EMPLOYMENT TRIBUNALS

Claimant: **Ms A Kieler-Piziorska**

Respondent: **JK Lewis & Son Limited**

Heard at: **Swansea** **On:** **17 January 2020**

Before: **Employment Judge M R Havard (sitting alone)**

Representation:
Claimant: Ms H Dahill, Solicitor
Respondent: Mr J Duffy, Counsel

JUDGMENT ON REMEDY

The judgment of the Tribunal is that the Respondent must pay to the Claimant compensation in the total sum of £23,940.94. This amount is made up of the following:

(i)	Basic award	£2,791.40
(ii)	Holiday pay	£1,950.70
(iii)	Wrongful dismissal	£1,748.16
(iv)	Loss of statutory rights	£500.00
(v)	Injury to feelings	£12,000.00
(vi)	Uplift on compensation for failure to comply with ACAS Code	£2,848.54
(vii)	Interest	£2,102.14

REASONS

Introduction

1. By a default judgment dated 19 August 2019, the Tribunal upheld the following claims:

    - Unfair dismissal
    - Disability discrimination
    - Breach of contract
    - Unpaid wages

2. The judgment applied to liability only and it was directed that the matter would proceed to a hearing on remedy.

3. The judgment was entered in accordance with the Tribunal's powers under Rule 21 of the Employment Tribunal Rules of Procedure 2013.

4. At a preliminary hearing on 29 November 2019, the judgment issued on 14 August 2019 was reconsidered. At the conclusion of that hearing, the judgment issued on 14 August 2019 was confirmed.

5. At the remedy hearing, I heard evidence from the Claimant.

6. On behalf of the Respondent, I heard evidence from the directors of the Respondent, Mr and Mrs James, the shop manager, Mrs Rees and Miss Phillips who worked in the bakery. I had in front of me a bundle of papers containing the documents described in the index to the bundle.

Findings of Fact

7. The Respondent is owned by co-directors, Carwyn James and Sian James, who purchased the business in 2006. It operates from two sites at Glantycroes and Crymych in Pembrokeshire.

8. The Respondent employs some 28 members of staff at Crymych which includes a shop and a bakery attached to it. The bakery has 12 staff, either full-time or part-time, and there is an administrative staff of two or three.

9. On 9 August 2012, the Claimant commenced employment as a Baker Assistant which continued until the date of her dismissal which I found to be 25 April 2019.

10. Prior to 2015, the Claimant worked 40 to 50 hours a week.

11. In 2015, the Claimant was diagnosed with cancer and she was absent from work.

12. It was a requirement for the Claimant to receive dental treatment prior to receiving treatment for her illness. There was a dispute about the arrangements made for such dental treatment which I did not consider to be material but I found that, following the Claimant's initial diagnosis, Mr and Mrs James were supportive of the Claimant. Indeed, it was intended that they would go on holiday together although it transpired that the Claimant was too ill to go.

13. On her return to work on 26 March 2016 after a sickness leave of 28 weeks plus accrued holidays, an informal meeting took place on 5 April 2016. The Claimant wished to return and resume her normal hours but Mr and Mrs James wanted to reduce her hours to 34 hours per week. The Claimant was upset at this proposal. It was suggested by Mrs James that this was to reflect their concern at the Claimant's ability to work full-time but the note of the meeting records that the Claimant*, "became quite agitated as she felt Sian was trying to reduce her hours of working."* It was decided that her hours would not be reduced to quite the extent originally suggested and they were reduced to 37 hours per week. It was suggested that this was taking account of their duty of care towards her and it had also been determined that there was no other role for the Claimant even for part of her shift within the office.

14. The reduction in hours was therefore implemented without the agreement of the Claimant who wished to resume her original hours of work.

15. There was reference to the Claimant not wishing to work on a Friday as she did not get on with another member of staff who worked on that day but this was disputed by the Claimant. I noted that in a letter sent to the Claimant on 10 February 2019, to which I make further reference in due course, Mr Carwyn James set out her hours of work to include the normal hours she worked on a Friday.

