**Case No: 2302001/2016**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Axford

**Respondent:** The Network (Field Marketing and Promotions Co) Limited

**Heard at: London South (Croydon)** **On: 9 November 2018**

**Before: Employment Judge John Crosfill**
**Mr M P O'Connor**
**Ms T Williams**

**Representation**

Claimant: In person (in part assisted by Mr Barnett)

Respondent: Mr N Bidnell-Edwards of Counsel

# Reasons (Remedy)

1. Following our judgment signed on 9 November 2018 the Respondent sent an e-mail to the Tribunal requesting written reasons for our decision in respect of remedy. Those reasons are set out below.

2. The matter had been listed for a remedy hearing following our previous decision at a hearing on 10 May 2018 that the Claimant's claims of under sections 15, 19 and 20 of the Equality Act 2010 succeeded.

3. The Respondent had prepared a bundle of relevant documents which contained pay slips from the period prior to the Claimant's dismissal. The Claimant had not prepared a statement but, without objection from the Respondent gave evidence and was cross examined about matters relevant to remedy. We heard from Ms Dev who gave evidence on behalf of the Respondent. As usual, at the conclusion of the evidence, we heard submissions from the parties. We shall recite only those submissions which were relevant for our decision.

4. The following issues were identified as those that we needed to determine:

   4.1. Whether or not the Claimant had suffered any loss of earnings (in particular there was a dispute about the level of the Claimant's pre dismissal earnings); and

   4.2. If the Claimant had suffered any loss of earnings whether he had taken reasonable steps to mitigate that loss; and

   4.3. Whether or not the Claimant had suffered any injury to feelings and if so whether he should be awarded any compensation in that regard; and

   4.4. Whether the Claimant was entitled to or ought to be awarded interest on all or part of any award and if so at what rate.

5. It appeared to be common ground that it would be artificial to make separate awards under each head of discrimination as the losses and injury to feelings all flowed from the dismissal which we had found to be an act of discrimination. Accordingly, we did not separate out the compensation we awarded.

6. As there was no request for full written reasons of our judgment on liability it is necessary to set out briefly our conclusions reached in that regard. The principle matters were:

   6.1. That the Respondent was a distributer of free magazines. Its clients were the publishers. One of its clients was the New Musical Express ('NME'). In order to distribute the magazines the Respondent recruited a number of employees who were required to meet a delivery van at sites around London, take trolleys of magazines to positions around stations or similar public buildings and then hand them out to members of the public passing by.

   6.2. The Claimant suffers from a significant spinal condition which means he walks using a walking stick and has difficulty standing for a long time.

   6.3. The Claimant had been unemployed for some time when he saw an advertisement by the Respondent seeking magazine distributers. He attended a selection day using his walking stick and was given a job. He was employed on a zero hours contract but on the understanding that there would be work available whilst the NME was promoting its magazine.

   6.4. The Claimant distributed the NME at Waterloo Station. He was able to maneuver his trolley into position without significant difficulty. He was a reliable employee and enjoyed his work. He told us and we accept that he was working as much for the benefit of his mental health as he was for the money. In order to aliviate his back pain the Claimant would perch on the trolley of magazines. From that position he distributed no fewer and perhaps more magazines than the other employees.

   6.5. The Claimant was observed by an employee of the publisher of the NME to be leaning or sitting on his trolley of magazines. Without speaking to the Claimant and with no knowledge of the Claimant's reasons for sitting down that employee suggested to the Respondent that there was a breach of

their service level agreement which required the Distributors to stand up to distribute the magazines.

6.6. The Respondent says that it asked an employee responsible for health and safety to observe the Claimant. There was a report provided to the Tribunal which on its face suggested that it had been compiled at a later date than was possible. Nevertheless, that report suggested that the Claimant sitting on the pile of magazines was dangerous. We considered the report badly reasoned.

6.7. The Claimant was invited to a meeting. He explained about his back condition. He offered to provide a stool if required.

6.8. The Respondent dismissed that Claimant ostensibly for reasons of health and safety. It took the view that the Claimant could not safely do his duties and that the provision of a stool or chair was unsafe or involved the Claimant working in a manner contrary to that its client insisted upon.

6.9. We found that there was no significant health and safety risk from the Claimant pulling a trolley to his pitch and even if there had been it would have been relatively simple to have assisted the Claimant with this by asking another employee to help him.

