfered with by the EAT – in fact it had been upheld. There was no proper basis on which this could be further revisited now.

22. The second point that Mr Simret sought to have us reopen, was our previous decision that the cut-off date for the period of lost remuneration covered by the compensatory award, should be the last day of the 28-day period to which we have previously referred. Mr Simret sought to have us revisit that cut-off date and extend it. Specifically, he postulated that, if the Respondent had only taken the decision to terminate on the last day of that period, then it would, in order to act lawfully at that point, have had to give, or compensate the Claimant, in respect of a further two months' notice period.

23. However, once again, it was not open to him to seek to have us reopen our decision on the cut-off date. There had been an appeal in respect of the cut-off date, but that point of appeal had been unsuccessful. The EAT's reasons included an acceptance that the Tribunal had understood, and applied, the principle that for these purposes any putative termination must be lawful. Had Mr Simret wanted to argue before the EAT that the Tribunal had erred in law in not adopting the particular approach that he now sought to advocate, he could have done so. If the EAT was thought itself to have erred, permission could have been sought to pursue the matter to the Court of Appeal.

24. But where matters stood was that there had been no successful challenge to the cut-off date on appeal, and we could not revisit it. We add that this would not have been an appropriate issue for an application for reconsideration either (nor would the pension loss calculation point), and in any event, any such application would have been long out of time.

25. We turn then to our consideration of each of the remitted points in turn.

<u>Interaction of Wrongful Dismissal and Compensatory Awards and ACAS Code Uplift</u>

26. On reconsideration of the point at this remedy hearing, we accepted that the Tribunal had not sufficiently considered the question of whether the ACAS Code uplift should apply to the whole period of lost remuneration starting from the effective date of termination, and the interaction of this with the approach taken to the overlap of the wrongful dismissal and compensatory awards. We therefore considered, and reasoned out, the matter afresh.

27. The thing that caused us to consider an ACAS Code uplift to be appropriate was our finding (in the liability decision) that the manager who dealt with the decision on the Claimant's grievance was not sufficiently independent, and that this was a breach of the ACAS Code (see paragraph 65 of the original remedy decision). That finding about the handling of the grievance was part of what had led us to the conclusion that there had been a fundamental breach of contract by the Respondent, and that the Claimant had been constructively dismissed. That had not only supported the successful claim of unfair dismissal. The finding that the Respondent had been in fundamental breach of contract also led to the success of the wrongful dismissal, or notice money, claim.

28. So, in principle, the same findings that had led us, in our original remedy decision to uplift the unfair dismissal compensatory award, were also pertinent to the wrongful dismissal award as well. Furthermore, we accepted that it was a relevant consideration, revisiting the matter now, that, had we chosen to apply the compensatory award to the whole of the period starting from the effective date of termination, then the ACAS Code uplift would have applied to the element of compensation relating to the initial notice period through that route as well. On reconsideration we could see no reason why, through one route or another, the compensation in respect of that initial period should not be so enhanced, which could most easily be achieved now by revisiting and adjusting the wrongful dismissal award.

29. Ms Robinson submitted that to do this would give the Claimant something of a windfall, because then the wrongful dismissal damages would be enhanced beyond the appropriate amount of notice money which she was in principle contractually entitled to receive. But it can always be said of an ACAS Code uplift that it has the effect, in respect of *any* award to which it applies, that the final amount will be more than it otherwise would be, in accordance with the principles that would otherwise apply to it. But that is because Parliament has decreed that, where section 207 of the 1992 Act applies, relevant awards may, and should, depending on the Tribunal's findings, be enhanced in precisely that way.

30. Further, Parliament has specifically contemplated that a wrongful dismissal award can, indeed, be the subject of an ACAS Code uplift, because the 1994 Order, which gives the Tribunal jurisdiction to entertain claims for damages for breach of the contract of employment arising or outstanding on termination (which is the jurisdiction under which wrongful dismissal awards are made), is among those jurisdictions listed in schedule A2 of the 1992 Act.

31. Ms Robinson argued a further point however. She said that when the Tribunal had, in the original remedy decision, decided upon the 20% uplift, it had applied it only to the actual amount of the compensatory award that had been made on the last occasion. But, in deciding what percentage uplift to make, the Tribunal could properly take into account the underlying actual amount of the award or awards that might be susceptible to uplift, and hence the actual amount of additional compensation that a given uplift would deliver. She therefore invited us to take a view that the actual amount of uplift delivered by our remedy decision was, in absolute terms, sufficient, and to go no further.

32. There is authority, dating from the period when statutory disciplinary and grievance procedures applied, between 2004 and 2009, to the effect that, under that regime, it was not an error of law, when deciding what percentage uplift to apply, for the Tribunal to have regard to the underlying amounts involved and the actual amount of additional compensation that any particular percentage uplift would therefore deliver. We considered that it would not be impermissible to have regard to such considerations under the present uplift regime either. However, in this case we did not think that the underlying amounts involved were so substantial in absolute size that it would be unjust to the Respondent to uplift the wrongful dismissal award by 20%, in addition to the compensatory award.

33. We therefore decided on reconsideration on remission to address this matter by maintaining the approach of the compensatory award covering the period from the end of the notice period, but then to enhance the wrongful dismissal award that we had previously made by 20%. So, increasing our previous award of £3011.34 by 20%, we substituted an award of damages for wrongful dismissal in the higher amount of £3613.61.

<u>Impact of Further Accrual of Holiday Entitlement on Compensatory Award</u>

34. We turn to the adjustment to the compensatory award in respect of further holiday entitlement that would have accrued, but not been used, during the putative 28-week sickness period.

