THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	***Respondent***
Mr E Thompson-Shaw	**HCT Group**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON: 6 June 2019**

EMPLOYMENT JUDGE Mr J Tayler
MEMBERS: Mr R Pell
Mr S Soskin

Appearances
For the Claimant: In Person
For the Respondents: Simon Perhar, Counsel

JUDGMENT

1. The Claimant is awarded a basic award of £7,363.13[1]

2. The Claimant is awarded a compensatory award of £13,083.76[2]

3. The Claimant is awarded compensation for injury to feeling in the sum of £4,600.00[3]

4. The Claimant is awarded interest on injury to feelings in the sum of £736.00

5. The total sum the Claimant is awarded is £25,782.89

6. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply;

   6.1. The monetary award is £25,782.89

   6.2. The amount of the prescribed element is £13,083.76

   6.3. The dates of the period to which the prescribed element is attributable are 1 June 2017 to 30 November 2017

   6.4. The amount by which the monetary award exceeds the prescribed element £12,699.13

[1] Reduced for contributory conduct by 15%
[2] Reduced for contributory conduct by 15% but uplifted for failure to comply by ACAS code by 15%
[3] uplifted for failure to comply by ACAS code by 15%

Reasons

1. By a Judgment sent to the parties on 12 December 2018 we held that:

   1.1. The Claimant was unfairly dismissed.

   1.2. The Claimant contributed to his dismissal by 15%.

   1.3. The Respondent failed to make a reasonable adjustment by not giving the Claimant additional time to present his case.

2. This Remedy Hearing was fixed at a Preliminary Hearing for Case Management on 3 May 2019. There has been significant delay in fixing a Remedy Hearing, principally due to the parties failing to take steps to prepare for the Remedy Hearing while the Respondent sought to appeal the remedy Judgment which resulted in the postponement of an earlier Remedy Hearing.

3. The Claimant gave evidence from a brief witness statement.

4. The Respondent called Darren Rees, Head of People and Talent. His witness statement was mainly a summary of the arguments that the Respondent was advancing on the remedy issues.

5. Pursuant to section 123 of the Employment Rights Act 1996 ("ERA"), the Tribunal should award a sum of compensation to the Claimant that is:

   > "…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".

6. The Claimant is entitled to be put in the position in which he would have been if the wrong had not been committed.

7. The assessment of loss is not an exact science; in assessing damages there must be "elements of estimate and to some extent of conjecture": per Lord Morris in **Mallet v McMonagle** [1970] AC 166.

8. The burden of proving loss lies on the Claimant: **Newton Tool Co v Tewson** [1972] ICR 501.

9. The burden of establishing any unreasonable failure to mitigate loss lies on the Respondent: **Wilding v British Telecom** [2002] ICR 1079. There is a difference between acting reasonably and not acting unreasonably: **Cooper Contracting v Lindsay** [2016] ICR D3.

10. Section 124 Equality Act 2010 ("EQA") provides:

> **124 Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may--
>
> (*a*) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (*b*) order the respondent to pay compensation to the complainant;

11. So far as is possible the Claimant should be placed in the position he would have been in but for the unlawful act: **Ministry of Defence v Cannock** [1994] IRLR 509.

12. Future loss of earnings should normally be assessed up to the point when the Tribunal estimates that the employee will obtain a job at an equivalent salary: **Wardle v Credit Agricole Corporate and Investment Bank** [2011] IRLR 604 Mr Justice Elias (as he then was) at para 51:

> "…in my view the usual approach, assessing loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases – and they are likely to be the vast majority – where it is at least possible to conclude that the employee will in time find such a job."

13. In **Griffin v Plymouth Hospital NHS Trust** [2015] ICR 347 Lord Justice Underhill explained the assessment at paragraph 9:

> "At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the Claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the Claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of probabilities"

14. In considering the award for injury to feelings we had regards to the Presidential Guidance Employment Tribunal awards for injury to feelings as at the date of the dismissal following **De Souza v Vinci Construction (UK) Ltd** [2017] EWCA Civ 879 and the bands and cases referred to therein, together with the **Simmons v Castle** uplift. At the relevant time the Presidential Guidance provided;

> **"**Subject to what is said in paragraph 12, in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*, the Vento bands shall be as follows: a lower band of £800 to £8,400 (less serious cases); a middle

> band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000."

