EMPLOYMENT TRIBUNALS

Claimant: Mr E Bell

Respondent: Cordant People Limited (formerly Prime Time Recruitment Limited)

HELD AT: Manchester **ON:** 6 September 2017 & 13 October 2017 (in chambers)

BEFORE: Employment Judge Slater
Mr J Ostrowski
Ms E Cadbury

REPRESENTATION:

Claimant: Mr Corderey, counsel
Respondent: Ms S Cowan, counsel

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

1. The respondent is ordered to pay to the claimant compensation for unfair dismissal of £283,472.03, including a 25% uplift to the compensatory award for failure to comply with a relevant ACAS Code of Practice.

2. The Recoupment Regulations apply to this award. The grand total of the award is £283,472.03. The prescribed element is £55,620.20. The period of the prescribed element is 30 March 2016 to 13 October 2017. The excess of the grand total over the prescribed element is £227,851.83. The annex to this judgment explains the operation of the Recoupment Regulations.

3. The respondent is ordered to pay to the claimant compensation of £7000 for injury to feelings for harassment related to race plus interest of £1353.33.

REASONS

Issues

1. In a reserved judgment sent to the parties on 14 July 2017, the tribunal found complaints of unfair dismissal because of making protected disclosures and harassment related to race to be well founded.

2. This was a remedy hearing to determine what compensation should be awarded for these complaints.

3. The claimant's representative clarified that the claimant was not seeking to argue that he should be awarded compensation for loss due to damage to his reputation.

4. The claimant did not pursue a claim for compensation relating to shares which had been included in his schedule of loss.

Facts

5. These findings should be read in conjunction with the findings of fact made in the decision on liability.

6. The claimant's net monthly pay with the respondent was agreed to be £5,347.37 (giving a weekly equivalent of £1234.01).

7. It was agreed that the claimant had life assurance cover with the respondent and that the replacement cost of this was £257.52 per annum.

8. It was agreed that the claimant had benefited from long term illness insurance with the respondent and the replacement cost of this was £1,190.76 per annum.

9. There was no agreement on pension contributions, private medical insurance or bonus.

10. The respondent did not agree the claimant's estimate of £400 for job seeking expenses. The claimant did not provide any documentary evidence to support the claim for expenses.

11. The claimant could, on request, have benefited from 7% employer pension contributions from the end of July 2015 under the improved terms of the contract signed in June 2015 which took effect on 1 July 2015. He did not make a request before the end of his employment so was receiving contributions of 1% of earnings between the lower and upper earnings limits i.e. £30.47 per month as at the date of termination. We accept that the claimant had been intending to take financial advice on the best way to fund his pension before deciding what to do but had not found time to do this before he was dismissed. We find that it is more likely than not that

the claimant would, after taking advice, have taken up the opportunity to receive 7% pension contributions had he remained in the employment of the respondent. We find that it is more likely than not that he would have been receiving pension contributions at this level by the effective date of termination.

12. The claimant could have had the benefit of private medical insurance. He had not taken this up before his dismissal although he could have received this benefit under the terms of his original contract with effect from 6 months from the start of his employment i.e. from 2 December 2014. Even if the claimant had, as he said, made some enquiries about this, the failure to have requested cover over such a lengthy period leads us to find, on a balance of probabilities, that he would not have taken up the cover had he remained in employment.

13. Bonus under the claimant's contract was discretionary. However, a scheme had been drawn up under which the claimant could receive 50% of salary for each quarter where targets were achieved. The claimant did not achieve target during his employment. As noted in our previous decision, we did not find the respondent's accounts to be reliable. In paragraph 60, we noted that the respondent conceded that the Cordant Dynamic business had not been credited with around £92,000 worth of internal sales which would have generated around £30,000 profit split between July and August 2015. Mr Morrison gave further evidence at the remedy hearing suggesting that these errors may have continued over a longer period. The claimant has submitted that the figures produced by the respondent should be adjusted by adding in £15,000 profit per month on an ongoing basis. He has submitted that he would have achieved bonus if there had not been errors in the accounts and having regard to leads and pipeline. We do not consider there is sufficient evidence to find, on a balance of probabilities, that the accounts produced by the respondent were £15,000 adrift on profit on an ongoing basis. We are unable to find that it was more likely than not that the claimant would have achieved bonus by March 2016, if he had not been given notice. If he had remained employed, we consider there was a real possibility that he would have achieved bonus at some point in the future given that the trend was improving prior to the claimant being given notice. We return to the assessment of the chances of this happening in our conclusions.

14. The claimant's employment with the respondent ended on 28 March 2016, after a 6 months' period of garden leave.

15. We accept the claimant's evidence as to the steps taken by him to obtain new employment. Immediately the claimant was given notice, he started seeking a new role. He updated his CV. He placed his details on many recruitment websites. He initiated job alerts on these websites and, as at 26 August 2017, he had received 699 job alerts, some with multiple roles. He ran searches daily and weekly to find roles and registered with man recruitment for recruitment companies. He sent his CV to most of the recruitment companies in the North West that he knew, including companies outside of the IT and technology niche. The claimant produced in evidence a very large amount of documentation illustrating much, but not all, of his search for work.

