



EMPLOYMENT TRIBUNALS

Claimant: Mr W Hoch
Respondent: Thor Atkinson Steel Fabrication Limited

HELD AT: Carlisle **ON:** 12 August 2019
BEFORE: Employment Judge B Hodgson
Mrs C Bowman
Mr C Cunningham

REPRESENTATION

Claimant: Miss L Amartey, Counsel
Respondent: Ms C Elvin, Consultant

JUDGMENT ON REMEDY having been sent to the parties on 18 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Following a Liability Hearing heard on 15 – 18 April 2019, the claimant's claims of constructive unfair dismissal, harassment related to race and harassment related to sexual orientation were upheld
2. The parties accordingly attended a Remedy Hearing for remedy to be determined

3. The claimant gave evidence on his own behalf. The respondent did not call any witnesses. Both representatives made oral submissions, the claimant's representative producing written as well as oral submissions. References to submissions made by the parties are to submissions made on their behalf by their respective representatives
4. The parties produced an agreed Bundle of Documents and references within these Reasons to a numbered page are to documents as numbered within that Bundle
5. There was agreement as to the various heads of claim that needed to be determined and the parties were in a measure of agreement as to elements of those heads
6. The Tribunal sets out in these Reasons the areas of agreement together with the submissions made and the Tribunal's conclusions in respect of those elements upon which agreement was not reached
7. The claimant's basic position is set out in his Schedule of Loss (see pages 79 – 81) and the respondent's response in its Counter-Schedule (see pages 82 – 83)

Heads of Loss

Basic Award

8. It was agreed that the claimant had a total of three years' service with the respondent and that, at the date of the termination of his employment, he had a gross weekly pay of £541.50 which exceeds the relevant statutory cap of £508
9. It was accordingly agreed between the parties that the correct figure for the basic award was £1,524
10. The respondent sought to argue that this figure should be reduced by reference to the provisions of section 122(2) of the Employment Rights Act 1996
11. The respondent referred the Tribunal to its findings at paragraphs 68 and 69 of its Reasons in its Liability Judgment and argued that in light of those findings there should be a reduction of up to 30%. The claimant's submission was that at least some of those findings do not relate to conduct in the course of the claimant's employment, but rather prior to the commencement of his employment and, in any event, the findings are not such as to justify any reduction on a just and equitable basis
12. The Tribunal's conclusion was that, in the overall context of the Tribunal's findings, those elements of conduct referred to on the part of the claimant are not of sufficient materiality, particularly given the extent of the respondent's conduct, to render it just and equitable to make any reduction to the basic award

Compensatory Award – Loss of Earnings

13. The parties had a marginal difference in the calculation of the claimant's net loss of salary to date (namely from termination of employment to the date of this hearing - a period agreed at 67 weeks) but this figure was ultimately agreed in the sum of £29,082.67
14. The claimant had mitigated his loss by obtaining alternative employment immediately following the termination of his employment
15. Although his basic pay in his alternative employment was lower than the figure he was earning at the respondent, the claimant had taken advantage of the opportunity to work overtime on a regular basis and his corresponding income for the 67 week period was significantly in excess of the income he would have earned with the respondent had he not been dismissed (see Appendix 1 to the claimant's written submissions)
16. The claimant's submission was that overtime payments should be ignored and it was not appropriate to look at the overall position over the entire 67 week period. The respondent's submission was that the claimant's earnings in his new employment meant that he had not suffered, and would continue not to suffer, any loss of earnings; his earnings with the respondent had also reflected an element of overtime working
17. The Tribunal accepted that the claimant's own evidence at the liability hearing had been that he was required to work overtime periodically when employed by the respondent
18. The Tribunal's conclusion was that, looking at both the period up to the hearing and forward, it was apparent that the level of the claimant's earnings in his new employment were and would be such as to cancel out any loss of earnings he would otherwise have had. There was already an element of overtime in the claimant's earnings with the respondent. Accordingly, the overall just and equitable position was to make no award in respect of both past and future loss of earnings

Compensatory Award - Loss of Statutory Rights

19. The claimant valued this at a figure of £500, the respondent at a figure of £350
20. Taking into account the level of earnings of the claimant and his length of service with the respondent, the Tribunal concluded that a figure in the sum of £500 was appropriate

Injury to Feelings – Race Claim

21. The claimant's position in this head of claim was that an award at the top of the 'Vento middle band' was appropriate

22. In support, the claimant argued that the discriminatory conduct effectively ran over a three-year period and was perpetrated by numerous individuals including his superiors; that the effects on him were profound and long-lasting, affecting his personal as well as his professional life
23. The Tribunal was referred to a number of examples of awards (set out in Appendix 2 to the claimant's written submissions)
24. The respondent accepted that an appropriate award would be in the middle band of Vento but at the bottom end of that band, arguing that the claimant had been fit enough to work immediately following his (constructive) dismissal and that he appeared to have other 'stressors' independent of any discriminatory conduct
25. In respect of both claims for an award of injury to feelings, the Tribunal took note of the general principles regarding injury to feelings awards (see, for example, *Prison Service v Johnson* [1997] IRLR 162) together with the relevant Presidential Guidance
26. The Tribunal noted the extreme nature and extent of the conduct found; the fact that the perpetrators included the owner of the business; the prolonged period over which the conduct continued; the impact upon the claimant as shown by his medical records and his oral evidence
27. In all the circumstances, the Tribunal's conclusion was that an appropriate award was in the sum of £22,000

Injury to Feelings – Sexual Orientation Claim

28. The claimant's position in this head of claim was that an award in the sum of £5,000 was appropriate, accepting that the discriminatory conduct in this regard was not at the same level or frequency as that of the claim related to race
29. The respondent repeated its arguments as with the claim related to race and agreed that an award should fall within the bottom band of Vento but not at the level claimed
30. Taking account of the similar factors, albeit the lesser nature of the conduct in this regard relative to that related to race, the Tribunal concluded that an award in the sum of £5,000 was appropriate