16. On her return, Mrs James and Mrs James' mother would drive the Claimant to chemotherapy treatment but the Claimant was required to work for the Respondent preparing invoices to make up for the cost of the time taken to go to the chemotherapy treatments and the Claimant stated that she would not be paid for this work.

17. In July 2017, the Claimant was diagnosed with cancer once again and went on sick leave for 28 weeks, receiving statutory sick pay throughout that period.

18. On 21 March 2018, the Claimant received a letter from Mr James of the Respondent which stated as follows:

"Please be informed that at the end of March Sage Payroll will process your Payslip and generate a Sage Payroll System automatically printed P45.

The Sage Payroll System recognises that your current Employment Contract has come to an end. The System must generate this P45 document, otherwise it would continue to accrue holiday entitlement on your behalf.

We, at JK Lewis, are happy to keep your employment options open with us for an extended period of a calendar year from this date, i.e. until March 30th 2019. Our hope is that, at some point during this time, you will make a full and complete recovery from your illness, and will be able to return to the workplace, to resume your duties.

Yours sincerely"

19. It was suggested by Mrs James and Ms Philips that it was the Claimant who had requested the P45. It was also suggested that the Claimant would need a P45 to enable her to be entitled to receive benefits.

20. The Claimant, who is Polish, stated that the reference to her being issued with a P45 had caused considerable distress and uncertainty. She stated that she did not know why she had to receive a P45. She was adamant that she did not request a P45.

21. On the balance of probabilities, and for the following reasons, I prefer the Claimant's evidence.

22. The Claimant's partner was also employed by the Respondent. There were exchanges of text messages between the Claimant and Heather Rees on 19 March 2018 which referred to the Claimant requesting a P45 but only in respect of her partner. She said, *"Hi Heather I have questions? Can you tell me when Artur p45 will be ready?"*

23. Ms Rees sent a text stating:

"*Hi have checked with Sian. Both yours and Arturs will be ready late Friday afternoon (30th March). Hope all goes well for you Agnes xx"*

24. The Claimant replied:

"*O don't asked abaut mine*

Why she wants give me p45 heater?

I'm don't asked abaut me

Can you ask her please"

25. Ms Rees replies:

> "*Sian said after 28 days sick pay and holiday pay, paid up to date, then it generates a P45 which you will need to take into benefit office."*

26. It was following this exchange that the letter of 21 March 2018 was sent to the Claimant and the letter made no reference at all to any request having been made by the Claimant for her P45.

27. The Claimant concluded that the Respondent had sent this letter to her in order to avoid the Claimant continuing to accrue holiday entitlements whilst she was on long-term sick leave. Indeed, this was effectively what the letter said. I accepted the Claimant's evidence that, at the time, she did not understand why the Respondent had taken this action. I also found that the Claimant was upset and distressed at receiving a text which indicated that, once 28 days sick pay and holiday pay has been paid, a P45 was generated. This had to be seen in conjunction with the letter stating that the Sage Payroll System recognised that the Claimant's current employment contract*, "has come to an end. The system must therefore generate this P45 document, otherwise it would continue to accrue holiday entitlement on your behalf."*

28. This was not consistent with Mrs James saying that the P45 would be necessary for the Claimant to enable her to take it into the Benefit Office.

29. The fact that Mr James of the Respondent said that the company was happy to keep the Claimant's employment options open for a calendar year did not of itself provide certainty and reassurance to the Claimant that she remained employed.

30. Indeed, there had been no further contact between the Claimant and the Respondent before the Claimant sent a letter to Mr James at the Respondent dated 7 February 2019 which was consistent with the Claimant indicating that she was not aware of her status. She said:

> "*Dear Mr Carwyn James*
>
> *I am writing in relation to your letter of 21 March 2018.*
>
> *In your letter you state that you would keep my employment options open for a calendar year. Please therefore confirm my current employment position*."