6.10. We rejected the suggestion that providing a stool, shooting stick, folding chair or wheelchair for the Claimant gave rise to a health and safety risk. The presence of the Claimant whether standing or sitting was a minor obstruction for passers by. If sitting he was no more of an obstruction than a pram, wheelchair or the sort of invalid carriages often seen on the pavement. We considered that allowing him to sit on a chair or stool beside his trolley when he needed to would not create any significantly greater obstruction than asking him to work standing up. Even if he had moved from the main flow of pedestrian traffic there was little reason to suppose that his otherwise good performance would have dropped off significantly. We found that the Respondent's concerns were ill founded and that if the Claimant's disability and fact that he was capable of good performance had been explained and understood by the NME, that company could have had no lawful objection to the provision of these reasonable adjustments/auxiliary aids.

6.11. The Claimant had during his evidence repeatedly stated words to the effect that *'if I cannot even hand out free magazines I am good for nothing'*. He had told us that he had a previous career as an engineer but was now in straightened circumstances living in the back of a van.

7. We shall deal with the individual issues set out above under headings below setting out our relevant findings under each heading.

**The amount of earnings**

8. The first issue that we had to determine concerned the claim for loss of earnings. We needed to make findings as to the amount the Claimant earned during his employment with the Respondent.

9. We accept the evidence given by Ms Dev that the hourly rate of pay paid to the magazine distributors including the Claimant was £7.20 (which was the rate of the national minimum wage in force at the time). Ms Dev's evidence was supported by the pay slips provided by the Respondent which, whilst they did not always show the calculation based on hours, did show that any payment was exactly divisible by £7.20. Whilst the Claimant was under the impression that the rate was higher he had no clear position that contradicted what the Respondent said.

10. There was a dispute as to the number of hours that the Claimant would work. Ms Dev suggested that generally speaking the Claimant was expected to work for some hours in the morning and again in the evening making a total of seven hours per day. There were a few payslips which supported that position. Against that the Claimant maintained that towards the end of his employment he worked for 10 hours per week. That contention is supported both by payslips towards the end of his employment where it is clear he is being paid for a 10 hours each week (less some tax which is not easy to understand). What is more, after the Claimant had been suspended without pay, a back payment was made to him that is calculated on the basis of working a 10 hour week. It seems to us that that provides strong evidence that at the time the Respondent thought that was his weekly pay.

11. We note that during the period over which loss is claimed the national minimum wage rate was increased from £7.20 to £7.50. An assessment of loss is not an exact science and some degree of a broad brush approach is appropriate. We find that on many occasions the Claimant did work for a 10 hour each week. That said there were some weeks when he might have worked less. We consider that this can be compensated for by disregarding the increase in the national minimum wage rate and find that on average the Claimant's daily loss was £72.00 gross and using the deduction figures made on the pay slips that gives a net loss of £69.20 per week per week.

**Over what period, if any, should the Claimant recover any loss**

12. The Claimant accepted in his evidence that, other than taking up one day of work with the Respondent after his dismissal, he had not attempted to get any other work. The Respondent argues that this was because the Claimant was a man of 'independent means' and had chosen not to find any work. We make the following findings of fact in this regard:

    12.1. In his cross examination the Claimant was asked by Mr Bidnell-Edwards about the circumstances where an adjournment of the hearing was caused by the fact that the Claimant was in prison. The Claimant accepted that he had been committed to prison for contempt in circumstances where he had not made a repayment of benefits which had been overpaid. The Claimant explained that the issue which led to this was his ownership of a yacht and a property in France. It was this that Mr Bidnell-Edwards characterized as

being a man of 'independent means. The Claimant explained and we accept that whilst he is the co-owner of a French property that property is in disrepair and he is unable to sell it as he co-owns it with his ex-wife with whom he is not on good terms. He explained that he did own a yacht but said that it was old and of no value. He described it as rotten.

12.2. Both at the liability and remedy hearing the Claimant has told us that he was living in a van. It was common ground that he had been in receipt of benefits and had taken a job that paid the minimum wage. We find that that is inconsistent with the suggestion that the Claimant had sufficient money he did not need to work. We are not bound by findings made between other parties in other proceedings. Indeed, we were not presented with any findings or judgment. We are entirely satisfied that the Claimant could not reasonably be described as a man of independent means who had simply chosen not to seek any work. We find that he is living in straightened circumstances in a van as he has described. He may have assets and they might have disqualified him from some means tested benefits but we are satisfied that they are not immediately available to the Claimant or that they acted as any disincentive for working.

