



# EMPLOYMENT TRIBUNALS

**Claimant:** A

**Respondents:** 1. B  
2. C  
3. D

**Heard at:** Manchester

**On:** 3 and 4 July 2019

**Before:** Employment Judge Langridge  
Mr M C Smith  
Mrs C Clover

## REPRESENTATION:

**Claimant:** In person  
**1<sup>st</sup> Respondent:** Not in attendance  
**2<sup>nd</sup> & 3<sup>rd</sup> Respondent:** Mr B Henry, Counsel

# JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. The third respondent shall pay the claimant £4,389.40 gross pay in respect of the non-payment of National Minimum Wage rates between 1 October 2015 and 12 February 2017 (subject to any statutory deductions payable).
2. The third respondent shall pay the claimant £2,342.74 gross pay in respect of holiday pay accrued between 1 October 2015 and 12 February 2017 (subject to any statutory deductions payable).
3. The second and third respondents are jointly and severally liable to pay the claimant compensation of £5,951.89 representing her financial losses resulting from direct sex and race discrimination.
4. The second and third respondents are jointly and severally liable to pay the claimant compensation for injury to feelings resulting from direct sex and race discrimination in the sum of £3,000.

5. The second and third respondents are jointly and severally liable to pay the claimant compensation for injury to feelings resulting from sexual harassment in the sum of £14,000.
6. The second and third respondents are jointly and severally liable to pay the claimant aggravated damages in the sum of £2,000.
7. The second and third respondents are jointly and severally liable to pay the claimant interest totalling £7,195.16.
8. The third respondent shall pay the claimant £331.20 gross pay in respect of her entitlement to receive one week's notice of termination of her employment, subject to any statutory deductions which are payable.
9. The third respondent shall pay the claimant £1,324.80 as compensation for failure to provide her with written particulars of employment.

## REASONS

### Introduction

1. This Tribunal reserved its judgment on liability, which was sent to the parties on 4 February 2019. Judgment was given against the first and second respondents (then the only parties) in relation to seven claims:
  - (1) The first respondent's failure to pay the claimant the National Minimum Wage throughout her employment;
  - (2) The first respondent's failure to pay the claimant holiday pay;
  - (3) The decision not to pay minimum wage and holiday pay was direct race and sex discrimination by the first and second respondents;
  - (4) The first and second respondents subjected the claimant to harassment related to her sex and harassment of a sexual nature;
  - (5) The claimant was further harassed by the first and second respondents because she rejected the second respondent's sexual advances;
  - (6) The first respondent unlawfully terminated the claimant's contract of employment, without notice;
  - (7) The first respondent did not provide the claimant with written particulars of her employment such that the claimant was entitled to an award under section 38 Employment Act 2002.
2. The primary liability for the claims in paragraphs (1), (2), (6) and (7) was that of the employer, the first respondent, a limited company owned and managed by the second respondent. The discrimination claims were the joint responsibility of the first and second respondents, by virtue of provisions in the Equality Act 2010. Under

section 109 the first respondent was liable for the second respondent's acts done in the course of his employment, as those acts would also be treated as done by the employer, the limited company. Under section 110 the second respondent was personally liable for the acts of discrimination he committed, which under section 109 were also treated as being done by the first respondent.

3. The addition of the third respondent was ordered at the remedy hearing on 3 July and arose from information which came to light immediately before the hearing began. The third respondent is a limited company owned and managed by the second respondent and it has succeeded the first respondent in running the business where the claimant was employed, taking on the first respondent's assets and liabilities.

4. For ease of reading, references in this judgment to 'the old company' mean the first respondent, references to 'the director' mean the second respondent and references to 'the new company' mean the third respondent.

5. Mr Henry did not appear in the liability hearing but at the outset of the remedy hearing he had instructions to represent only the director. He had received his instructions on the afternoon before the hearing and although he was well-prepared those instructions were limited and at times unclear. Mr Henry's involvement was extremely helpful to the Tribunal, which also appreciated the courtesies he extended to the claimant who remained unrepresented.

6. On arrival at the Tribunal Mr Henry explained that he was unable to represent the old company because it had been dissolved on 15 January 2019. The Tribunal verified this through a Companies House search and noted that the director applied to dissolve the old company on 5 June 2018. This was only a few weeks before the liability hearing which took place between 10-13 July 2018, yet no attempt was made to notify the respondents' solicitors (who continue to act), the claimant or the Tribunal that the old company was being dissolved. This remained the position for many months until today's remedy hearing.

