



EMPLOYMENT TRIBUNALS

Claimant: Ms Joanna De Winton
Respondent: The Club House Bude Limited
Heard at: Exeter **On:** 19 February 2019
Before: Employment Judge Fowell
Representation:
Claimant: Mr A Passman of Tom Street & Co. Ltd
Respondent: No appearance

RESERVED JUDGMENT

1. The claimant is awarded compensation as follows:

a. Unfair dismissal	£2,173.66
b. Breach of contract	£304.31
c. Discrimination	£14,424.52
Total	£16,902.49

2. No separate award is made for unlawful deduction from wages or holiday pay

REASONS

Background

3. This judgment deals with compensation only. The response to the claim was struck out on 5 October 2018 because the respondent did not pay a deposit it was ordered to pay.

4. According to the claim form, Ms De Winton was employed by the respondent as a restaurant manager at its golf club in Bude. During the summer of 2017 she also had to cover for the bar manager and became aware of complaints by members of staff, complaints of sexually inappropriate comments and other behaviour by the bar manager. She raised this with the management and there was a staff meeting on 6 November 2017. Afterwards the bar manager was dismissed. But from then on Ms De Winton had fewer and fewer shifts. Pressure was placed on other members of staff to raise a complaint about her. After a period of no work she was dismissed. This was done by letter, with effect from 30 January 2018, and there was no right of appeal.
5. The different complaints raised in her claim form were of sex discrimination – in particular of direct discrimination, harassment and victimisation – unfair dismissal, unlawful deduction from her wages, breach of contract in respect of her notice pay and breach of the Working Time Regulations in relation to her entitlement to annual leave.
6. A response was submitted asserting that she was not the restaurant manager but simply a waitress on a zero hours contract. A preliminary hearing was listed to determine her employment status but a deposit order was made against the respondent as a condition of being permitted to advance that argument. As already noted, it was not paid and so the response was struck out. Since then the respondent has informed the Tribunal that it has ceased trading and has taken no further part in these proceedings.
7. This hearing is therefore to determine the losses flowing from these complaints. Mr Passman accepted that the main element of the discrimination claim was victimisation and no separate loss was sought for direct discrimination or harassment. The act for which she was victimised was the complaint raised at the staff meeting on 6 November 2017.
8. Ms De Winton provided a detailed witness statement about the effect this victimisation had on her. She works as a volunteer for a mental health charity and so has a clear insight into the effect of stress. In her case it caused her sleeplessness, anxiety, loss of appetite, panic attacks, listlessness, lack of interest in friends or family and general preoccupation with her situation. She chose not to seek medical help however and so her claim for injury to feelings is was placed by Mr Passman at the top of the lower *Vento* band.
9. It is not necessary to set out here the different bands and the rationale behind each. It has been explained in the most recent presidential guidance available online at:

<https://www.judiciary.uk/wp-content/uploads/2013/08/vento-bands-presidential-guidance-first-addendum-230318.pdf>
10. Applying this guidance, the top of the lower band is £8,600 for claims which began from April 2018, and this claim form was submitted on 11 May 2018. Given the debilitating and distressing nature of Ms De Winton's symptoms I accept that assessment.
11. Her financial losses fall into two categories. There was a period from 6 November 2017, after the staff meeting, in which her earnings fell. Then there

was the period after her dismissal when she earned nothing at all. She got another job 22 days later and the new job paid more, so her losses came to an end then.

12. Both types of loss are clearly attributable to victimisation. It was not clear to me in the hearing that a separate complaint of unlawful deduction from wages had been made, but on reviewing the file I see that it was. However, there is no complaint that she was underpaid for the hours worked, simply that she should have been given more hours, and would have been but for this discrimination. That is not in fact an unlawful deduction from her wages, so those losses, as explained at the hearing, do in fact form part of the losses due for her discrimination claim.
13. There are some other points to note before setting out the figures. Firstly, no award is made for loss of statutory rights since the claimant had not worked for two years before her dismissal and so had not acquired these rights. Secondly, there was separate claim for a failure to provide written particulars of employment, and I award four weeks net pay for that under section 38 of the Employment Act 2002. This forms part of the compensatory award for the complaint of unfair dismissal. Thirdly, no separate award could be made for arrears of holiday pay in the absence of any supporting evidence about the holidays paid or taken. Finally, there was a claim for one week's notice pay, and I have separated this out from the rest of the compensatory award. An ACAS uplift has been applied at the end.