12.3. The Claimant had accepted one day's work that was offered to him by the Respondent who by administrative oversight had left him on their books as a casual worker. The Respondent relied upon this as evidence that the Claimant was able to work and had chosen not to. The Claimant told us and we accept that he had taken this day's work knowing that the proceedings were on foot in order to make the point that he could have carried on working and that he was not so disabled that he should have been dismissed.

12.4. We think the Claimant could be fairly described as a 'character'. He is a rough diamond and fiercely proud. The Claimant said that after having a previous successful career as an engineer, he had taken the job with the Respondent partially for the money but partially to get himself out of the house for the benefit of his mental health. He had really enjoyed his job both meeting people and sharing an interest in music. He repeatedly told us that when dismissed he had concluded that if he could not do a job as simple as that he carried out for the Respondent there was nothing useful he could do. We accept the Claimant's evidence and have concluded that he was significantly affected by his dismissal.

12.5. We find that the Claimant's dismissal had a profound effect on his self-confidence and self-worth. He was angry with the Respondent and to a great extent remains so. We find that he simply could not bring himself to attempt to take on other work from a fear that he would again be told he was unfit to do so.

12.6. A final point made by Mr Bidnell-Edwards was that the Claimant should have returned to his former career as an engineer. We accept the Claimant's evidence that this is quite impossible. He has not worked as an engineer for years due to his back condition and is in no position to so now. Had that been the remotest possibility we accept that the Claimant would have been delighted to do so. It is not and it was quite clear to us that the Claimant considered the suggestion to be insulting.

13. The law relating to the mitigation of loss is not controversial. It is for the person asserting a failure to mitigate loss to show that is the case. It is necessary for the Respondent to show that the Claimant acted unreasonably. See ***Cooper Contracting Ltd v Lindsey*** **UKEAT/0184/15/JOJ**. If there has been a failure to mitigate then the loss should be calculated on the basis of the loss that would have been suffered had the Claimant taken reasonable steps to mitigate his loss.

14. The principles upon which compensation must be assessed are those which are applied in the County Court see Section 124(6) of the Equality Act 2010. As a general rule a tortfeasor must take their victim as they find them and cannot complain of any special vulnerability that leads to increased loss.

15. Where an act of discrimination has caused an illness then it is uncontroversial that the tortfeasor must compensate the injured person for any wages lost through ill health.

16. Mr Bidnell-Edwards argued that, as the Claimant was able to do a day's work for the Respondent, it was not open to him to say that he was unable to work for another employer. He went on to say that if it was so open to the Claimant he has acted unreasonably in not doing so. Mr Bidnell-Edwards repeated this point when he asked for an oral reconsideration of our judgment.

17. The issue for us is whether or not the Claimant acted unreasonably in not seeking employment. For the following reasons, we find that he did not. We find that the actions of the Respondent effectively shattered the Claimants self-confidence/sense of self-worth to the extent that he felt unable to risk further rejection by another employer. We find that the Respondent cannot criticize the Claimant for such a loss of self-esteem that their conduct caused. As such the Claimant's position is similar to an employee caused a physical injury who could not be said to be acting unreasonably by not looking for work until fit to do so.

18. We do not suggest that the Claimant would have not have acted unreasonably if the situation had carried on indefinitely. At some point the Claimant would have been acting unreasonably if he did not give the world of work another try. That said we do not find that he acted unreasonably in the circumstances he had been placed in by the Respondent in not having the courage to pick himself up and try again to look for work before the point at which we say the losses would have been extinguished by external events. We recognise that this is a lengthy period to allow anybody time to pick themselves back up but consider it justified by our findings in relation to the impact of the discrimination in this case. These passages should be read in conjunction with our findings as to the level of injury to feelings.

19. We have considered whether there is anything in Mr Bidnell-Edwards's point that this is inconsistent with the evidence that the Claimant took up a day's work with the Respondent. We have found above that the Claimant took that day's work in order to make a point to the Respondent and for the purposes of these proceedings. It does nothing to undermine our finding about the significant loss of self-confidence/self-worth which led to the Claimant not seeking work with others. He had nothing to lose by working for the Respondent he had already in his words 'been thrown on the scrap heap' by them. That does not support

the proposition that he acted unreasonably by not having the fortitude to apply for work on the open labour market.

