



EMPLOYMENT TRIBUNALS

Claimant: Miss S Daniels

Respondents: 1. Hilbre Care Limited
2. Ms D McManus

Heard at: Liverpool **On:** 11 September 2019

Before: Employment Judge T Vincent Ryan
Mr A G Barker
Mr A Wells

REPRESENTATION:

Claimant: Mrs S Kearns (Personal Friend)
Respondents: Mr S Joshi (Solicitor)

JUDGMENT ON REMEDY

Pursuant to the Judgment on Liability sent to the parties on 10 January 2019, the unanimous judgment of the Tribunal in respect of remedy is:

1. The claimant is not entitled to recover her claimed pecuniary losses in respect of unpaid statutory sick pay and loss of statutory protection in relation to the finding that she was automatically constructively unfairly dismissed (where the reason for the dismissal was that she had made protected disclosures).
2. The respondent shall pay to the claimant damages for injury to her feelings in relation to her successful public interest disclosure detriment claims in the sum of £10,000 with interest of £876.92. The respondent is ordered to pay to the claimant £10,876.92.
3. The respondent's application for a stay with regard to enforcement of the above award is refused in the interests of justice.

REASONS

1. Introduction

- 1.1 The Tribunal found unanimously that the claimant made three public interest disclosures in 2017 in consequence of which she was subjected to detriments, and she resigned in circumstances amounting to an automatically unfair constructive dismissal. That finding followed a hearing on 4-17 December 2018. The Judgment was signed on 27 December 2018 and it was sent to the parties on 10 January 2019 (“the Liability Judgment”).
- 1.2 The claimant provided the respondent and the Tribunal with a Schedule of Loss for the remedy hearing that appears at pages 15-16 of the remedy hearing bundle of documents (hereinafter referred to as “the bundle”). She amended the schedule during the course of the hearing, confirming that her claim was in relation to a shortfall in the payment of statutory sick pay due to her in the sum of £17.87 during the course of her employment, loss of statutory rights in the sum of £500 and damages for injury to feelings in the sum of £10,000. No further financial awards were sought.
- 1.3 The Tribunal heard evidence from the claimant and submissions made for and on behalf of both parties.
- 1.4 The Tribunal’s findings in respect of remedy are based upon the findings of fact and application of the applicable law to facts set out in the Liability Judgment, and the facts also found at this remedy hearing and law detailed below.

2. The Facts

- 2.1 The effective date of termination of the claimant’s employment was 16 November 2017, and this followed a period of sickness absence that commenced on 14 June 2017 during which time the claimant raised a formal grievance on 28 July 2017. By way of public interest disclosure detriment, the respondents withheld SSP for some time from the claimant and failed to deal with her grievance.
- 2.2 The claimant's absence from work having commenced on 14 June 2017, her first payment of SSP would have been due to her during the week ending 24 June 2017.
- 2.3 The claimant was entitled to receive £89.35 per week by way of SSP and, by the date that the first respondent paid it, 22 weeks’ SSP had accrued and was outstanding due to the claimant (£1,965.70). HMRC calculated the sum due to the claimant. The claimant received £1,947.83 following the involvement of HMRC. The claimant's receipt of £1,947.83 was £17.87 less than the sum to which she was entitled; this balance remains outstanding.

- 2.4 The claimant commenced employment following her resignation on 16 November and has been in more highly remunerated employment since that date.
- 2.5 The claimant was not employed for two years prior to her resignation and had not acquired the statutory right of protection against ordinary unfair dismissal.
- 2.6 Prior to her resignation the claimant had sought, both informally and formally through a grievance procedure, to resolve issues with the respondents. She wished to “sit down” with the second respondent to discuss matters and to sort them out amicably and remain in employment which she enjoyed.
- 2.7 The claimant felt considerable injury to her feelings as she was aware of being ostracised by her employer, effectively the second respondent as the controlling mind. This made her anxious and ill such that she was unfit to work. She had financial worries at the time, with dependent children, and this caused her anxiety and stress. She was prescribed medication for these symptoms. Throughout the period of her unpaid absence and while the respondent was refusing to deal with her grievance the claimant was offended at feeling that she was being forced out of her job. This lasted for a period of some five months.
- 2.8 The claimant resigned because the respondents would not resolve matters with her; she was without income; she felt isolated and ostracised and concluded that she ought to seek alternative employment even though she enjoyed working for the first respondent, would rather have stayed there, and most of all wanted to resolve any issues amicably with the second respondent.
- 2.9 The facts in the Liability Judgment are confirmed and the Tribunal referred to them.