7. The Tribunal immediately made clear its suspicions that the dissolution of the old company may have been done deliberately in an attempt to avoid liability for these claims. It impressed upon the director that it expected to be given evidence of the reasons why the old company was dissolved. The director was invited to provide both oral and written evidence to explain the position, and although he did give evidence on the second day of this hearing he was unable to produce a single document to explain what had happened. He relied on the fact that his accountant was away on holiday and said his solicitors had not handled the transfer of the business to the new company, a fact which the solicitors later confirmed.

8. Mr Henry acknowledged the possibility of the claimant applying to have the old company restored to the register for the purposes of making a claim against the state for some aspects of the claims relating to pay. Following further enquiries he informed the Tribunal of his understanding that in order for the old company to have been dissolved, it must have been solvent at the time. Over the course of the hearing Mr Henry did his best to convey the instructions he was given about the old company's status. Helpfully, Mr Henry suggested on instructions from the director that the new company be added to the proceedings, and the Tribunal made that order. This was on the understanding that the new company had taken over trading

at the shop where the claimant had worked. The addition of the new company as a respondent was on instructions from the director, who confirmed those instructions under oath after also confirming that it is a successor business liable for any judgment that might have been made against the first respondent.

9. At this remedy hearing the Tribunal also heard oral evidence from the claimant in relation to her non-financial claims, and in assessing those claims took that evidence into account as well as the evidence she had given at the liability hearing. The calculation of the monetary claims was achieved by agreement during the course of the hearing with the cooperation and assistance of the parties.

### **Findings of fact relating to the first respondent**

10. The following is a summary of some key aspects of the facts which the Tribunal found proven after considering the available evidence.

11. The old company was dissolved on 15 January 2019 following an application by the director (the sole director and shareholder) on 5 June 2018. The director has held some other directorships, none of which were current as at the day of this hearing, and no new directorships appeared in Companies House searches for the period after January 2019. It then transpired, when the Tribunal pursued the point with the director, that he set up the new company on 8 March 2019. The director's wife was also named as a director but her name was removed after a few days. The second respondent has been a director of the new company since 11 March 2019 and is employed by the new company to manage the shop in the same way that he managed the shop for the old company.

12. The reason why the Tribunal was unable to find the director's new appointments at Companies House is that he registered his directorship in the new company (and another business not relevant to these claims) under an abbreviated version of his name, omitting the middle names. A fresh Companies House search carried out by the Tribunal confirmed the position.

13. In his evidence in chief the director said the reason why the old company was dissolved was because of his marital difficulties, in that he was separating from and then divorcing his wife. That was the extent of his explanation. When the Tribunal sought clarification by asking how closing the old company would assist his marital situation, the director referred to his health problems and said he could not run the business at the time, could not pay his staff and preferred to close the old company and not work for a while. He said his wife and a friend had run the shop in the interim. According to the director, the reason there was no paperwork was because he dealt with the arrangements himself, without solicitors. When asked questions about what happened to the old company's assets (such as stock and equipment), the director gave contradictory answers. When asked about staff working in the shop he first said they had left for other jobs. However, on later being questioned by the claimant and the Tribunal he conceded that two particular employees (Marzena and Magda) who worked with the claimant during her time there, still work for him and had also been working for his wife when she ran the shop. The Tribunal found the director's evidence in response to all these questions wholly unsatisfactory, contradictory and evasive.

14. The claimant was able to give limited evidence about her understanding of what had happened to the business. The new employment she started shortly after being dismissed is opposite the shop in the same street. She has seen the director in and around the shop continuously since she left. She has seen him talking to customers and suppliers, and noticed that the building is currently being improved and appears to be being extended.

15. After evaluating the evidence presented, the Tribunal was satisfied that the shop never ceased trading even on the dissolution of the old company and accepted as credible that the new company has been carrying out works to extend and improve it. The director's explanation for closing the old company was completely implausible. It lacked any detail or rationale. The Tribunal saw no clear or plausible explanation for taking that step and was satisfied that the director dissolved the old company in order to try and defeat the claimant's judgment against the first respondent.