15. Interest is to be calculated in accordance with the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996.

16. Where there has been a breach in the ACAS Code of Practice on Disciplinary and Grievance Procedures an uplift may be awarded of up to 25% of any financial compensation that is awarded: s 207A TULRCA 1992.

17. In **De Souza v Vinci Construction UK Ltd** [2018] ICR 433 the Court of Appeal considered a claim in which the Claimant had been awarded £9,000 for injury to feelings and £3,000 for psychiatric injury. The Court of Appeal held that the Simmons v Castle uplift applied to both awards. They held that the Employment Tribunal had failed to properly consider whether a s 207A TULRCA 1992 uplift for failure to follow the ACAS Code in respect of the Claimant's grievance. This aspect of the case was remitted to the Employment Tribunal. It is implicit that it was accepted that the uplift can apply to an award to Injury to feelings. There is nothing in the statute to suggest that it does not.

18. The ACAS code provides in respect of disciplinary hearings that;

> "The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses."

19. In assessing an appropriate figure for the ACAS uplift the Employment Tribunal must assess the blameworthiness of the Respondent's conduct **Wardle v Credit Agricole** [2011] IRLR 604. Lord Justice Elias stated that of the uplift;

> "It is a stick rather than a carrot, and the sanction for failing to comply has a significant punitive element since failure leads to additional compensation irrespective of the adverse effect on the employee. It is no doubt because the penalty should be commensurate with the offence that the EAT has expressed the view on a number of occasions that the degree of culpability is a highly significant factor when assessing the appropriate uplift. Culpability will include such considerations as the extent of the breach and whether it is deliberate or inadvertent"

20. Having assessed the blameworthiness of the Respondent's conduct the Tribunal should have regard to the overall figure for compensation to ensure that the sum awarded is not excessive, having regard, for example, to the sums awarded for injury to feeling: at paragraphs 27-9.

21. Mr Rees gave evidence that there is substantial demand for people with payroll experience and that the Claimant could mitigate his loss by obtaining work as a Payroll Manager or at a lower level as a Payroll Supervisor or Senior Payroll Assistant.

22. The Claimant stated at the time of his appeal in July 2017;

> "I remained very distressed and depressed to have been sacked in such a manner despite my unblemished record at HCT. This led to me having sleepless nights, feeling very angry with people around me as I felt very weak and helpless."

23. During the course of the hearing I raised with the parties the question of whether the statutory ACAS uplift could apply to an award of injury to feelings. The Respondent submitted it would be inappropriate as the award of injury to feeling in this case is designed to compensate for the upset caused by the manner in which the disciplinary process was dealt with; the Claimant not being given an opportunity of a reconvened hearing at which could finalise his evidence and submission. There was limited time to investigate the point and accordingly we granted permission for the parties to submit written submissions after the close of the hearing.

24. In the written submissions, the Respondent contended that as we had not found that the dismissal was discriminatory, contrary to their submission at the hearing that the Claimant should have an award of injury to feelings towards the bottom of the lowest band, there should be no award for injury to feeling because the Claimant had given no evidence to suggest that the manner in which he was treated by not being given a full opportunity to complete his submissions at a reconvened hearing had caused injury to feeling. We do not accept that is correct. The Claimant specifically referred in his statement to the manner in which he was dismissed. We consider that includes the process and, specifically, that conduct that we found to be discriminatory. Although we do accept that the majority of the upset that the Claimant has felt resulted from the dismissal itself and, accordingly, does not fall to be compensated under an award for injury to feelings for the discrimination that we found against the Respondent. We consider that there was real upset that the Claimant has been affecting his relationship with others and that a part of that upset has resulted from the failure to reconvene the disciplinary hearing which we have found to be discriminatory. We consider an appropriate award for injury to feelings is £4,000.