3. The Law

- 3.1 Section 118 Employment Rights Act 1996 (“ERA”) provides that where a Tribunal makes an award of compensation for unfair dismissal under sections 112(4) or 117(3)(a) the award shall consist of a basic award calculated in accordance with sections 119-122 and section 126 ERA, and a compensatory award calculated in accordance with sections 123 and 124 ERA.
- 3.2 The basic award for unfair dismissal is calculated by reference to the period of employment, calculated in the number of years of employment exceeding two years.
- 3.3 Section 123 ERA provides that with regard to a compensatory award the Tribunal may make such award as it considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in

consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

- 3.4 There is no statutory provision for an award of damages for injury to feelings in respect of a claim of “ordinary” unfair dismissal, that is a claim that the right not to be unfairly dismissed granted by section 94 ERA has been infringed in the circumstances described in sections 95-98 ERA.
- 3.5 Where there is however a dismissal under section 103A ERA where the reason, or if more than one reason the principal reason, for the dismissal was that the employee had made a protected disclosure, such dismissal is treated as a form of discrimination. That said, the claim is still one of unfair dismissal and a successful claimant is not entitled to damages for injury to feelings.
- 3.6 Where a claimant is successful in claiming that he or she was subjected to detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure, then that too is a form of discrimination (**Virgo Fidelis Senior School v Boyle [2004] IRLR 268, [2004] ICR 210**). The EAT also confirmed that detriment suffered by a whistle-blower should be regarded as a very serious form of discrimination and breach of anti-discrimination legislation. Whilst a successful claimant cannot claim damages for injury to feelings in respect of a “whistle-blowing” dismissal that is automatically unfair, they may claim such damages in respect of detriments to which they were subjected.
- 3.7 The EAT set out the general principles that apply to assessing an appropriate injury to feelings award in *Prison Service v Johnson* [1997] IRLR 162, para 27:
 - 3.7.1 Injury to feelings awards are compensatory and not punitive; they must be fair to both parties and ought not be influenced by the tribunal’s attitude to the detrimental treatment in question;
 - 3.7.2 Awards should not be so high or so low as to cause disrespect to the process and purpose of making such awards;
 - 3.7.3 Awards should have some correlation with personal injury awards in general;
 - 3.7.4 The tribunal should consider the real-life value, purchasing power, of any award in day to day living;
 - 3.7.5 The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

- 3.8 In *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102) the Court of Appeal identified three broad bands of compensation for injury to feelings (albeit within each band there is flexibility, allowing a tribunal to fix what it considers to be fair, reasonable and just compensation in the circumstances of the case) and it gave the following guidance:
- 3.8.1 The top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in the most exceptional case should an award of compensation for injury to feelings exceed top of this band;
 - 3.8.2 The middle band should be used for serious cases, which do not merit an award in the highest band;
 - 3.8.3 The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than the bottom of this band are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
- 3.9 The bands have been revised over time and the Presidents of the Employment Tribunals in England & Wales and Scotland issued '[Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction \(UK\) Ltd](#)'. This Guidance updated the bands (and provided a formula for updating them for claims presented before 11 September 2017). That guidance was updated by an [Addendum](#) issued on 23 March 2018. The bands are now:
- 3.9.1 Upper Band: £25,700 to £42,900;
 - 3.9.2 Middle Band: £8,600 to £25,700; and
 - 3.9.3 Lower Band: £900 to £8,500.
- 3.10 It is necessary for the individual to prove the nature of the injury to feelings and its extent.
- 3.11 Such awards attract interest at the rate of 8% from the date of the act of discrimination/detriment to the date of calculation.

4. Submissions by the Claimant

- 4.1 The claimant, acting on both formal and informal advice and by reference to the applicable guidelines for injury to feelings, assessed damages in her case at £10,000.
- 4.2 The claimant also sought recovery of the shortfall in statutory sick pay that arose during her employment and compensation for loss of statutory rights.