16. As well as seeking work in the area in which he has most experience, technology recruitment, the claimant also applied for a wider range of roles including a delivery driver, a manager with Aldi and a call centre role.

17. The claimant's job hunt included many jobs at a lower salary than his salary with the respondent. The average salary for the roles he applied for was around £40,000 to £50,000 which was less than half his remuneration with the respondent.

18. In April 2016, the claimant applied for job seekers' allowance. He was required to complete and provide details of his job search when he attended meetings to sign for benefits. The claimant always satisfied the requirements of the job centre and had so much information to provide on his job search that the official form did not have sufficient space and the claimant provided his own spreadsheets to show all his applications.

19. The claimant worked for a company, TXM, from late October to late December 2016 to help them develop an office in the North West. His salary was £45,000 per annum. At the time he was approached by TXM, he was in discussions with Talent International for a much better role. Nothing was guaranteed at that stage. He explained the situation to TXM and they decided that he would work for TXM to help them grow their business and, if no Talent International role emerged, he would become a contracted employee. He was subsequently offered a post with Talent International and left to start work with them in January 2017. The role the claimant was eventually offered was a more junior role than had been originally discussed. The claimant attributes this to the reference he was given by Mr Barnes. The claimant had to travel frequently to Birmingham from Manchester in the role with Talent International. He negotiated a salary of £50,000 per annum plus guaranteed bonus of £2500 per month for 6 months. The claimant's contract was terminated at the end of April 2017, during his probationary period. We find, having considered the email exchange between the claimant and Mr Butterworth on 28 April 2017, that this was due to the claimant's sales not meeting Talent International's expectations.

20. The claimant recommenced his job search after losing his job with Talent International. As at the date of his witness statement, he had applied for over 110 roles since that time but had, as at the date of the remedy hearing, not been successful in his search for alternative employment.

21. At the time of the remedy hearing, the claimant told us that he had four potential interviews coming up in the following week.

22. The claimant believes that his ability to obtain comparable employment in the recruitment industry has been severely hampered by the manner in which he was dismissed.

23. The claimant established his own company, Dynamic Professionals, on 9 March 2016, in an attempt to mitigate his loss. Unfortunately, the claimant has not, as yet, obtained any income from this business. The claimant did not provide us with details of the expenses he incurred in setting up this business.

24. The claimant's net earnings since his dismissal by the respondent are £18,840.96 in total.

25. Mr Steers produced in evidence details of some recruitment roles he found to be available from an internet search conducted on 23 August 2017. He expressed

the understanding that the claimant had not applied for any of these roles. We accepted the evidence of the claimant that he had applied for all the roles, other than those based in London. The claimant does not feel able to take a job based in London because of his childcare responsibilities.

26. We found, in our decision on liability, that the Cordant Dynamic brand ceased trading in June 2016. Other "incubator" businesses were closed or sold to their Managing Directors or investors at varying times, the last sale being in February 2017.

27. Joanne Till, Managing Director of Cordant Procurement, was introduced, with the assistance of Cordant and Sid Barnes to an investor who purchased her business. She transferred, under operation of TUPE, to the new employer on the same personal package. The business carried as before, but under a new name. Mark Sheldon, Managing Director of the Savant business, purchased the Savant business. Grays Search and Selection also left the group.

28. Mr Steers accepted that it was a possibility that, if the claimant had not been dismissed, they would have explored the possibility of the claimant, with the assistance of investors, purchasing the Cordant Dynamics business.

29. We accept that the claimant, if he had been given the opportunity to purchase the Cordant Dynamics business for a reasonable amount, would either have taken on the business alone or found investors to allow him to continue running the business.

30. Given that the Cordant Dynamics business was in competition with Staffgroup, which was retained in the Cordant Group, we do not consider that there was, in fact, any realistic possibility that the Cordant Dynamics business would have been sold. We return to this in our conclusions.

31. The claimant asserts that Mr Ban Murray drove the Cordant Dynamics business into the ground from October 2015 at the instigation of Mr Barnes. Whilst this is a possible explanation for what happened, it is not the only possible explanation. The claimant has not satisfied us, on a balance of probabilities, that this was the explanation.

32. Mr Morrison's opinion is that Cordant Dynamics was dismantled so Staffgroup would have no competition.

33. Whether due to a deliberate strategy or lack of competence, we are satisfied, on the evidence, that Peter Ban Murray ran down the business, losing accounts and failing to follow up leads which may have brought in new business, in particular leads passed on by those attending the Microsoft Dynamics annual conference in Barcelona in November 2015. Any increased profitability after the claimant's departure appears to be largely, if not wholly, attributable to reducing numbers of staff and, therefore, lower salary costs.

