Case Nos: 2303198/2017 and 2300723/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr K Ofosu		**Cordant Cleaning Limited**

WRITTEN REASONS FOR JUDGMENT ON REMEDY

Introduction

1. These two cases were heard together on 15 and 16 April 2019 and judgment on liability was given orally at the end of that hearing together with the tribunal's reasons for that judgment.

2. The written judgment was sent to the parties on 21 May 2019 together with a separate Case Management Order for the remedy hearing. There was no request for written reasons for the liability judgment.

3. The Claimant having succeeded on part of his claims, the cases were listed for a remedy hearing which took place on 31 May 2019. Judgment on remedy was given orally at the end of that second hearing together with the tribunal's reasons.

4. The written judgment on remedy was sent to the parties on 12 June 2019 and a request was received from the Claimant on 15 June 2019 for written reasons. That request did not specify that it was in relation to the judgment on remedy but it has been taken as such since the time for requesting written reasons for the liability judgment had expired by the date of the request.

5. The paragraph immediately below repeats the content of the remedy judgment, and is followed by the reasons for that judgment as given orally to the parties at the end of the remedy hearing.

6. Pursuant to the remedy judgment, the Respondent has been ordered to pay to the Claimant the following sums:

   6.1 £1,920 as a basic award for unfair dismissal, which represents the statutory basic award but reduced by 20% pursuant to section 122(2) of the Employment Rights Act 1996.
   6.2 £1,269.24 as a compensatory award for unfair dismissal.
   6.3 £3,000 for injury to feelings in respect of the finding of unlawful race discrimination.
   6.4 £2,544.26 for financial losses in respect of the finding of unlawful race discrimination.
   6.5 £353.10 interest on the above sum for injury to feelings.
   6.6 £150.01 interest on the above sum for financial losses.
   6.7 £1,200, which amounts to 4 weeks' pay, pursuant to section 38 of the Employment Act 2002.

7. The tribunal had heard evidence from the Claimant on his own behalf and from two witnesses on behalf of the Respondent at the liability hearing and had been provided with a number of documents.

8. At the remedy hearing the tribunal heard further evidence from the Claimant on issues relevant to remedy in respect of his successful claims.

9. In light of the all the evidence read and heard by the tribunal at both hearings, it made the following findings and reached the following conclusions on remedy.

Section 38, Employment Act 2002

10. There had been a clear failure to comply with the requirements of section 4 of the Employment Rights Act 1996 in this case. The Respondent accepted that. Further, the Claimant had succeeded in relevant claims such that section 38 of the Employment Act 2002 was engaged. The Respondent argued that the tribunal should award only two weeks' pay under section 38 on the basis that the failure concerned a change to terms and conditions and not a failure to provide a contract in the first place and also because the Claimant had not raised this as an issue at any stage during his employment.

11. However, in the tribunal's judgment this was not merely a technical breach of the section 4 requirements. There had been no statement provided on the change of employer following the TUPE transfer of the Claimant's employment to the Respondent. Nor had there been any statement when the Claimant moved to fixed part time hours to facilitate his university studies. The tribunal also reminded itself that the Respondent is a relatively large employer with its own in-house HR function.

12. In the circumstances, the tribunal considered that it was just and equitable to award four week's pay under section 38. The Claimant's gross pay was £1300 per month, which becomes £300 when converted to a weekly figure (ie by multiplying by 12 and dividing by 52). 4 x £300 = £1,200 which is the sum awarded to the Claimant under this heading.

Race discrimination

13. The Claimant succeeded on one of his allegations of direct race discrimination, namely the Respondent's failure to offer him any work from 20 September 2017 to the date of his resignation on 11 December 2017. The tribunal found that the Respondent, whether through management or HR, failed to engage with the Claimant at all during this period. The context was that the Claimant had had a discussion with his manager on the evening of 20 September 2017 and had interpreted the end of that discussion, reasonably in the tribunal's view, as an instruction to go home and stay at home until he received a letter from HR telling him what would happen next. He never received such a letter or any substantive communication from HR or anyone else even though, after about 2 weeks, he tried to make contact with HR by phone and in writing.

14. The tribunal has considered what remedy to award for this aspect of the case and has considered an award for injury to feelings and an award for financial losses. Neither party suggested that any other remedy, apart from the declaration already made in the liability judgment, was appropriate.

15. The Claimant (who represents himself) put forward a figure of £3,000 for injury to feelings in his schedule of loss. The Respondent says that this was on the basis of all four of his allegations of race discrimination and he has only succeeded on one.

16. However, the finding that has been made in the Claimant's favour is in respect of the most serious and long-lasting of his discrimination allegations.

17. The tribunal has taken into account the length of time over which the discriminatory conduct continued and the evident hurt that was caused to the Claimant's feelings during that period. The tribunal also reminded itself that injury to feelings awards are intended to be compensatory rather than punitive and that there is no suggestion of any impact to the Claimant's health. Indeed, he was able to obtain alternative employment within a relatively short time after his resignation.

18. Taking all of the evidence into account, and relevant guidance from case law and from the Presidential Guidance, the tribunal has concluded that an award for injury to feelings of £3,000 is appropriate in this case.

19. Turning to the question of financial losses, the tribunal found that the Claimant would have returned to work if the Respondent had offered him work in accordance with his contractual role as an allocator/shunter. The finding of discrimination concerned their failure to offer him work for a period of 10½ weeks up to his resignation on 11 December 2017. The tribunal has concluded that an award should be made for the earnings he would have received during that period.