25. The Claimant provided relatively limited evidence about the steps that he has taken to find alternative employment. The Claimant's effective date of termination was 1 June 2017. He has produced documentation from 5 June 2017 suggesting that he was investigating six specific roles as a Payroll Team Leader, Payroll Support Partner, Payroll Assistant, Payroll Administrator, Payroll Manager and Payroll Provider. There appears to have been a flurry of activity shortly after the Claimant's dismissal. Thereafter, there is much less evidence. The Claimant contended that he had misunderstood the Order for disclosure and provided only sample evidence. We granted a substantially longer lunch break than normal to allow the Claimant an opportunity to provide evidence about other job searches. Despite the lengthy lunch break he was unable to do so. We do not accept the Claimant had not understood the order. It is notable that rather than there being a sample of applications spread over

the full period of alleged loss there are a number of clumps of activity. The next major series of application for jobs was in December 2017, resulting in a number of interviews in January 2018. The Claimant obtained temporary employment from 28 January 2018 to 27 July 2018.

26. In the latter part of 2017 the Claimant had investigated a number of alternative job roles, including being a minicab driver and/or a driver for Uber or a driver for Amazon.

27. We consider that the substantial gap in 2017 shows that the Claimant did not take sufficient steps to mitigate his loss. While we appreciate he only has to take reasonable steps to mitigate loss we consider, he fell short of this. We accept that the Claimant suffered a number of challenges. He was very upset by his treatment in the dismissal process and because of the dismissal. In particular, we accept that this had an adverse effect on his ability to focus properly on applying for new roles, particularly while the appeal process was ongoing. We also accept that the Claimant has limited formal qualification in payroll as we found in our decision on liability. Although described as a Payroll Manager, the Claimant had no significant managerial responsibility. We also accept that the Claimant would face challenges in obtaining new employment where he had been dismissed from his previous employment the basis that he had failed to perform his job duties properly. However, we also accept the Respondent's evidence that there are substantial numbers of payroll roles available and that the Claimant could mitigate his loss if he took roles at a considerably more junior level, at least in terms of job title, to that he had with the Respondent.

28. In analysing periods of loss, we have to pick a midpoint of the various probabilities. This is to reflect the possibility that the Claimant could have obtained the role sooner or later and the possibilities that there might initially have been a temporary or part-time involving a lower level of salary than that the Claimant obtained from the Respondent which would require some period of work before the Claimant would be able to apply for a job at a higher rate of pay. Taking those various possibilities into account we consider that it is appropriate to award a loss period of six months on the basis that the Claimant should within six months of the date of his dismissal, as a midpoint of the probabilities, have been able to fully mitigate his loss.

29. We calculate remedy as follows. The Claimant's gross weekly pay was £581.75. Net weekly pay was agreed at £443.57. In addition, the Claimant had a loss of pension contributions agreed at £55.85 per week. We consider it is appropriate to award the Claimant the sum the loss of statutory rights in the sum of £400.

30. We consider it is appropriate to award an ACAS uplift. We do not consider that the Claimant was given a full proper opportunity to set out his case and answer fully the allegations that had been made as he was not allowed the reconvened herring as promised. However, there was a disciplinary hearing and an appeal. We consider that the default in the process merits an uplift of 15%.

31. Net pay of £443.57 plus pension loss of £55.85 plus statutory rights of £400; multiplied by .85 for contributory conduct, multiplied by 1.15 for the ACAS uplift provides compensation in the sum of £13,083.76.

32. The basic award was agreed in the sum of £7363.13, having been reduced contributory conduct by 15%.

33. We consider it is appropriate to apply uplift compensation for injury to feeling. The scheme that provides uplift for failure to comply with the ACAS code is designed to include a punitive element to reflect the importance of complying with the code and to ensure that employers take it seriously. We consider it is appropriate to apply the uplift of 15% giving an award of £4,600 for injury to feelings.

34. Interest is to be awarded at the rate of 8% for a period of 2.01 years. It is awarded at the full rate from the date of the discriminatory act. That provides a multiplier of 0.16; giving at interest of £736.

35. The total sum the Claimant is awarded is £25,782.89. The recoupment regulations apply. The monetary award is £25,782.89. The prescribed element is £13,083.76, covering the period 1 June 2017 to 30 November 2017. The amount by which the monetary award exceeds the prescribed element is £12,699.13.

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Employment Judge Tayler

17 July 2019

Judgment and Reasons sent to the parties on

19th July 2019