Aggravated Damages

31. The claimant claimed aggravated damages particularly based on the following:
 - 31.1. The fact that the respondent, in its early pleadings, adopted a stance of denying any comments of a racist nature contrary to the position it ultimately presented in evidence

- 31.2. That allegations were made by Mrs Atkinson on behalf of the respondent which were described as "malicious and fanciful" and "solely designed to impugn [the claimant's] character and undermine his credibility" (as referred to in the findings of fact in the Liability Judgment)
- 31.3. The respondent attempting to discourage the claimant from pursuing his claim by, through its solicitors, raising claims for financial compensation which were "a transparent attempt to discourage the claimant from pursuing his claims and represented unacceptable and coercive pressure" (as referred to in the findings of fact in the Liability Judgment)
- 31.4. Reporting the claimant to the Police resulting in his arrest over the question of company property which he had already offered to return
32. The claimant valued the claim under this head in the sum of £5,000
33. The respondent opposed the claim, submitting that it had not acted in a manner that could be categorised as high-handed, malicious or oppressive, based on the following:
 - 33.1. The respondent was entitled to put forward its defence in good faith and corrected their position as early as possible
 - 33.2. There was no malice intended in instructing solicitors to pursue the claimant or in reporting matters to the Police
 - 33.3. There was no attempt to bully or discourage the claimant or any witness on his behalf
34. The Tribunal noted the general principles under which an award under this head should be considered (see, for example, Commissioner of Police of the Metropolis v Shaw 2012 ICR 464) and that any such award is compensatory and not punitive
35. The Tribunal noted in particular the following factors
 - 35.1. the letters that the respondent caused its solicitors to write to both the claimant and the witness Mrs Brady following the termination of his employment
 - 35.2. the content of such correspondence as to the level of financial claim being made
 - 35.3. the timing of the correspondence
 - 35.4. the unchallenged evidence given by the claimant as to the impact of his arrest upon his future employment prospects
36. The Tribunal's conclusion is that there is no other proper explanation of this conduct other than as being and intended to be intimidatory and taken

maliciously, with no other adequate explanation being given as to alternative motivation

37. In the circumstances, the Tribunal's conclusion was that it is appropriate to make an award of aggravated damages in the sum of £5,000
38. In reaching this conclusion, the Tribunal considered the overall total of the awards of injury to feelings and aggravated damages to ensure no double recovery and concluded that the overall figure was proportionate to the totality of the suffering caused to the claimant

Personal Injury

39. The claimant claimed a sum of £5,000 in this regard
40. The claimant referred to the Medical Report from the claimant's GP dated 19 June 2019 (page 160) as evidence of the causal link between the discrimination suffered and the claimant's ongoing psychological injury; the ongoing nature of the condition requiring medication; his medical records and further relevant correspondence (at pages 151 – 154)
41. The Tribunal was referred to the Judicial College Guidelines (at Appendix 3 of the claimant's written submissions with examples of awards at Appendix 4). The respondent categorised the level of psychiatric damage as 'moderate'
42. The respondent accepted the principle of an award under this head but submitted that, taking account of the fact that not all of the claimant's mental health issues were caused by the respondent's discriminatory conduct, a more appropriate figure was the sum of £3,000
43. The Tribunal balanced the fact that the claimant had been able to continue in alternative work but that the respondent's conduct had led to suicidal thoughts and a need for ongoing medication and concluded that the psychiatric damage fell into the top end of the 'less severe' category
44. The Tribunal sought to ensure there was no overlap between this award and the injury to feeling awards and concluded that the appropriate award in all the circumstances was in the sum of £4,500

Interest

45. The parties were in agreement, given the above findings, on the appropriate level of interest. There was agreement that, in the circumstances of the awards made, the relevant period was 3.7 years (1 December 2015 to 12 August 2019) and interest at a rate of 8% per annum was to be applied to a total figure of £36,500
46. The parties accordingly agreed that the correct calculation for interest amounted to the sum of £10,804

Failure to Provide Statement of Particulars

47. The claimant further claimed a breach of his right to be given a written statement of particulars under the provisions of section 38 of the Employment Act 2002 (these being claims falling under Schedule 5 to the Act)
48. The respondent opposed the claim, relying on a copy statement purporting to be signed by both parties (see pages 84 – 85). The claimant contended that this was not a genuine document and that he had not been provided with any such document in the course of his employment
49. This was matter raised in the Liability Hearing but upon which the Tribunal had not needed to make a finding of fact
50. The respondent did not dispute that it had been unable to disclose either the original of the document or any meta-data as to its provenance despite being invited to do so
51. The Tribunal noted that the claimant had adopted his position, denying that the copy was genuine, from early after the termination of his employment (see his e-mail dated 15 May 2018 at page 144) and, in all the circumstances, concluded, on the evidence before it and on balance, that the document is not genuine and that the respondent is accordingly in breach
52. Given this finding, the Tribunal considered it just and equitable to award the maximum period of four weeks' pay. Applying the statutory cap, this produced a figure of £2,032

Grossing up

53. The parties were in agreement that, given the total level of awards, it was necessary to gross up the final figure in so far as appropriate
54. It was agreed that the relevant figure in this regard was the sum of £43,304 of which the first £30,000 would be free of tax. The balance of £13,304 therefore fell to be grossed up at basic rate giving an agreed additional sum of £3,326

Employment Judge B Hodgson

Date 6 December 2019

REASONS SENT TO THE PARTIES ON

19 December 2019

FOR THE TRIBUNAL OFFICE