34. We found in our previous decision that the accounts produced for the business were not wholly reliable. A further example causing us to doubt the accuracy of the respondent's accounts was the reduction to 0% in the final month of

the “chargeable temp margin” which had previously averaged 22%. The respondent was not able to provide a satisfactory explanation for this change. It seems unlikely that the accounts are accurate in showing only £408 profit on £63,090 worth of contractor time billed to clients.

35. According to the evidence given by Mr Steers, Peter Ban Murray was given notice on 7 May 2016. The last payment was made to him on 30 June 2016. The claimant has queried that Mr Ban Murray was given only one month’s notice given the size of payment in the accounts. It is not necessary for us to make a finding of fact about this.

36. At the least, ongoing dynamics contracts arranged by Cordant Dynamics and still bringing in revenue were transferred to Cordant Technical and Engineering after June 2016, when the Cordant Dynamics brand stopped trading. There is an issue as to whether the extent of dynamics business done after 30 June 2016 was greater than this.

37. The respondent asserted at the remedy hearing that the only dynamics business done by the respondent, through the Cordant Technical and Engineering brand, was the “run off” of contracts which had been entered into before June 2016. Mr Steers was the only witness to give evidence for the respondent at the remedy hearing. There was nothing in his witness statement about dynamics business done by the respondent or the group after June 2016. Mr Steers gave oral evidence, which he said was based on what he had been told by Sean Simmons, Managing Director of Cordant Technical and Engineering, in a telephone call over the lunch break, that there were six contracts still ongoing after June 2016.

38. On 14 September 2016, Cordant Group plc put out an advert on the internet for a recruitment consultant from the IT sector to join the Cordant Technical and Engineering Manchester team. The advert included the statement: “We are now looking to build a Microsoft Dynamics contacts [sic] business from within our T & E contracts hub.” The salary range was given as £22,000 to £32,000 per annum plus bonus structure. On the face of it, the advert indicates an intention to expand the dynamics business beyond simply the “run off” of contracts left by the closing of the Cordant Dynamics business. Mr Steers did not deal with this advert in his witness statement and told the tribunal in oral evidence that he had not had his attention drawn to this advert before he wrote his statement. Again, on the basis of a telephone call with Sean Simmons over the lunch break, Mr Steers told the tribunal that Mr Simmons had told him that he had explored the possibility of bringing in one consultant or a desk operating the dynamics business but they never appointed anyone following the advert. Mr Steers said that Mr Simmons had told him that the Group Chief Executive Officer had given an express instruction that Cordant Technical and Engineering could not do additional IT business since this would breach a commitment that Cordant would need to give to a purchaser of Staffgroup not to do IT recruitment elsewhere in the group, other than the 6 contractors inherited from Cordant Dynamics. Mr Steers said that, at the time of the advert, the Group was in discussion with potential purchasers of Staffgroup’s business. In the end, the Staffgroup business was not sold and, as noted in our previous decision, remains a profitable part of the Cordant Group.

39. In preparation for this remedy hearing scheduled for 6 September 2017, the claimant made a request for specific disclosure by email on 23 August 2017 at 8.53 a.m. This request included a request for:

> "Details of all contractors who were via Cordant dynamic who were being billed for/running as from 28th September 2015 to include details
>
> Full details of all contractors after September 2015 who were signed by cordant dynamics including those being used by any part of the cordant group) and also those who were later on transferred to any other part of the business/ or continued to work with any part of the business after 28th September 2015."

The claimant included a non-exhaustive list of contractors about whom he was asking for details.

40. The respondent's in-house representative, Ms Vittorio, replied four minutes later by email as follows:

> "Your request for further information is refused. This is not relevant to your claim for loss. In any event this information cannot be obtained in such a short period of time."

41. It appears to the tribunal that, at the least, information about any dynamics contractors placed by a Cordant business after June 2016 would be relevant to the issue of remedy; as to whether there could have been any other position in the Group for the claimant after Cordant Dynamics ceased trading. The tribunal considers it unlikely that the respondent gave proper consideration to the request and to its obligations in relation to disclosure in the four minutes from receipt of the claimant's request until the respondent's response. The respondent's statement that the information requested by the claimant could not be obtained before the remedy hearing must be cast into doubt by the apparent ability of Mr Steers to find out at least some relevant information during the course of a lunchbreak.

42. The tribunal finds it surprising, in the light of this request from the claimant, and in the light of the existence of the advert put out on 14 September 2016, that the respondent did not come to this remedy hearing with witness evidence and any documents relating to any dynamics business done within the respondent group after June 2016. The tribunal considers the failure of the respondent to bring evidence to the remedy hearing casts doubt on the picture the respondent seeks to paint of the respondent group doing little, if any, dynamics work after the closure of the Cordant Dynamics brand in June 2016.

43. Rosie O'Brien, the office manager for the Cordant Dynamics business, transferred to Cordant Technical and Engineering in June 2016, after the claimant left.

44. Chris Merchant was offered work with Staffgroup. He understood that this was to do the same work he had done with Cordant Dynamics but in a different location. Staffgroup operates from London.

45. Mr Merchant gave evidence, which we accept, that he contacted contractors who had been placed by Cordant Dynamics. At least one of these, GB, had her contract extended in July 2016, after Cordant Dynamics had ceased trading. The contractor thought the recruiter who dealt with her was working for Cordant Technical and Engineering.

46. Mr Steers was unable to help the tribunal with any information as to what dynamics work was done by Staffgroup.

47. The claimant gave evidence that he was not prepared to work in London, due to his childcare responsibilities.

48. The claimant was given notice of termination and put on garden leave at a meeting with Mr Barnes and Mr Steers on 28 September 2015. The claimant was not told before the meeting what it was to be about; he had thought it might be to discuss the queries he had raised in relation to the accounts. The claimant was not given anything in writing before the meeting. He was not given copies of any evidence Mr Barnes intended to rely on to support the allegations of poor performance, either before or at the meeting. He was not advised of his right to be accompanied at the meeting. As we found in our decision on liability, this was a short meeting. The claimant was told he was being dismissed for reasons later recorded by Mr Steers. These reasons were that the business for which the claimant was responsible was underperforming; that the business was continually failing to deliver against the forecasts the claimant was giving; and that staff attrition was extremely high. The claimant asked to discuss the reasons and was not allowed to do so. The claimant was not advised of his right of appeal against dismissal.

49. The claimant gave evidence at the remedy hearing about the distress caused to him by his dismissal and the financial difficulties he suffered as a result of his dismissal. Any distress suffered by the claimant because of his dismissal and the resultant financial difficulties is not relevant to our decision on remedy. No damages can be awarded for distress suffered because of unfair dismissal. The injury to feelings award we are to consider relates to the complaints of harassment which we found to be well founded. We must, therefore, focus on what injury to feelings has been suffered as a result of those acts of harassment, not injury suffered because of dismissal.

50. The complaints of harassment related to race which we found to be well founded related to the following conduct:

50.1. Mr Barnes making comments about the claimant's "strong and thick accent";

50.2. Mr Barnes saying that the claimant dressed like a gypsy or a "Gypo";

50.3. Mr Barnes, at the meeting on 2 September 2015, saying that the claimant looked like a tinker and asked him "where did you leave your horse and cart";

50.4. Mr Barnes calling the claimant "Pikey" and/or "Paddy"; and

50.5. Mr Barnes, at dinner on 2 September 2015, continuing making similar offensive comments related to the claimant's race.

51. At paragraph 16 of our findings of fact in the reasons for our decision on liability, we accepted that the claimant had been offended by the comment made by Mr Barnes about the claimant being able to upgrade to a new horse and cart under the new company car policy. We find that the claimant was offended by the incidents which we held to be harassment related to race, although the claimant did not make his offence apparent at the time. As we found in paragraph 16 of the reasons for our decision on liability, we considered it entirely consistent with the way the claimant conducted himself in these tribunal proceedings that he would not have made his upset evident at the time. The claimant had a view, rightly or wrongly, that saying he was offended by Mr Barnes' behaviour and asking him to stop may have risked his job "because that's the real world". At paragraph 15 of the reasons for our decision on liability, we recorded the fact that, following a meeting on 27 April 2015, the claimant had sent an email to people who had been present at the time, attaching a picture of someone driving a horse and cart and writing "Sid and Steven have put me on the new Irish only top end company transport scheme, or at least that's what Sid said it was." At paragraph 16, we accepted the claimant's evidence that he had sent the email to put Mr Barnes' pattern of racism against him into the open. He expected Mr Barnes to take the hint and stop his offensive behaviour. At paragraph 168 of our conclusions, we referred to this as an attempt to "call out" Mr Barnes' racist comments and get him to stop. We reject the respondent's submission that to try to "call out" Mr Barnes' comments shows an element of audacity which is inconsistent with feelings of hurt and this undermines the suggestion of hurt. It may be that, as the respondent submits, many people who were upset by such comments would not choose to respond in such a public and noticeable manner as the claimant did. However, we are considering the injury suffered by the claimant. We found, in our previous decision, for the reasons we gave, that the claimant was offended by Mr Barnes' comments. The claimant is clearly a resilient character and able to control the way he reacts to offensive behaviour. This does not mean, however, that he did not suffer injury to his feelings because of Mr Barnes' behaviour. The injury did not affect the claimant's ability to carry on working with Mr Barnes, which suggests to us that the injury was not very severe. The claimant has not given any evidence as to any impact the offence suffered had on his life outside work.

Submissions

52. The parties provided written submissions and comments on the other party's submissions. We do not seek to summarise the submissions but address the principal arguments in our conclusions.

Law

53. Section 118 Employment Rights Act 1996 (ERA) provides that an award of compensation for unfair dismissal shall consist of a basic award and a compensatory award calculated in accordance with the relevant provisions.

54. Section 119 ERA sets out the statutory formula for calculation of a basic award based on age, length of service and weekly pay, which is subject to the maximum amount which applied at the effective date of termination.