31. On 10 February 2019, Mr James replied to the Claimant's letter indicating that, *"at the time of the onset of your illness, and prior to your departure on long-term sickness leave you were employed at our bakery for an average 33.5 hours per week."*

32. Mr James sets out the Claimant's working days which, despite the contention that the Claimant had asked not to work on a Friday due to some personality differences with another member of staff, included a shift on the Friday in the schedule of shifts set out in the letter. The Claimant was told that these shifts had been kept available for her and would continue to be so until March 30th 2019.

33. The Claimant was asked to confirm by means of a medical practitioner statement of fitness for work that she was fit to return and it was suggested that she should undergo a phased return to work. It was also indicated that the Respondent wished, *"to have an understanding of any reasonable adjustments that we will need to consider making to accommodate any disability you have as a result of your illness".*

34. On 29 March 2019, the Claimant wrote to Mr James saying that her understanding was that her job would be waiting for her until 31 March 2019 although she was not able to return to work at that time and she had a sick note to 30 April 2019. She sought clarification of her situation at work and again requested an explanation for the P45 having been sent to her in March 2018.

35. On 18 April 2019, the Claimant wrote a further letter to Mr James asking for clarification with regard to the P45 that had been sent to her and when they intended to pay her statutory notice. In that letter, the Claimant intimated that she believed she had been dismissed as she said, *"when you intend to pay my statutory notice"* and that notice*, "is due to every person who has been dismissed from work".*

36. On 25 April 2019, Mr James wrote a letter to the Claimant. In respect of the P45, he simply suggested to the Claimant that she should re-read his letter of 21 March 2018. He then went on to say:

> "*You have not been dismissed from our employment and no statutory notice exists in this case. Your employment contract has eventually had to be regrettably terminated due to the fact that you are unable to return to the workplace, in any capacity, due to your ill health."*

37. Mr James wrote that the Claimant had failed to respond to his invitation to discuss a phased return to work or any potential adjustments and then said:

> "*We have been left with no other option, as previously explained in our correspondence, other than termination of your employment contract with our company. As previously mentioned, we have a duty of care to all our employees. The member of staff covering your sickness absence also needs due consideration.*

In summary, we feel we can do no more to try to accommodate you. There is no notice pay as you have left due to ill health after a long period of absence."

38. I also accepted the Claimant's evidence and found that, other than the exchanges of correspondence, there was no contact between the Claimant and anyone at the Respondent. Certainly, no formal procedure was followed by the Respondent prior to reaching its decision to dismiss the Claimant. Indeed, I accepted Mr James' evidence when he stated that the letter that he sent to the Claimant on 25 April 2019 was a mistake which he much regretted.

The Law

39. I reminded myself of paragraph 53 of **Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102** where it stated:

> "In HM Prison Service v Johnson, Smith J reviewed the authorities on compensation for non-pecuniary loss and made a valuable summary of the general principles gathered from them. We would gratefully adopt that summary. Employment Tribunals should have it in mind when carrying out this challenging exercise. In her judgment on behalf of the Appeal Tribunal, Smith J said at p.165:
>
> "(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award;
>
> (ii) Awards should not be too low, as that would diminish respect for the policy of the ante-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham MR, be seen as the way to "untaxed riches".
>
> (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards;
>
> (iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of a value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings;
>
> (v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made".

40. Paragraph 65 sets out guidance to tribunals and provides:

> "Employment tribunals and those who practice in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.
>
> (i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race … only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000;
>
> (ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band;
>
> (iii) Awards of between £500 and £5,000 are 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 £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

41. At paragraph 66 the court added:

> "There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

42. There was an addendum to the Presidential Guidance with a further uprating of the Vento bands for claims presented on or after 6 April 2019, which apply to this case which was issued on 31 May 2019.