### **Decision on remedy**

16. After considering the above questions relating to the first respondent's status, the Tribunal went on to deal with the assessment of compensation for the seven successful claims. It was helped considerably by the fact that the parties were able to present some agreed calculations, in that the claimant's calculations on wages and holiday pay were agreed by the respondents. Weekly rates of pay were also agreed, as was the methodology for calculating interest.

### **Minimum wage and holiday pay**

17. The Tribunal first calculated the amount that would have been payable by the old company, if it still existed, in respect of non-payment of the National Minimum Wage rates throughout the claimant's employment. Using the parties' agreed figures, this amounted to £4,389.40 based on gross pay. The amount of holiday pay payable by the old company would be £2,342.74 gross. The Tribunal was unable to give judgment for these sums against the first respondent because it no longer exists, but judgment for them was given against the third respondent as a successor business.

### **Direct discrimination**

18. The Tribunal was satisfied that the second respondent, the director, is personally liable for the decision not to pay National Minimum Wage rates or holiday pay, as damages for direct discrimination contrary to section 13 Equality Act 2010. He was an employee of the old company and was the actor in relation to the decisions not to make those payments. He made the discriminatory comments referred to in paragraphs 33, 66 and 68 of the liability judgment. By virtue of sections 109 and 110 Equality Act his actions made the first respondent liable and the director is also liable in his own right. The third respondent, the new company, has also become liable for the discrimination awards as a successor to the old company.

19. The remedy the claimant is entitled to receive as a result of direct discrimination is twofold: the first is compensation for the financial losses that she suffered as a result of the discriminatory decision not to pay her correctly, under

section 124(2) Equality Act. Under sections 119 and 124(6) of the Act, the amount of compensation should be calculated so as to put the claimant in the position she would have been in, if the discriminatory acts had not taken place. The Tribunal assessed these figures by taking the gross awards for minimum wage and holiday pay and converting them into net figures representing the money the claimant would have received had she not been discriminated against. These calculations were done by making a reliable estimate of net pay based on the respondent's estimate of net weekly pay amounting to £293.25 (agreed by the claimant), and then applying the same gross-to-net conversion rate to the wages and holiday pay figures.

20. On this basis, the net amount of compensation for financial losses is £5,951.89, comprising a net minimum wage shortfall of £3,880.67 and net holiday pay of £2,071.22.

21. The second award of compensation for direct discrimination relates to injury to feelings. The Tribunal felt that an award of £3,000 was appropriate, having regard to the Vento guidelines. This amount was determined on the strength of the claimant's evidence at the liability hearing, from which it was clear that she suffered a repeated and continuing level of upset and distress at having to ask constantly to be paid holiday pay and the correct minimum wage rates promised when she started work. At the remedy hearing the claimant gave further evidence about how demeaning she found the comments about not being entitled to these payments because she is Polish and a woman.

### **Sexual harassment**

22. The Tribunal next considered compensation in respect of the sexual harassment and harassment as a result of rejecting sexual advances, and took into account a number of factors in the evidence as well as the Vento guidelines. To ensure there was no risk of double recovery, and to reflect the overlap in the evidence about the injury suffered, the Tribunal considered together the claims of harassment under section 26(1) (related to sex), section 26(2) (unwanted conduct of a sexual nature) and section 26(3) (harassment for rejecting sexual advances).

23. Having heard evidence from the claimant at both the liability and remedy hearings, the Tribunal accepted that she suffered a serious and long-lasting emotional impact as a result of the treatment she received at work. The Tribunal was mindful of the fact that she was fit and able to start work in another shop very soon after leaving her employment, but even after more than two years she continues to experience a lingering distrust of her new employers and a general lack of trust in the people around her. This is especially the case when anyone at work comes too close to her physically, invading her personal space. The claimant has experienced depressive symptoms since her employment ended and has been taking medication in the form of a sedative which helps deal with those symptoms.

24. After considering the evidence in this case, as reflected in our original findings of fact, the Tribunal felt there are a number of particular factors which were relevant to the level of an award for injury to feelings. The following is not an exhaustive list but an attempt to identify the most significant aspects of the case to which we wish to draw attention.

25. The overarching feature of the harassment is that the director used his authority and his power over the claimant improperly to deny her her employment rights and to deny her a safe and dignified place of work. The reason he did that was because of his sexual interest in her, because he is a man and the owner of the shop and because she is a woman, and that fed into almost all of their interactions. The claimant endured sexual harassment, sometimes minor, sometimes more serious, on a weekly if not daily basis over the whole time that she worked in the shop, in excess of 16 months. We are satisfied that this was a sustained campaign because the director was quite determined to overcome the claimant's objections to his desire to have a sexual relationship with her. The fact that the director involved the claimant's young daughter on occasions in the harassment was an aggravating factor, as noted in paragraphs 79 and 80 of the liability judgment.

26. There are three particular incidents of sexual harassment which the Tribunal viewed as especially serious. The first was the incident when the director gave the claimant a lift in his car, tried to kiss her and tried to pressure her into a sexual relationship to the point where she had to escape the car to her daughter's house. The second was the incident in the storeroom, an assault. It was a serious abuse of power, completely unacceptable and extremely serious. It involved touching of a sexual nature and it involved slapping the claimant's face when those advances were rebuffed. The third incident took place in the latter part of the claimant's employment when the director followed her around the shop, pressurising her to take a lift with him, and then tried to find her outside the shop such that the claimant had to hide from him at the bus stop.

27. Towards the end of the claimant's employment the director decided to punish her for resisting his sexual advances. For example, he prevented her family from visiting her in the shop whereas previously he had been happy for them to do that; then he reduced her working hours to zero and soon afterwards he dismissed her.

28. We are conscious of the need to avoid compensating the claimant twice in respect of the same factors. The key incidents summarised above are all serious and have aggravating features. With this in mind, the Tribunal determined that the injury to feelings award should be at a level which reflects the serious and aggravating aspects of the harassment, and felt that an award of £14,000 for injury to feelings was appropriate on the facts.

### **Aggravated damages**

29. Following the guidelines in Alexander v Home Office, the Tribunal considered whether it was appropriate to make an award for aggravated damages. We took into account the presence of some features which warrant such an award, such as particularly upsetting conduct, a discriminatory motive, and subsequent conduct adding to the injury, which can include the conduct of proceedings.

30. Rather than make separate awards reflecting the aggravating features of the harassment, and to avoid duplication, the Tribunal assessed the injury to feelings award so as to take such features into account. In deciding whether to award aggravated damages, the Tribunal considered different features relating to the respondents' conduct of these proceedings. One example was the evidence heard at the liability hearing, when the director alleged that the clock cards produced by the claimant had been fabricated by her. Despite this bold (and unsupported) assertion,

it quickly became apparent that this was not the case, even on the evidence of some of the respondents' other witnesses. The evidence of the members of staff who spoke about the clock cards demonstrated that the director knew his assertion was false. In fact, it was not the claimant's clock cards which were incorrect: the Tribunal felt it was initially misled by the respondents about their own versions of clock cards, when it became apparent only well into the hearing that these were not authentic but rather 'samples'.

31. The Tribunal felt the respondents had been untruthful at the liability hearing about a number of matters. By way of example, the director had made an allegation of theft against the claimant during her employment, and the way he presented evidence about the CCTV footage supposedly proving the theft was completely unreliable and cast doubt on the validity of the theft allegation. The Tribunal did not accept that truthful evidence was presented about this issues, as summarised in paragraph 88 of the liability judgment. Maintaining the allegation of theft during the hearing aggravated the harm done during employment.

32. The final and most serious aspect of the aggravated damages award is that the Tribunal was in no doubt at all that the director deliberately dissolved the first respondent to try and avoid responsibility for these claims, taking no steps to advise the claimant or the Tribunal of this decision and simply turning up to the remedy hearing without having made any attempt to explain the position. It was only through the assistance of Mr Henry and the pressing of questions by the claimant and Tribunal that any information about the company changes was obtained.

33. For these reasons the Tribunal awarded aggravated damages in the sum of £2,000. We felt this was a relatively modest award in the circumstances but were mindful of the legal guidelines and the submissions made by Mr Henry which make it clear that we needed to consider all aspects of the compensation in the round, to ensure that the overall award was not disproportionate to the harm done.

### **Interest**

34. Interest is payable under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. It is awarded under Regulation 6(1)(a) on awards for injury to feelings, counting from the date of the act of discrimination until the calculation date. Interest on other losses is calculated under Regulation 6(1)(b) from the mid-point date between the beginning of the period over which the discrimination was experienced until the calculation date. The applicable rate of interest is 8% per annum.