20. The Claimant was committed to prison on 29 August 2017. He was in prison for some months. We find that had the Claimant not been dismissed by the Claimant he would certainly have been dismissed when he was sent to prison. He was not anticipating that incarceration and we find that notwithstanding the fact that he was not guaranteed any work he was expected to turn up when asked and if he disappeared without explanation would have been treated as AWOL and taken off the Respondent's books. His employment would have lawfully ended on that date. This event was entirely distinct from the discriminatory dismissal and breaks the chain of causation in respect of any future loss. We therefore cut of the Claimant's loss on 29 August 2017.

21. We find that the appropriate period over which to award loss of earnings is from the date of dismissal, 28 June 2016 to the date that the claimant was sent to prison 29 August 2017. That is a period of 61 weeks. The weekly remuneration we have calculated as (see above) £68.20. That gives an award for loss of earnings of £4160.20.

**Injury to feelings award**

22. Mr Bidnell-Edwards sought to persuade the Tribunal by reference to a first instance decision that the appropriate injury to feelings award was in the lower band of the ***Vento*** guidance and towards the middle of that. The Claimant made no specific submissions in reply leaving the decision to the tribunal.

23. An injury to feelings award does not depend on the severity of any discriminatory act but of the consequences of that act on the individual employee. That said the severity of the discriminatory act might well provide an indication of the likely injury. It is necessary for us to make findings as to the degree to which we find the Claimant was affected by his treatment by the Respondent. There is some overlap under this heading with our findings and conclusions relating to the period of loss. The two should be read together.

24. We have had regard to the most recent Presidential Guidance which adjusts the guidance in ***Chief Constable of West Yorkshire v Vento*** **(No.2) [2003] IRLR 102** to take into accounts adjustments to personal injury awards generally and the effect of inflation.

25. We consider it significant that the act of discrimination in this case was a dismissal. The Claimant had benefited from his employment in terms of his wages which served to lift him from a subsistence level to a more comfortable level. In addition to that the Claimant told us and we accept that the job was good for his mental health, got him out of the house and, we infer, restored a sense of self worth. The Claimant enjoyed his job and valued it.

26. During the process that lead to his dismissal the Claimant had volunteered to provide a stool for himself. He was plainly very keen to maintain his employment. The fact that he brought the present proceedings where his loss of wages is by most standards small is indicative of the injury to his feelings.

27. We have found above that the Claimant's dismissal had a profound effect on his self-worth and self-esteem. Whilst his external demeanor was robust his remarks about feeling that he was not worthy of any work revealed a vulnerability which he would otherwise conceal.

28. Mr Bidnell-Edwards suggested that the fact that the Claimant was able to do a day's work for the Respondent suggested that he had suffered little offence. We do not accept that submission and accept the Claimant's evidence that he accepted that work only to make a point that he was not incapable of handing out free newspapers. Far from undermining the suggestion that the Claimant was upset and angry, the actions of the Claimant support that.

29. We do not conclude that this was a deliberate act of discrimination by the Respondent. Nonetheless it was thoughtless and carried out with little regard for the impact of the decision to dismiss on the Claimant himself. The Respondent had a far greater regard for the assumed position of its commercial client. This would have been apparent to the Claimant and we find that he perceived the Respondents actions in this way. As a consequence, he was angry at the time and remains angry and upset to this day.

30. We consider that the award should be in the middle band of the ***Vento*** guidelines. We find that any award should be at the mid to low level within that band. We do so as there is no evidence of any clinical illness as opposed to the anger, upset and damage to self-confidence we have identified. That said all of those feelings have proven to be long term and, in our view, significant.