5. Submissions by the Respondent

- 5.1 Mr Joshi for the respondent contended that the shortfall in SSP, such as it was, arose during the course of employment and was not in consequence of the dismissal. There was no claim nor any judgment with regard to an alleged unauthorised deduction of wages, and therefore the Tribunal was not entitled to make an award in respect of the SSP shortfall under the guise of an unfair dismissal award.
- 5.2 Mr Joshi also submitted that a claim in respect of loss of statutory rights related to the right not to be unfairly dismissed. That right only arises under section 94 ERA upon the completion of two years' continuous employment. In this case the claimant did not have two years' continuous employment. She did not have the right of protection against "ordinary" unfair dismissal. She cannot be said to have lost the right that she was in the course of accruing but did not accrue, and therefore is not entitled to compensation in respect of it.
- 5.3 Mr Joshi contended that the claimant is not entitled to an award in respect of injury to feelings by analogy with litigation relating to the breaches of the Working Time Regulations, specifically the case of **Santos Gomez v Higher Level Care Limited [2016] ICR 926**. This claim related to a breach of the Working Time Regulations. The EAT upheld the Tribunal's decision at first instance that such a claim did not permit of compensation for injury to feelings. Mr Joshi's argument was that by extension, in the absence of specific statutory authority for making such an award there should be no award for injury to feelings damages in respect of a whistleblowing detriment claim. Any such award was dependent upon specific statutory authority.

6. Application of Law to Facts

- 6.1 The tribunal agreed with the respondent's submissions as to the claimant's claims for the recovery of unpaid SSP and compensation for loss of statutory rights. For the reasons stated by Mr Joshi those claims were not allowed.
- 6.2 The tribunal disagreed with Mr Joshi about the recovery of damages for injury to feelings in "whistleblowing" detriment (as opposed to automatic unfair dismissal) claims.
- 6.3 **Injury to Feelings Damages:**
- 6.3.1 I drew to the parties' attention the Judgment of the EAT in **South Yorkshire Fire and Rescue Service v D Mansell & Others [2018] UKEAT 0151-17-3001**. This is authority for the contention that all claims of detriment under Part V of the Employment Rights Act 1996 could be considered as if, and treated akin to, claims of discrimination and victimisation; whether or not an award of injury to

feelings was appropriate was a question of fact in each particular case.

- 6.3.2 Following **Virgo Fidelis**, the authorities, and practice in the Tribunal, it is usual to consider awarding damages for injury to feelings in whistle-blowing detriment claims where they are appropriate.
- 6.3.3 In all the circumstances of this case the tribunal considered that it was appropriate to award damages for injury to feelings. Statutory sick pay is in place to protect the income of employees who are absent from work and unable to earn their full wage; grievance procedures are in place to assist employers and employees to arrive at informal or formal resolution of problems that arise during the course of work so as to avoid or reduce conflict and impossible, litigation. In this case the respondent chose to delay payment to the claimant of her full statutory sick pay entitlement and wilfully refused to engage in the grievance procedure leaving the claimant with what she considered to be no other option than to resign from her congenial employment. This caused the claimant hardship, frustration, disappointment and upset. The tribunal considered it would be inappropriate in the circumstances for it not to follow the usual practice in such cases of awarding damages for injury to feelings in respect of successful detriment claims and it was entirely appropriate to make such an award.
- 6.3.4 This claim was presented to the tribunal on 10th October 2017. The applicable “Vento” bands are those then recommended.
- 6.3.5 The tribunal considered the applicable guidelines and banding. The claimant was subjected to detriment over a considerable period of time and this was not an isolated or one-off event. It was a continuing event. The prolongation of the period of subjection to detriment exacerbated the stress and distress caused to the claimant to the point of her resigning from employment that she enjoyed and had hoped to retain. The injury to her feelings was compounded by the respondents’ intransigence in a situation where she sought a swift and peaceful resolution so that she could resume the duties that she enjoyed.
- 6.3.6 The tribunal considered that the award ought to be towards the bottom end of the middle band. After careful consideration the tribunal considered that £10,000 was the appropriate sum.

7. Summary

- 7.1 SSP – nil
- 7.2 Loss of statutory rights – nil

7.3 Injury to feelings - £10,000.

7.4 Interest - £876.92.

Employment Judge T Vincent Ryan

Date: 21.10.19

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 October 2019

FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2420916/2017**

Name of **Miss S Daniels** v **(1) Hilbre Care Ltd**
case(s): **(2) Ms D McManus**

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: **23 October 2019**

"the calculation day" is: **24 October 2019**

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

MRS L WHITE
For the Employment Tribunal Office