55. Section 123 ERA provides:

> "(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
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> (2) The loss referred to in subsection (1) shall be taken to include –
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> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
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> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
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> (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
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> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

54. The compensatory award for unfair dismissal because of making protected disclosures is not subject to a cap.

55. The onus of showing a failure to mitigate lies on the respondent: *Fyfe v Scientific Furnishings Ltd [1989] ICR 648 EAT.*

56. In accordance with principles set out by the House of Lords in *Polkey v AE Dayton Services Limited [1988] ICR 142,* a tribunal may reduce a compensatory award for unfair dismissal by up to 100% if there is evidence to suggest the claimant might have been fairly dismissed, either at the time the claimant was dismissed or at some later date.

57. The EAT in *Software 2000 Limited v Andrews [2007[ICR 825* said at paragraph 53 in relation to applying the *Polkey* principle, "The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It summarised the principles relating to the assessment of compensation as follows;

> *"Summary.*
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> 54. The following principles emerge from these cases:
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> (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for

> how long the employee would have been employed but for the dismissal.
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> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

58. In *Virgin Media Ltd v Seddington [2009] All ER (D) 23,* the EAT concluded that the burden is on the employer to raise the argument that there was no suitable alternative employment that the employee could or would have taken. But if it raises a prima facie case, it is then for the employee to say what job, or kind of job, he believes was available and to give evidence to the effect that he would have taken such a job.

59. Section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992 provides that: "If, in any proceedings to which this section applies, it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent." Unfair dismissal is included in the list of proceedings to which section 207A(2) applies. Section 124A Employment Rights Act 1996 provides that the uplift applies to the compensatory award only.

60. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded for a breach of the Equality Act in relation to work is "the amount which could be awarded by a county court…under section 119". Section 119 provides that the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort and section 119(4) provides: "an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)". The aim of damages in tort is to put the claimant in the position they would have been in, had the act of discrimination not occurred. Compensation (with the possible exception of exemplary damages which may be relevant in rare cases) is to compensate for loss caused by the act of discrimination. There is no limit on compensation for discrimination.

61. In relation to compensation for injury to feeling, we have regard to the guidelines in *Vento v Chief Constable of West Yorkshire Police (no.2) [2003] IRLR 102.* We note in particular the guidance that awards are compensatory and not punitive. *Vento* sets out the bands that we must consider. These were amended by the case of *Da'Bell v NSPCC [2010] IRLR 19*. The Court of Appeal in *De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879* has held that the 10% uplift provided for in *Simmons v Castle [2012] EWCA Civ 1288,* should apply to employment tribunal awards of compensation for injury to feelings. Taking account of the amendments made in *Da'Bell*, and the 10% uplift, the top band would be £19,800

to £27,500. This is to be said for the most serious cases such as where there is a lengthy campaign of discriminatory harassment. The middle band would be £6,600 to £19,800, described as used for serious cases which do not merit an award in the highest band. The lower band would be between £550 and £6,600. This is for less serious cases such as where the act of discrimination is an isolated or one off occurrence. The Employment Appeal Tribunal has also stated that bands and awards for injury to feelings can be adjusted by individual employment tribunals where there is cogent evidence of the rate of change in the value of money: *AA Solicitors Ltd v Majid [2016] UKEAT/0217/15* and *Bullimore v Pothecary Witham Weld [2011] IRLR 18.* The bands have not been uprated for changes in the value of money since *Da'Bell* in 2009. The Presidents of the employment tribunals in England and Wales and Scotland have issued presidential guidance suggesting increases to the bands to take account of inflation. The revised bands apply in respect of claims presented on or after 11 September 2017. Paragraph 11 of the guidance provides a formula which may be applied by tribunals to uprate the bands for inflation in respect of claims presented before 11 September 2017.

62. Interest may be awarded on awards made in discrimination cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The interest rate for claims presented on or after 29 July 2013 is 8%.

Conclusions

Unfair dismissal – the basic award

63. The claimant is entitled to be paid a basic award, calculated according to the statutory formula based on his age, length of service and weekly pay (subject to a cap of £475 per week, being the maximum week's pay applicable at his effective date of termination). The claimant had completed one year's service at age 41 or above. The calculation is, therefore, 1 x 1.5 x 475 = £712.50.

Unfair dismissal – the compensatory award

64. The respondent argued that the claimant would have been fairly dismissed by 30 June 2016, when the Cordant Dynamic business ceased trading. They argued, therefore, that any losses were restricted to the period up until 30 June 2016. They also argued that the claimant had not taken reasonable steps to mitigate his loss.

65. The claimant argued that his employment with the respondent or in the respondent group would have continued beyond 30 June 2016. His primary argument was that, under his leadership, the Cordant Dynamic business would have continued to trade long past June 2016 and into the foreseeable future as a profitable business. Alternatively, he argued that he would have been given suitable alternative employment within the Cordant Group. A further alternative argument was that he would have been permitted to purchase the Cordant Dynamics business alone or with the assistance of investors and would have remained employed in that business on the same terms and conditions of employment for the foreseeable future. He argued that he had taken more than reasonable steps to mitigate his loss.