Calculations

14. The employment started on 19 May 2016 and ended on 30 January 2018 so there was only one year's complete service.
15. The calculation of a week's pay has to be conducted in accordance with section 222 of the Employment Rights Act 1996. No payslips were issued by the respondent and so the only record of those earnings were the claimant's bank statements, which naturally show net figures. To calculate the weekly pay, an average should be taken over the relevant 12 week period, in this case the 12 weeks prior to 6 November 2017.
16. Over the previous three months there had been three payments made: £695.00, £1,278.20 and £1,191.60, amounting to a total of £3,164.80. That is the best evidence of earnings over the relevant period, but it covers 13 weeks, giving a weekly net figure of **£243.45**, slightly less than claimed.

Reduction in Wages

17. The period from 6 November 2017 to the claimant's dismissal on 30 January 2018 is 85 days, or 12 weeks and one day. At the rate of pay calculated above, the total amount earned during that period would have been £2,955.48. (It is possible that earnings reduced through other causes, such as seasonal variation, but I have no information from the respondent on which to base any such adjustment.) Instead, the only payments received were for £582.75 in November and £342.35 in January, amounting to £925.10. The shortfall is therefore **£2,030.38**

Unfair dismissal

18. The basic award corresponds to one week's pay of £243.45
19. The period from Ms De Winton's dismissal until finding suitable alternative employment on 21 February 2008 was just 22 days, or three weeks and one day. At this weekly rate, losses during this period amounted to £765.13
20. I will separate this figure out into the entitlement to one week's notice pay - £243.45 - and the balance of £521.68.
21. Further, four weeks pay for failing to provide a contract of employment entitles her to a further £973.80, and this also forms part of the compensatory award.
22. The total compensation for unfair dismissal is therefore **£1,738.93**
23. The total financial loss for the deduction in her earnings, breach of contract and unfair dismissal therefore amounts to **£4,012.76**
24. All of these losses were in fact attributable to the victimisation she suffered from the respondent, so interest is payable. This is calculated at 8% from the midpoint of the period from dismissal the date of the hearing (an overall period of 385 days) which fell on 11 August 2008¹. The interest due at that rate over that period is £169.31. Hence, the total financial loss with interest is **£4,182.07**

Injury to Feelings

25. For the reasons already explained, damages or injury to feelings are assessed at £8,600.
26. Interest is also payable on such general damages but runs from the date of the Injury to the date of calculation.
27. Here, I will take the date of the injury as 30 January 2018. Although arguably the injury started somewhat earlier, it is difficult to be clear in the absence of detailed findings of fact about when that was, and the main blow fell on that date. The period in question is therefore 385 days. At 8%, the total interest on damages for injury to feelings amounts to £739.92, bringing the total to **£9,339.92**
28. The total of financial and non-financial losses therefore amounts to **£13,521.99**

ACAS Uplift

29. The final stage is the uplift for failure to follow the statutory dismissal procedures in accordance with the ACAS Code of Practice. Under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 this can be up to 25%. In the present case, the failure to comply with that Code of Practice appears to be entire. The claimant was dismissed by letter, not a meeting, and had no right of appeal. In the circumstances an uplift of 25% appears appropriate. That

¹ Reg. 6 Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996

amounts to £3,380.50, bringing the overall total to **£16,902.49**.

30. It is not always a straightforward matter to attribute each type of loss to individual complaints since the losses overlap. If the only complaint made had been of discrimination the same total loss would have resulted, save for the basic award, and the uplift for not having a contract of employment. It is preferable to divide up the relevant parts as far as possible, which I do as follows.

31. Compensation for unfair dismissal is as follows:

Basic award	£243.45
Compensatory award	£521.68
Compensation under s.38 Employment Act 2002	£973.80
Sub-Total	£1,738.93

32. Breach of contract **£243.45**

33. Discrimination

Reduction in wages before dismissal	£2,030.38
Interest on financial loss	£169.31
Injury to feelings	£8,600.00
Interest on non-financial loss	£739.92
Sub-total	£11,539.61

34. The total of these three elements is **£13,521.99**

35. The ACAS uplift at 25% amounts to **£3,380.50**

36. Hence the overall total is **£16,902.49**

37. That ACAS uplift in fact applies equally to the three elements, unfair dismissal, breach of contract and discrimination, since the ACAS code applies to each. The respective increments are £434.73, £60.86 and £2,884.90, so the summary figures for each complaint are:

a. Unfair dismissal:	£1,738.93
ACAS uplift	£434.73
Sub-total	£2,173.66
b. Breach of Contract	£243.45
ACAS uplift	£60.86
Sub-total	£304.31

c. Discrimination	£11,539.61
ACAS uplift	£2884.90
Sub-total	£14,424.52
38. The total, again, is	£16,902.49

Employment Judge Fowell

Date 19 February 2019