31. We have concluded that the appropriate award for injury to feelings should be £12,000.

**Should the tribunal award interest and if so at what rate and over what period**

32. The jurisdiction to award interest in discrimination cases is found in the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996**. The material parts of those regulation reads as follows:

*2 Interest on awards*

*(1) Where, at any time after the commencement of these Regulations, an employment tribunal makes an award under the relevant legislation—*

*(a) it may, subject to the following provisions of these Regulations, include interest on the sums awarded; and*

*(b) it shall consider whether to do so, without the need for any application by a party in the proceedings.*

*(2) Nothing in paragraph (1) shall prevent the tribunal from making an award or decision, with regard to interest, in terms which have been agreed between the parties.*

*3 Rate of interest*

*(1) Interest shall be calculated as simple interest which accrues from day to day.*

*(2) Subject to paragraph (3), the rate of interest to be applied shall be, in England and Wales, the rate fixed for the time being by section 17 of the Judgments Act 1838 ….*

*(3) ……*

*[Regulation] 6*

*(1) Subject to the following paragraphs of this regulation—*

*(a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;*

*(b) in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the day of calculation.*

*(2) Where any payment has been made before the day of calculation to the complainant by or on behalf of the respondent in respect of the subject matter of the award, interest in respect of that part of the award covered by the payment shall be calculated as if the references in paragraph (1), and in the definition of 'mid-point date' in regulation 4, to the day of calculation were to the date on which the payment was made.*

*(3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may—*

*(a) calculate interest, or as the case may be interest on the particular sum, for such different period, or*

*(b) calculate interest for such different periods in respect of various sums in the award,*

*as it considers appropriate in the circumstances, having regard to the provisions of these Regulations.*

33. Mr Bidnell-Edwards sought to persuade the Tribunal that we should not make an award of interest at the statutory rate of 8% or that we did we should not award interest over the whole of the period since the discriminatory acts complained of to reflect the fact that the Claimant had been sent to prison and the hearing delayed as a consequence.

34. We agree with Mr Bidnell-Edwards that regulation 2 uses the permissive word 'may' and on its face appears to give a general discretion whether or not to award interest. That said, regulation 2 (1)(b) imposes a mandatory duty to consider doing so. We concluded that the effect of the regulations is that there is a discretion whether or not to award interest but that if that discretion is exercised in favour of making an award of interest then the interest must be calculated in accordance with regulations 4-6 unless to do so would amount to a serious injustice.

35. The purpose of an award of interest is to compensate the injured party for having been kept out of their award of damages by the delay in the tortfeasor paying what the court finds was due. We consider that there would have to be some compelling reason to make no award at all. No such reason exists in the present case and we consider that we should make an award calculated in accordance with the regulations.

36. We do not accept that there would be a 'serious injustice' caused by including in the period over which interest is calculated the delay in the final hearing caused by the fact that the Claimant's imprisonment. The necessity for a contested hearing was the Respondent's decision to fight both liability and latterly dispute quantum. Court proceedings are often protracted. The effect of the delay is that the Respondent has retained money which the Claimant was entitled to. It has benefitted and the Claimant has lost out through that delay. The Claimant did not deliberately delay the proceedings. These factors are such that we do not find that calculating interest on the ordinary basis set out in the regulations would cause any serious injustice.

37. As required by Regulation 7 we set out our calculations in the judgment already sent to the parties and shall not repeat those calculations here.

**Application for a reconsideration**

38. After we had delivered our oral reasons Mr Bidnell-Edwards made an oral application for a reconsideration of our decision to award the Claimant loss of wages to the date of his imprisonment.

39. A tribunal may reconsider any judgment where it is necessary in the interests of justice to do so - see rule 71 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

40. Mr Bidnell-Edwards valiantly tried to persuade us that there was a manifest inconsistency between our finding that the Claimant was incapable of seeking work and the fact that the Claimant had accepted a day's work with the Respondent. He said that that justified us setting aside our judgment on that point.

41. We considered Mr Bidnell-Edwards's application. We concluded that Mr Bidnell-Edwards was simply repeating the submissions that he had already made. We had rejected those submissions when reaching our conclusions. We drew a distinction between the Claimant accepting a day's work in order to make a point to the Respondent that they had treated him badly with the question of whether he had acted unreasonably by not seeking work with other employers if he felt unable to do so. Our findings were quite clear that the

Claimant was suffering from low self-esteem caused by the Respondent and could not bring himself to look for work. That is not inconsistent with him seeking to do a day's work for the Respondent to prove a point to them. Anger and a lack of self-esteem are different drivers and the presence of one does not evidence the absence of the other. We are satisfied that our judgment is internally consistent on the evidence we heard and the findings that we made. We therefore dismissed the application for a reconsideration.

Employment Judge John Crosfill

Date 15 March 2019