66. Most of the elements of the remuneration package to be included in the remedy calculation were agreed between the parties. Whether pension loss should be calculated at the rate of 7% of earnings or the lower amount the claimant was actually receiving prior to termination was in issue. Whether the claimant should receive compensation for the benefit of private medical insurance was also in issue, since the claimant had not made an application to receive this prior to termination. Whether the claimant would have been awarded any bonus if he had remained employed is also in issue.

67. There was also an issue to be determined as to whether the claimant could claim job hunting expenses and expenses of setting up in business as part of loss attributable to the unfair dismissal.

68. Whether there should be an uplift to the compensatory award for failure to comply with an applicable ACAS Code of Practice was also in issue.

The length of time the claimant would have remained employed by the respondent or the Cordant Group if he had not been unfairly dismissed

69. This is necessarily a speculative matter. However, we consider there is material which enables us to estimate the chances of the claimant having remained working in the Cordant Dynamics business or within the Cordant Group.

70. We deal first with the possibility that the Cordant Dynamics business would have been sold either to the claimant or to investors and the claimant would have remained employed as its Managing Director. A number of the other incubator businesses were sold off, an example being Jo Till's business. Mr Steers accepted in giving evidence at this remedy hearing that it was a possibility that, if the claimant had not been dismissed, they would have explored the possibility of the claimant, with the assistance of investors, purchasing the Cordant Dynamics business. We conclude that, had the claimant remained in charge and Mr Ban Murray not taken over, it is more likely than not that the Cordant Dynamics business would still have been a viable operation by the end of June 2016. However, given the competition between the Cordant Dynamics business and the Staffgroup business detailed in our decision on liability, we do not consider that was any real possibility that the respondent would have sold the Cordant Dynamics business, thereby assisting a competing business to set up. Competition within the Group would have been acceptable, since all profits from the competing businesses would remain within the Group. Competition from outside the Group would be a completely different matter. There has been no suggestion that the incubator businesses which were sold off then went into competition with any business still within the Group. The Cordant Dynamics business would have been in competition with Staffgroup. It appears to us inconceivable that the Cordant Group would help to set up a competitor to one of its remaining businesses. Mr Steers gave evidence that Cordant Technical and Engineering would not have been allowed to compete in the dynamics business if Staffgroup was sold off, under the terms of a sale agreement. This leads us to conclude that, if, at the relevant time, the Cordant Group had been considering selling Staffgroup, it would not have sold off the Cordant Dynamics business to a separate buyer because this would have affected their ability to sell Staffgroup.

71. We now deal with the possibility that the claimant would have remained within the Cordant Group. We conclude that, if the claimant had remained employed, it would have been to continue working in the field of dynamics recruitment, which was the claimant's area of expertise. We consider the only real possibilities are that he could have continued to head up the Cordant Dynamics business if this continued to trade after June 2016 or that he could have moved to a role within Staffgroup or Cordant Technical and Engineering, dealing with dynamics recruitment. If he continued to head up the Cordant Dynamics business, we conclude he would have retained the same remuneration package. If he moved into a role with one of the other businesses, there would be a lower chance of him retaining the same package but we conclude he would have been willing to accept a reduction in the package to enable him to remain in employment.

72. We conclude that, had the claimant remained in charge of the Cordant Dynamics business, it would have still been a viable business at the end of June 2016. As we noted in our decision on liability at paragraph 153, the trend appeared to be of improvement rather than getting worse. If leads for new business had been followed up, rather than disregarded, as they were under Mr Ban Murray's regime, we consider it more likely than not that the trend for improvement would have continued. The respondent would not have had any reason, based on trading performance, therefore, to cease trading at the end of June 2016. We do not consider there would have been any sensible business reason simply to close a business that was likely to become profitable, if it was not already, at the end of June 2016. Given the failure of the respondent to provide satisfactory evidence as to what dynamics recruitment work was carried on in the Group after June 2016, the respondent has not satisfied us that the only work previously done by Cordant Dynamics which carried on after June 2016 was the "run off" of six contracts.

73. It is possible that, even if the Cordant Dynamics business was profitable by June 2016, the respondent Group may have decided, for other business reasons to move the business of Cordant Dynamics into Staffgroup and/or Cordant Technical and Engineering. We do not consider that Staffgroup's base in London was an insurmountable obstacle to the claimant joining that business. Although the claimant would not have moved to London, he could have remained with a team in Manchester if the Cordant Dynamics viable business was transferred to Staffgroup.

74. Doing our best, given all the uncertainties about what might have happened, and evening out the chances of remaining on the same package within the Cordant Dynamics business or elsewhere in the Group and the higher chance that the claimant would have been retained, but not necessarily in the Cordant Dynamics business, but at a lower package, we conclude that there was a 60% chance of the claimant remaining on the same remuneration package either within a continuing Cordant Dynamics business or somewhere else in the Group.

75. Given the claimant's age (52 at the effective date of termination) and the fact that he has responsibilities for a fairly young daughter which limit his ability to move for work and makes it all the more important that he maintain financial stability, we conclude that the claimant would not have left the respondent group's employment voluntarily unless he had been offered a comparable or better remuneration package at a location convenient to him. We conclude that the claimant would have remained employed by the Group until at least the date by which we conclude it is likely to take

the claimant to get back to a comparable level of earnings. We assess this to be four years, based on the claimant's experiences so far in the job market and the likelihood he will have to build up his remuneration from a level considerably below his package with the respondent.

76. The burden is on the respondent to satisfy us that the claimant has not taken reasonable steps to mitigate his loss. The respondent has failed to satisfy that burden. Regardless of the burden of proof, we conclude that the claimant has taken more than reasonable steps to mitigate his loss. His diligence and persistence in his job search is to be commended.

Break in the chain of causation?

77. The respondent argues that the job with Talent breaks the chain of causation and that loss of earnings after the claimant's contract with Talent was ended is not attributable to the unfair dismissal. We agree to the extent that the claimant was able to mitigate his loss in his employment with Talent. He took a job with them on a lower rate of pay. He had a continuing loss even when employed with them. We have found that his employment was ended because the claimant had not met Talent's sales expectations. We conclude that loss, to the extent of the remuneration he received with Talent, after the ending of his employment with Talent, is not attributable to the unfair dismissal by the respondent. However, the continuing loss, being the difference between the claimant's remuneration package with the respondent and that with Talent, continued during, and continues after, his employment with Talent.

Elements of remuneration package

78. We found that it was more likely than not that the claimant would, after taking advice, have taken up the opportunity to receive 7% pension contributions had he remained in the employment of the respondent. We found that it was more likely than not that he would have been receiving pension contributions at this level by the effective date of termination. 7% pension contributions should, therefore, be included in the calculation of loss i.e. £6300 per annum.

79. We found, on a balance of probabilities, that the claimant would not have taken up private medical cover had he remained in employment. We do not, therefore, include this in the calculation of loss.

80. We conclude that, given the improving trend at the time the claimant was removed from the business, there was a real chance that, at some point in the future, the claimant would achieve targets and receive bonus. We consider it more likely than not that the claimant would achieve bonus in some quarters and not in others and that it would have been some time before bonus was achieved in any quarter. To take account of likely variations in bonus, we consider it just and equitable to include an amount for bonus calculated on the basis of a 25% chance of receiving this at the rate of 50% of salary from October 2017 until October 2021, at which time we consider the claimant likely to have reached a comparable level of remuneration to his package with the respondent.

Job hunting expenses

81. The claimant has not provided documentary evidence to support his estimate of £400 expenses. We conclude that the claimant is likely to have incurred expenses of at least this amount on travel to interviews and other expenses, even though much job hunting activity has been conducted on line and, therefore, at no additional cost to the claimant's normal internet package.

Expenses incurred in setting up in business

82. From the claimant's schedule of loss, we had not understood this to be a head of loss the claimant was seeking to recover. However, it appears, from the submissions on behalf of the claimant, that such expenses may be being sought as a head of loss. If this is the case, we conclude that we have insufficient evidence to be satisfied about the purpose and amount of expenditure. The only documentary evidence provided to us relates to VAT rebates. This is insufficient to enable us to make an award for any expenses incurred in setting up in business, even though, as a matter of law, such an award is possible.

Loss of statutory rights

83. The claimant had not worked 2 years for the respondent so had not yet acquired the statutory right not to be unfairly dismissed on grounds to which a qualifying period applies and the right to receive a statutory redundancy payment if dismissed by reason of redundancy. However, the claimant was close to acquiring such rights by the time of the effective date of termination, having completed 22 months service. He now has to start from scratch again in building up his continuous service to acquire such rights. We accept the submission made on behalf of the claimant that it would be just and equitable to award an appropriate proportion of a week's pay (capped at the statutory limit of a week's pay) i.e. 22/24 x 475 = £435.42.

ACAS uplift

84. The respondent purported to dismiss the claimant because of concerns about his performance. The ACAS Code of Practice on Discipline and Grievance was relevant to his dismissal. In accordance with this Code, the claimant should have been notified in writing of the case to answer, the notification containing sufficient information about the alleged poor performance and its possible consequences to enable the claimant to prepare to answer the case at a disciplinary meeting. Written evidence to be relied on should normally have been copied to the claimant. The notification should have given details of the time and venue for the disciplinary meeting and advised the claimant of his right to be accompanied at the meeting. The respondent did none of these things. There was no notification in writing at all. The claimant attended the meeting without any warning of the matters to be raised or that it could result in his dismissal. In accordance with the Code, the claimant should have been given an opportunity at the meeting to answer the allegations made. The claimant was not allowed to discuss these at all. The claimant was presented with a fait accompli, being informed, in a very short meeting of his dismissal and the reasons for this. The Code requires that employees who are dismissed should be advised of their right of appeal. The respondent failed to do this. There was a virtually complete disregard of all the requirements of the Code. In these

circumstances, we consider it just and equitable to apply the maximum uplift to the compensatory award, being 25%.

85. The calculation of the compensatory award is set out in the Schedule to these reasons. The amount of the award would exceed £30,000 which we understand would be tax free. We have, therefore, grossed up what we understand to be the taxable element on the basis that the claimant would be taxed at the rate of 40% on the taxable element.

Harassment related to race – injury to feelings

86. We conclude that the level of injury caused to the claimant, on the basis of the evidence presented to us, means that the award appropriately falls in the lower *Vento* band, but in the upper half of that band. Although the evidence does not suggest to us very serious injury, it was not a one-off remark. Mr Barnes made comments which we found to be harassment related to race on a number of occasions over the period from the start of the claimant's employment until he was put on garden leave. Before uprating for the effects of inflation since *Da'Bell*, but taking into account the 10% increase due to *Simmons v* Castle, the lower *Vento* band is £550 to £6600. This claim was presented in June 2016. The Presidential Guidance gives uprated figures for claims presented on or after 11 September 2017. Although it provides a formula for calculating the bands for claims presented prior to that date, we have not considered it necessary or proportionate in the circumstances to do a precise calculation of the uprated band to arrive at a figure which we consider to be just and equitable. For claims presented after 11 September 2017, the Presidents suggest an upper figure for the lower band of £8400. This claim was presented around 15 months before that date. Inflation has not been very high during that period. We consider a figure of £7000 to be a just and equitable award, being an amount towards the top end of the lower *Vento* band.

87. We do not consider there is any reason not to award interest on the award of compensation for injury to feelings in this case. Interest on compensation for injury to feelings will normally run from the date of the act of discrimination until the calculation date. In this case, there were a number of acts of harassment over a period from around January 2015 until 2 September 2015. We consider it appropriate to calculate interest from a date approximately midway during this period. We use the date of 13 May 2015 as the start day so interest is calculated for the period 13 May 2015 until the calculation date, 13 October 2017 (29 months). Interest at 8% on £7000 for 29 months is 29/12 x 8/100 x 7000 = £1353.33.

Schedule: calculation of compensatory award for unfair dismissal

Loss of earnings and benefits to date of calculation

30 March 2016 – 13 October 2017 – 80 weeks

Loss of net earnings	80 x 1234.01	=	98720.80
Loss of pension contributions	80/52 x 6300	=	9692.31
Loss of group life assurance	80/52 x 257.52	=	396.18
Loss of long term illness assurance	80/52 x 1190.76	=	1831.94
			110,641.23
Less actual earnings			18,840.96
			91,800.27

Less earnings claimant would have received
If he had remained employed by Talent in the period
1 May 2017 to 13 October 2017 (24 weeks)

Gross annual earnings: 52500

Net annual earnings with Talent (using online calculator)
38229.88 (weekly equivalent £735)

24 x 735 =	17,640.00
	74,160.27
Reduce by 40 % because 60% chance of claimant staying on with respondent	29,664.11
	44,496.16
Increase by 25% for failure to comply with ACAS Code	11,124.04
Loss to date	55,620.20

Other losses			
Future loss of earnings and benefits			
4 years			
Loss of net earnings	4 x 52 x 1234.01	=	256,674.08
Bonus (25% chance at 50% of earnings)			
25/100 x 50/100 x 256,674.08		=	32,084.26
Loss of pension contributions			
4 x 6300		=	25,200
Loss of group life assurance			
4 x 257.52		=	1030.08
Loss of long term illness assurance			
4 x 1190.76		=	4763.04
			319,751.46
Less notional earnings with Talent			
4 x 38229.88		=	152,919.52
			166,831.94
Loss of statutory rights			435.42
Job hunting expenses			400.00
			167,667.36
Reduce by 40 % because 60% chance of claimant staying on with respondent			67066.94
Increase by 25% for failure to comply with ACAS Code			25,150.10
			125,750.52

Total compensatory award before grossing up

55,620.20 +
125,750.52
181,370.72

Grossing up

Amount of compensatory award up to £30,000 tax free:

30,000 – 712.50 = 29,287.50

Amount of compensatory award to be taxed

181,370.72 – 29,287.50 = 152,083.22

Gross up at 40% rate:

100/60 x 152,083.22 = 253,472.03

Add back tax free amount

253,472.03 = 29,287.50 = 282,759.53

Total compensatory award after grossing up: £282,759.53

Total award for unfair dismissal

Basic award	712.50
Compensatory award	282,759.53
	283,472.03

Employment Judge Slater

Date: 2 November 2017

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

8 November 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2401732/2016

Name of case: Mr E Bell v Cordant People Ltd (Formerly Prime Time Recruitment Limited)

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 7 November 2017

"the calculation day" is: 8 November 2017

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL
For the Employment Tribunal Office