35. In view of the immediate and continuing nature of the harassment experienced by the claimant, the Tribunal treated the start date for the calculation of interest on injured feelings as 1 October 2015, the date her employment began. The remedy hearing on 4 July was the end date, the calculation date under the Regulations.

36. Dealing first with the financial losses resulting from direct discrimination, the Tribunal calculated interest by reference to a mid-point date which amounted to interest at 8% over a period of 600 days. The net financial losses total £5,951.89, on which interest amounts to £895.16.



37. Interest on the injury to feelings awards was calculated for the entire period between 1 October 2015 and the remedy hearing. These were calculated to be:

- £900 interest on injury to feelings of £3,000 for direct discrimination.
- £4,200 interest on injury to feelings of £14,000 for sexual harassment.

38. In addition the Tribunal awarded interest of £600 on the aggravated damages award of £2,000.

39. The total amount of interest awarded therefore amounts to £7,195.16.

### **Notice pay**

40. Having found that the claimant was entitled to one week's notice, the Tribunal awarded compensation of £331.20. This figure was agreed between the parties and represented the gross amount of a week's pay. This was on the understanding that it qualifies as post-employment notice pay and is therefore subject to PAYE deductions.

### **Section 38 award**

41. The final award was made under section 38 Employment Act 2002, which was triggered by the claimant's successful claim under the National Minimum Wage Act 1998, a claim falling within Schedule 5 of the Act. Having succeeded in this claim, the Tribunal had to make an award under section 38 of at least two weeks' pay and had the discretion to increase this up to four weeks' pay if it felt it was just and equitable to do so. The amount of a week's pay is the gross weekly earnings up to the applicable statutory cap under the Employment Rights Act 1996. In this case the Tribunal applied the agreed figure of a gross week's pay of £331.20.

42. It was not in dispute that the claimant was never issued with a statement of her main terms and conditions of employment at any time. The Tribunal exercised its discretion to award four weeks' pay amounting to £1,324.80, which it felt was just and equitable for two reasons. The first is that the respondents made no attempt at all to provide any written information about terms and conditions of employment, which can be distinguished from a case where an employer attempts to provide some limited information, for example in the form of a letter. The second and more compelling factor was that the absence of written information about terms and conditions had a quite serious and negative impact on the working relationship. The claimant was promised that she would be paid the National Minimum Wage and she was not. She had to make repeated requests for the correct pay or for paid holiday, and these were either ignored or treated with hostility. She was afraid to keep asking, and was explicitly told she did not qualify for such rights because she is Polish. Had the claimant been given written information about her terms and conditions, she would have had a clearer understanding of the respondents' position and perhaps some of the disputes might not have impacted on her in the way that they did. It is for those reasons we exercise our discretion to increase the award.

## Summary

43. The total awards the Tribunal makes are summarised below. So far as the new company has assumed liability for the old company's actions, which we are led to believe is the case by the director, the third respondent is ordered to make those payments as the successor employer. The awards for discrimination and aggravated damages are made against the second and third respondents on the understanding that they are jointly and severally liable for the reasons set out above. The awards comprise:

- £4,389.40 in respect of non-payment of National Minimum Wage rates, payable by the third respondent.
- £2,342.74 in respect of non-payment of holiday pay, payable by the third respondent.
- £5,951.89 as compensation for financial losses for direct discrimination, payable by the second and/or third respondent.
- £3,000 injury to feelings for direct discrimination, payable by the second and/or third respondent.
- £14,000 injury to feelings for sexual harassment, payable by the second and/or third respondent.
- £2,000 aggravated damages, payable by the second and/or third respondent.
- Interest on the discrimination awards totalling £7,195.16, payable by the second and/or third respondent.
- £331.20 in respect of one week's notice, payable by the third respondent.
- £1,324.80 for the section 38 award, payable by the third respondent.

44. The total value of all awards is £40,535.19.

Employment Judge Langridge

Date 19 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 July 2019

FOR THE TRIBUNAL OFFICE

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## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2403142/2017**

Name of **A** v **1. B**  
case(s): **2. C**  
**3. D**

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: **29 July 2019**

"the calculation day" is: **30 July 2019**

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

For the Employment Tribunal Office