43. The bands are currently:

> "(i) Upper band: £26,300 to £44,000;
>
> (ii) Middle band: £8,800 to £26,300;
>
> (iii) Lower band: £900 to £8,800.

44. I am obliged to consider whether to award interest on any awards for discrimination. The basis of calculation is set out in the ***Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803*** (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated and the rate is currently 8%.

45. In relation to taxation, the Court of Appeal in Moorthy v HMRC 2018 EWCA Civ 847 held that awards for injury to feelings were to be treated as tax free, whether or not related to the termination of employment. This position changed from 6 April 2018 by an amendment to section 406 of the Income Tax (Earnings and Pensions) Act 2003 so that although "injury" in sub-section (1) includes psychiatric injury, it does not include injured feelings. This amendment has effect for the tax year 2018–19 and subsequent tax years. Section 406 which deals with tax exemption provides:

(1) This Chapter does not apply to a payment or other benefit provided—

(a) in connection with the termination of employment by the death of an employee, or

(b) on account of injury to, or disability of, an employee.

(2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings

46. An award for injury to feelings is taxable to the extent that it exceeds £30,000.

47. Grossing up: To avoid any disadvantage to the claimant, if any award to her is over £30,000, the amount over £30,000 should be grossed up. It requires me to estimate the tax she will have to pay on receipt of the award and add that sum back into the award, to cancel out the tax burden on the claimant. The purpose is to place in the claimant's hands the amount she would have received had she not been discriminated against.

48. In relation to the ACAS Code, section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that for the jurisdictions listed in Schedule A2 of the Act, which includes discrimination claims, where an employer has failed to comply with a relevant Code of Practice, and that failure was unreasonable, the tribunal may, if it considers it just and equitable to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

49. The following heads of claim were agreed:

Basic award	£2,791.40
Holiday pay	£1,950.70
Wrongful dismissal	£1,748.16
Loss of statutory rights	£500.00

50. The only disputed head of claim related to the Claimant's claim for injury to feelings.

51. The Claimant submitted that the discrimination as a result of her disability had what she described as *"a huge detrimental impact on my feelings and I was left feeling totally hurt and confused".*

52. The claimant's case is that there should be an award of the maximum of the middle Vento band, at £26,300.

53. The submission made on behalf of the Respondent was that there should be no award but that, if an award was made, it should be no more than £4,000.

54. The Respondent argued that it involved a one-off act of discrimination and centred around the dismissal. In support of that contention, I was referred to the decision of ***Zebbiche v Veolia ES (UK) Ltd*** *[2012] EqLR 382*. In that case, the Claimant was a road sweeper who suffered from depression and anxiety who was absent from work. He was dismissed but it was found that the Respondent had failed to consider a phased return to work and/or a return to work on reduced hours or whether there were jobs available on quieter streets. Nevertheless, the dismissal was a one-off event with time limited consequences because the claimant was still not fit to return to work.

55. This was not a comparable case to Zebbiche***.*** I have found that the discriminatory act of dismissal was the last in a series of acts of discrimination. I have also taken into account that in this case, the Claimant had been dismissed without any formal procedure having taken place.

56. In my judgment, it was appropriate to consider, for the purposes of the award, the conduct of the Respondent towards the Claimant from March 2018. Whilst there may have been issues between the Respondent and the Claimant prior to July 2017, I conclude that it was from March 2018 that the conduct of the Respondent caused the Claimant feelings of anxiety and uncertainty and which was related to her disability. It was clear that it was the circumstances regarding the Claimant being unexpectedly issued with a P45, which formed a considerable part of Mr Duffy's cross-examination of the Claimant, and the tenor of the correspondence, which had a deleterious effect on the Claimant. Indeed, even though this occurred in March 2018, the Claimant was still requesting the Respondent in her correspondence in March and April 2019 to tell her why they had issued her with a P45 in March 2018.