35. It was agreed that during that period 15.08 days' holiday entitlement would have accrued. However, there was a dispute about whether we should value those 15.08 days by reference to a day's gross pay or a day's net pay. Mr Simret argued that we should value it by reference to a day's gross pay, because awards of holiday pay are, and should be, calculated gross – and he referred to authority to that effect. Indeed, he pointed out, the separate holiday pay award that we had made in this very case, had (correctly) been made gross.

36. However, we agreed with Ms Robinson that that was not the correct approach to this particular exercise. The reason is that we were not here making an award of holiday pay. What we were doing was making an adjustment to a *compensatory award* in order to reflect the loss suffered by the Claimant in this regard. The Claimant had not actually remained in the employment of the Respondent off sick for 28 weeks, and accruing holiday pay which we were now awarding. What we were awarding was compensation to reflect a loss suffered by reference to a scenario that did not actually occur. The loss suffered by the Claimant is measured by reference to the net amount that she would have enjoyed, not the gross amount which would have been payable by the Respondent. That is the principle that applies to the element of a compensatory award relating to lost actual pay, and it equally applies to the element, here, relating to lost holiday pay.

37. Further if we added the net amount of lost holiday pay to the compensatory award in this case, the Claimant would then be fully compensated in that regard because the compensatory award overall was not of such a size as to attract liability to tax in itself. There would be no need for grossing up in this case.

38. Mr Simret also sought to argue that we should add a further amount, on the footing that, during the 28 weeks, two Bank holidays would have fallen, and that the Claimant would or should have been paid at full pay for those two Bank holidays. He submitted that we should therefore add a further amount, being the difference between two days at full pay and two days at statutory sick pay. We declined to do that for two reasons.

39. Firstly, this, again, was a new and distinct argument, which did not fall within our remit from the EAT. Secondly, even if it could have been properly considered, we would not have been persuaded by it. There are, theoretically, two possibilities. One possibility is that the Claimant is to be treated as having not taken any holiday at all during the SSP period, in which case she receives additional compensation, as we have calculated it, for the full 15.08 days accrued and unused. Alternatively, if she had (for some reason, though sick) taken those two days as paid holiday, then they would have been paid, but the same two days would then have reduced the number of days' holiday entitlement that were accrued *but unused*, and the amount of payment in lieu on termination would have been correspondingly less.

But, in any event, we repeat, this was not an aspect that we could revisit, at this hearing.

40. Accordingly, we applied the net rate, which was £67 per day, and multiplied it by 15.08, which produced a figure of £1010.36. This however is an enhancement of the *underlying* compensatory award, which was itself increased by 20%, because of the ACAS Code uplift. We considered that that uplift increase should apply to this element of the award as well. Once again that is because in principle this compensatory award fell to be enhanced by 20%, and because we did not think that the absolute figures were so large as to call for any tempering of that uplift. The extra amount that we needed to add to the compensation originally awarded was therefore £1010.36 plus 20% that is, £1212.43.

Pension Contributions During 28-Week period

41. Finally, there was the issue of revisiting the question of whether the Respondent would have continued to pay pension contributions at the rate of £54 per month during the 28-week sickness period.

42. We accepted that the Tribunal had not, in reaching its original remedy decision, specifically considered, when deciding this particular point, the evidence that the Respondent had made such contributions during a previous period of sickness during the Claimant's actual employment. So, we revisited and reconsidered this question, but this time taking that into account.

43. Ms Robinson submitted that upon reconsideration we should still conclude that the pension payment would not have been made. No useful insight could be gained, she said, from what had happened during a very short period of sickness during employment, as to what might have happened during a long period of sickness absence such as this, following an operation. Mr Simret invited us on reconsideration to infer that such a payment *would* have been made.

44. When the Tribunal had looked at this matter previously, it had found it to be finely balanced, but had concluded that the evidence was not sufficient to support an inference in the Claimant's favour. On this occasion, looking at the picture in the round, we concluded that the balance now tipped the other way.

45. It is true that we had had no specific evidence from Mr Nazarali to the effect that such a payment would have been made; but nor had we had any evidence specifically from him that it would not have been made. It was simply not picked up or addressed in his evidence. However, the Claimant had been in continuous employment since 2009 and the Tribunal had previously been prepared to accept that in certain respects the Respondent would have treated her more generously than it was absolutely obliged to – as reflected in our finding that it would have continued to pay her full pay until she went in to hospital at the end of December. We also did attach some weight to the evidence that the Respondent had previously continued to make pension contributions during a period of sickness absence. Further, the amount involved would, relatively speaking, have been at a very small cost to the Respondent of just £54 a month, and, once it was started, we did not think they would have stopped it later during the 28-week period.

46. Revisiting the whole picture in the round, taking account of all relevant matters, and just on balance, we were prepared to infer that this relatively small additional payment of £54 per month would have been maintained by the Respondent during the 28-week period.

47. We calculated this in the following way. £54 per month for a whole year would be £648. Multiplying by 28 and dividing by 52, to prorate for the correct number of weeks, gave a figure of £348.92. We then enhanced that by ACAS Code uplift of 20%. Our reasoning was the same as in respect of the previous item. This formed part of the compensatory award, which we had decided should be uplifted, and we did not think that the absolute sums were so great as to cause us to refrain from applying the multiplier of 20% to this extra element. So we enhanced the compensatory award in this regard by £348.92 plus, that is, £418.70.

Overall Adjustment of the Compensatory Award

48. Drawing the threads together, we started with an original compensatory award of £8868.06. There were, as a result of our decisions, two amounts to add to it: £1212.43 and £418.70. Adding those amounts produced a revised amount of the compensatory award of £10,499.19, so, upon reconsideration we made a revised, substituted, compensatory award of that amount.

Employment Judge Auerbach
4 September 2017