20. The Claimant's net earnings were £1,050 per month, which becomes £242.31 when converted to a weekly sum. 10½ x £242.31 = £2,544.26

which sum is awarded to the Claimant for financial losses consequent on the finding of direct race discrimination.

21. The tribunal has awarded the sum for financial losses on a net basis in accordance with the principles discussed in *A v Commissioners for HMRC* ([2015] UKFTT 0189).

Unfair dismissal

22. The tribunal found in its liability judgment that the Claimant's resignation on 11 December 2017 amounted to a constructive dismissal and that it was an unfair dismissal.

23. In accordance with the statutory formula, given the Claimant's age, length of service and weekly wage, the basic award for unfair dismissal (subject to any deduction as discussed below) would be 8 x £300 = £2,400.

24. Turning to the compensatory award, the tribunal considered loss of statutory rights and loss of earnings. Again, neither party suggested any other element that should be included in this award.

25. The Claimant claimed £300 for loss of statutory rights. He had many years' service. He obtained a new job shortly after his dismissal which he left after 5 or 6 months to pursue university studies towards a PhD. The Respondent contended that as a result he should receive a reduced award, if any, for this aspect of his claim. The tribunal disagreed. In all the circumstances, the tribunal found that £300 is a fair reflection of the Claimant's loss in this regard.

26. As for loss of earnings, the Claimant was out of work for 4 weeks between his dismissal and subsequently starting a new job. The Respondent said that he failed to mitigate his losses during this period but could not point to any particular job that it said he should have applied for. It said, more generally, that he could and should have obtained cleaning work. However, the Claimant had not undertaken cleaning work for some years and, in any event, around 80% of the relevant cleaning jobs in the area were with the Respondent. Further, the tribunal accepted that the Claimant was entitled, for a period at least, not to lower his sights when seeking alternative work. There was no failure to mitigate and the tribunal therefore awarded 4 weeks' net pay, ie 4 x £242.31 = £969.24. This element of the award was calculated on the basis of net wages since it will fall within the £30,000 termination payment exemption and will not be subject to tax.

Possible reductions

27. A number of possible reductions to the above awards were raised by the Respondent which it said should bite not only on the unfair dismissal award but also the race discrimination award:

    27.1 Arguments under Polkey should not, in the tribunal's judgment, succeed. It would be an unusual case in which such arguments would succeed following a constructive unfair dismissal. This is not

such a case. Even if, which it is not, the tribunal had been minded to accept that this was purely a procedurally unfair dismissal, there was, in effect, no evidence put forward to establish that the Claimant would, or even might, have been dismissed in any event. The arguments were far too speculative.

27.2 A point was also raised concerning non-compliance with the ACAS Code. However, if anything it was the Claimant who was trying to engage with the Respondent through its HR function and HR who, for some unknown reason, were unwilling or unable to engage with him. No reduction is appropriate for failure to follow the ACAS Code.

27.3 Finally, the Respondent raised arguments under sections 122(2) and 123(6) of the Employment Rights Act 1996 ('ERA') and under the Law Reform (Contributory Negligence) Act 1945 ('the 1945 Act') which may loosely be termed contributory fault arguments. The ERA arguments could lead to a reduction in the basic and/or compensatory awards for unfair dismissal, whereas the 1945 Act argument could, the Respondent said, lead to a reduction in the discrimination award.

27.4 Under section 123(6) of the ERA and under the 1945 Act the Respondent argued, and the tribunal accepted, that the question was essentially one of causation. In other words, did any conduct on the part of the Claimant cause or contribute to the matters in respect of which an award has been made? It is right that the Claimant's conduct on 19 September 2017 was, as the tribunal had already found in its liability judgment, unreasonable and that it preceded a series of events ultimately leading to his dismissal. However, on 20 September 2017 it was the Respondent that told the Claimant, as he reasonably interpreted it, to go home and stay there until he heard from HR. That, and the fact that HR never wrote to him or otherwise engaged with him is why he was at home from 21 September to 11 December 2017. It was the Respondent's failure to write to him or otherwise engage with him that amounted to unlawful discriminatory conduct and a repudiatory breach leading to his constructive dismissal. In the circumstances, the tribunal concluded that any unreasonable conduct on the part of the Claimant was too remote in a causative sense and it was not appropriate to make any reduction to the above awards under these provisions.

27.5 Under section 122(2) of the ERA the question for the tribunal is different. It is not a question of causation but, rather, whether any conduct of the Claimant before his dismissal was such that it would be just and equitable to reduce the basic award. This gives the tribunal a broad discretion. The tribunal had already found, as noted above and in its liability judgment, that certain aspects of the Claimant's conduct were unreasonable and that they were the prelude to the events ultimately leading to his dismissal. In all the circumstances the tribunal concluded that it would be just and equitable to reduce the basic award in this case by 20%.

Interest

28. The tribunal is obliged to consider an award of interest on discrimination awards pursuant to the Employment Tribunals (Interest on Awards in

Discrimination Cases) Regulations 1996 ('the 1996 Regulations'). The Respondent did not suggest that interest should not be awarded on anything other than the default basis under the 1996 Regulations.

29. The tribunal awarded interest at the statutory rate on the above award for injury to feelings for the period from 11 December 2017 (the day of dismissal) to 31 May 2019 (the day of the remedy judgment).

30. The calculation was: (537 days / 365) x 8% x £3,000 = £353.10.

31. The tribunal further awarded interest at the same rate on the above award for financial losses for half the period from the date of dismissal to the date of the remedy judgment.

32. The calculation was: (269 days / 365) x 8% x £2,544.26 = £150.01.

Employment Judge K Bryant QC
21 June 2019