



## EMPLOYMENT TRIBUNALS

**Claimant**  
**Ms Tracy Jackson**

**Respondent**  
**Roseberry Care Centres GB Ltd**  
**t/a Valley View Care Home**

### REMEDY JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HEARD AT NORTH SHIELDS  
EMPLOYMENT JUDGE GARNON

ON 3 JUNE 2019  
Members Ms L Jackson and Mr R Grieg

Appearances : Claimant in person .

Respondent Mr W Lane Solicitor

### JUDGMENT

1. On the claim of wrongful dismissal, we award damages of £2603.16 gross of tax.
2. On the claim of unfair dismissal, we award compensation of £ 15880.84 being a basic award of £4664 and a compensatory award of £11216.84. The Recoupment Regulations apply. The prescribed element is £ 8533.78 and the prescribed period is 6 August 2018 to 3 June 2019. The difference between the total award and the prescribed element is £ 7347.06.
3. On the claim for subjection to detriment, we order the respondent to pay compensation of £5000 to the claimant. Under rule 66 of the Employment Tribunal Rules of Procedure 2013 ( the Rules) we stay the order for payment of this element only until 14 days after the earlier of (a) the date upon which the Employment Appeal Tribunal notifies the parties of the result of its initial consideration of the appeal or (b) the date the appeal is withdrawn.
4. We make no order for costs.

### REASONS

#### 1. Introduction and Relevant Law

1.1. The claimant was born on 8 October 1963. There was a dispute as to when her continuous employment started . We find it commenced on 23 September 2002. She was dismissed on 14 May 2018 with no notice or payment in lieu. Her pay was £216.93 gross of tax £198.46 net.

1.2. The case was heard on 25-27 February with deliberations on 15 March 2019. The unanimous liability judgment of the Tribunal, sent to the parties on 4 April, was the complaints of wrongful and ordinary unfair dismissal were well founded but dismissal itself was not on the ground the claimant had made a protected disclosure. The complaint of subjection to detriment on that ground was well founded.

1.3. The respondent unsuccessfully applied for a reconsideration of the last element . The basis of the application is we should not have found the claimant was subjected to detriment by her managers at the care home where she was employed giving biased information to the dismissing officer because that detriment was not “pleaded “. Our Employment Judge gave written reasons for rejecting the application under Rule 72 because there was no reasonable prospect of any different outcome. The respondent has appealed also, but only on that aspect of our judgment .

1.4. Section 112 of the Employment Rights Act 1996 ( the Act) includes

*(2) The tribunal shall—*

*(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and*

*(b) ask him whether he wishes the tribunal to make such an order.*

1.5. Section 113 permits (a) an order for reinstatement (section 114), or (b) an order for re-engagement (section 115). Before and at this hearing, the claimant asked for neither order saying she would only want to work at Valley View if there was a change of management and would have transport problems working at any of the respondent’s other locations. Subsection (4) then says “ *If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.*

1.6 Section 118 includes :*(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—*

*(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and*

*(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).*

1.7. The basic award is an arithmetic calculation which Mr Lane agreed in this case is 21.5 “week’s pay” of £216.93 = £4664.

1.8. Section 123 includes

*(1) ... 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.*

*(2) The loss referred to in subsection (1) shall be taken to include—*

*(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*

*(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

*(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 ..*

There was no claim under paragraph 3 (a) in the schedule of loss.

1.9. Section 124 imposes limits on the amount of a compensatory award. At the relevant time, it was the lower of £83682 or 52 week’s gross pay giving a cap of £11280.36.

1.10. Unless an employee has been guilty of gross misconduct, her employment may only be terminated by notice. Dismissal without notice in other circumstances is known as wrongful dismissal and damages for such breach of contract are the pay she would have earned in the notice period. In this case the statutory minimum to which the claimant was entitled was 12 weeks. An award for that period may either be made under this heading or be part of the compensation for unfair dismissal, see O’Laoire-v-Jackel Industries. In this case it is plainly correct to award damages for wrongful dismissal and then start calculating the compensation for unfair dismissal from the date notice would have expired which was 6 August 2018. Until 6 April 2018 damages were based on net pay but due to changes to the Income Tax (Earnings and Pensions) Act 2003 are now taxable as Post Employment Notice Pay. The amount of the compensatory award for unfair dismissal is still calculated on pay net of tax.

1.11 Turning to the detriment claim . Section 49 includes:

*(1) Where an employment tribunal finds a complaint under section 48 .. (1B) well-founded, the tribunal—*

*(a) shall make a declaration to that effect, and*

*(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.*

Compensation for injury to feelings can be awarded in detriment claims but not unfair dismissal claims.

1.12. As affirmed in a discrimination case, Chaggar v Abbey National, damage to employability due to stigma caused by the dismissal most certainly can be taken into account if it explains why a person has remained unemployed to the date of the Hearing and may continue to do so for some time in the future. The duty to mitigate loss requires the claimant take such steps as are reasonable to find alternative employment. The burden of showing she has failed to do so rests on the respondent.

## **2 Findings of Fact**

2.1. The claimant had until her dismissal worked as a carer for about 25 years. She had little experience in other jobs but some in the retail industry. When dismissed she was unable to claim benefits for the first 12 weeks because she had been dismissed for gross misconduct. She tried to find other employment but, on applying within the care sector, found the fact she had been dismissed for gross misconduct meant no employer or agency would accept her. That is why she turned her attentions to applying for jobs in other industries, albeit still at the national minimum wage she was paid as a carer.

2.2. She has produced her job centre record and we are completely satisfied she has made full efforts to find work without success since the date of dismissal. However, as Mr Lane put it, the liability judgment is a “game changer”. From the time the claimant received it, about 9 weeks ago, the main impediment to her finding work in her chosen field has effectively been removed.

2.3. From our own experience of other cases locally, there is more competition for work at the national minimum wage in the retail industry than in the care sector where claimant’s experience should now stand her in good stead. She has in the last 2 to 4 weeks applied to two care establishments and is waiting to hear from both. She does

not drive and, whilst Valley View was within walking distance of her house, it is likely she will have to catch a bus to reach any other similar place of employment. She lives in an area with good bus services.

### 3. Conclusions

3.1. The only demanding features of this case have been (a) mitigation of loss and (b) deciding what is likely to happen in the near future. Up to the date upon which her notice would have expired we would not expect the claimant successfully to have mitigated her loss. His loss for that 12 weeks is £2603.16.

3.2. The basic award was agreed at £4664. The compensatory award consists of:

(a) £500 for loss of statutory rights

(b) from 6 August 2018 to the date of this Hearing is 43 weeks at £198.46 = £8,533.78 and we would not have expected the claimant successfully to have mitigated her loss. She has claimed recoupable benefits since the dismissal so the Recoupment Regulations apply.

(c) the assessment of future loss is a speculative exercise and always has been. In our view from the time she received the liability judgment stating she had not committed an act of gross misconduct we would expect her to obtain equally well paid employment within 20 weeks. Of that period nine weeks have elapsed, which leaves us with 11 weeks for which to compensate. This gives another element of loss of £2183.06.

3.3. The claimant has always been unrepresented before us. She has however had the advice of an experienced employment lawyer in the preparation of her schedule of loss. The sum it claims for injury to feelings is £5000. There are established guidelines for the assessment of injury to feelings and that falls just above halfway up the lower band. Mr Lane was prepared to agree that figure, subject to the appeal against the judgment on liability in that respect. We do not believe it would be right for us to award any higher figure in such circumstances. It would be possible to award direct financial losses but in this instance the awards for wrongful and unfair dismissal cover all such losses because the compensatory award we make falls just short of the statutory cap.

### 4. Costs

4.1. The Rules include:

*75. (1) A costs order is an order that a party (“the paying party”) make a payment to—  
(a) another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented ..*

*76. (1) A Tribunal may make a costs order ..., and shall consider whether to do so, where it considers that—*

*(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or **otherwise unreasonably** in either the bringing of the proceedings (or part) or **the way that the proceedings (or part) have been conducted**; or*

*(b) any claim **or response** had **no reasonable prospect of success***

4.2. The claimant has had professional assistance in the drafting of her schedule of loss and before the liability hearing in the drafting of her statement. We expected an application for costs on the basis that money spent in preparation for the liability hearing has been in response to a hopeless argument the reason given for dismissal was one

we found to be untrue. However, without hearing from Mr Lane, we decided to refuse that application. The Court of Appeal and EAT have said costs orders in the Tribunal:

(a) are rare and exceptional.

(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so

(c) the paying party's conduct as a whole needs to be considered Barnsley MBC v. Yerrakalva [2011] EWCA 1255

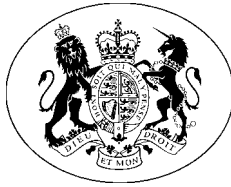
(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd- v- May-Bheemul 10/5/2011 EAT.

4.3. What we call the "threshold" issue is whether we are satisfied one of the circumstances in Rule 76 exists. If the "threshold" has not been reached, we need decide no more. There has been nothing wrong with the conduct of the proceedings and although we rejected the evidence of the respondent resoundingly in many respects we cannot say the line they ran had no reasonable prospect of success. Relying mainly on May-Bheemul, we make no costs order.

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**T M GARNON      EMPLOYMENT JUDGE**

**SIGNED BY EMPLOYMENT JUDGE ON 3 JUNE 2019**



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2501443/2018**

Name of case(s): **Mrs T Jackson** v **Roseberry Care Centres GB Ltd T/A Valley View Care Home**

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: **13 June 2019**

"the calculation day" is: **14 June 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE  
For the Employment Tribunal Office

## INTEREST ON TRIBUNAL AWARDS

### GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at [www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426](http://www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426)

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.