57. Whilst Mr James may say that his letter of 25 April 2019, which was effectively a letter of dismissal, was a mistake, it was the Claimant who had to bear the consequences of that mistake at a time when she was suffering from a very serious illness. It was sent to the Claimant without the Respondent having made any attempt to follow a formal procedure. It also stated that the

Claimant was not entitled to notice or notice pay as the termination of her employment was through ill health. I found that, whilst reference was made to it in the letter of 10 February 2019, there was no meaningful attempt to engage with the Claimant to discuss her return to work and whether reasonable adjustments were possible. Indeed, there appeared to be no contact between the Claimant and Mr and Mrs James other than via correspondence. This was confirmed by Mrs James when she gave evidence. Their knowledge of their responsibilities to consider reasonable adjustments in the role performed by the Claimant is apparent from the handwritten note of the meeting on 5 April 2016.

58. I did not find, however, that this was a case of a deliberate or malicious campaign to treat the Claimant in a discriminatory manner. Nevertheless, whilst seriously ill, the Claimant had been left in a state of uncertainty for a number of months with regard to her employment status and this was as a direct result of her disability.

59. The Claimant felt, with justification, that her job security was under threat over a period of some months and this caused her considerable anxiety and distress. I found that this was through the Respondent's failure to understand its obligations and responsibilities as employers. Mr and Mrs James of the Respondent had failed to follow a proper process leading to the Claimant's dismissal on 24 April 2019. Indeed, I refer to my findings of fact with regard to the issue relating to the P45 being issued to the Claimant, the content of Mr James's letter to the Claimant of 21 March 2018 and his letters dated 10 February 209 and 24 April 2019. Whilst all three letters were misconceived, Mr James had recognised his error in writing the letter of 24 April 2019 and had apologised for it.

60. As stated, the Claimant had claimed an award for injury to feelings at £26,300. Unlike Mr Duffy on behalf of the Respondent, Ms Hamill had not referred me to any decisions to support a finding of injury to feelings at that level. I acknowledge the impact of the Respondent's failures on the feelings of the Claimant. I find that the discrimination had a significant impact on the Claimant in terms of her injury to feelings. I reminded myself that it was necessary to ensure that the Claimant is compensated but it was not my role to punish the Respondent. I also noted that, unfortunately, the Claimant had not been able to return to work due to her illness.

61. In my judgment, I consider that the award should fall in the middle band but at the lower end of that band and I award the Claimant £12,000 for injury to feelings.

62. I have considered whether under section 207A of the 1992 Act, there was an unreasonable failure to follow the ACAS Code and if so, whether it is just and equitable to increase the amount of compensation payable to the claimant.

63. The Respondent did not follow a formal procedure at all before dismissing the Claimant. I consider in the circumstances that there should be an uplift.

64. I have to consider what is just and equitable in terms of the amount of that uplift. I have already found that the decisions, and actions, taken by the Respondent were unsatisfactory but were neither malicious nor deliberate. I award an uplift of 15% as being not at the very top of the amount I could award, but to reflect my view of the seriousness of the failure to comply with the Code.

The award

65. The award for injury to feelings is £12,000.

66. The total financial award is 6990.26.

67. The combined award of financial loss and non-financial loss is £18,990.26.

68. I uplift this award by 15%. The uplift is therefore £2,848.54 making a total of £21,838.80.

69. Taking account of the constituent parts of the financial award, I do not award interest on that amount. However, I award Interest on the award for injury to feelings calculated from 21 March 2018. This is based on the award of £12,000 plus the uplift on that amount of 15%, totalling £13,800. The number of days is 695 and the rate applied is 8%. The award of interest is therefore £2,102.14.

70. The total award is therefore in the sum of £23,940.94.

71. The amount of the award is less than £30,000 and therefore I do not need to consider the tax position.

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Employment Judge M R Havard
Dated: 14 February 2020

JUDGMENT SENT TO THE PARTIES ON

16 February 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS