**Case Number: 1600344/2015**

# EMPLOYMENT TRIBUNALS

**Mr Keith Crossland** **Chamberlains Security (Cardiff) Limited**

**Claimant** **Respondent**

**v**

**Heard at:** **Bristol** **On: 3 November 2020**

**Before:** **Regional Employment Judge Pirani**

**Members:**
Mr H Launder
Mr C Williams

**Appearances**
**For the Claimant:** in person
**For the Respondent:** Mr N Smith, counsel

# REMEDY JUDGMENT

The unanimous remedy judgment is as follows:

1. The claimant is awarded £13,000 for injury to feelings in relation to the section 15 and section 20/21 Equality Act claims (failure to make reasonable adjustments and discrimination because of something arising in consequence of the claimant's disability).

2. Interest on the £13,000 is awarded at 8% from 13 October 2014 until 10 December 2017. This amounts to £2.849 per day for 1154 days = £3,287.75.

3. The claimant is awarded £4,000 for injury to feelings in relation to the section 27 Equality Act claim (victimisation).

4. Interest on the £4,000 is added at 8% from 25 October 2014 until 10 December 2017. This amounts to £0.877 per day for 1142 days = £1,001.53.

5. A compensatory award for past lost earnings is awarded at £7,496.04 (six months net loss at £1,249.34 per month). From this is deducted monies awarded for loss of earnings by a previous Employment Tribunal in the sum of £8,529.13 (plus a 25% uplift). Therefore, the compensatory award is reduced to nil.

6. The total amount awarded is £21,289.28.

# REASONS

Reasons were provided but written reasons were also requested.

**Background and issues**

1. The substantive case was heard in the Bristol Employment Tribunal on 8, 9 and 10 May 2017 before Employment Judge Pirani with members Mr CD Harris and Mrs E Burlow. As set out in the judgment and reasons, the Claimant succeeded in all three of his causes of action under his claims under sections 20 and 21 of the Equality Act 2010 in his claim of a failure to make reasonable adjustments; and in his complaint of breach of section 15 discrimination (because of something arising in consequence of his disability), and also in his section 27 victimisation complaint. However, on two acts of discrimination the Claimant did not succeed: (1) the Tribunal found that Respondent was entitled to remove the Claimant from his particular post and that this complaint did not constitute a failure to make a reasonable adjustment, and (2) the Tribunal found that the Claimant resigned and was not dismissed, and his complaint of discrimination in dismissal therefore failed.

2. The case was due to proceed to a remedy hearing but was delayed pending the claimant's appeal to the Employment Appeal Tribunal (EAT). Her Honour Judge Stacey, as she then was, dismissed the appeal by judgment dated 31 May 2018.

3. The claimant then made further appeals. On 13 August 2018 the Court of Appeal rejected his application on paper. A further appeal, based on allegations of fraud, was issued on 22 July 2019 which was later withdrawn and re-presented in the Cardiff County Court. This was then dismissed with costs on 2 October 2019. On 11 August 2020 Soole J, sitting in the EAT on a rule 3(10) hearing, dismissed an appeal against the refusal of REJ Pirani to recuse himself from any remedy hearing. Soole J agreed with the President of the EAT that the allegations of bias were wholly without merit. The same judgment agreed with a previous observation that the application amounted to a re-run of arguments on his unsuccessful appeal.

**4.** The issues to be determined at the remedy hearing, which were set out at the start of the hearing, are:

4.1. What amount should be awarded for injury to feelings

4.2. What compensatory award should be made. Only past loss is claimed. Issues arose as to mitigation and whether the claimant would have been dismissed in any event. An issue also arose as to what, if any, deductions should be made.

4.3. What interest should be awarded.

**5.** In his statement and skeleton argument, the claimant again sought to re-run aspects of the liability hearing. Much of his evidence and submissions do not relate to remedy. Instead, the claimant has sought to return allegations of fraud. He says the ET has fallen into error because the respondent deceived the panel. He continues to argue, on paper, that the judgment, which was in his favour, should be set aside. It was made clear at the commencement of the remedy hearing that the tribunal would not be dealing with these matters. They have already been the subject of failed appeals and a dismissed application in the County Court.

**6.** Nonetheless, the claimant was asked whether he wished the tribunal to set aside liability judgement. The claimant responded that he did not want the judgment to be set aside.

**Appointment of new members**

**7.** The two non-legal members who sat on the liability hearing have retired. The claimant subsequently expressed a preference for the appointment of new members rather than acceding to a judge sitting alone. Accordingly, and in accordance with section 4(1)(a) of the Employment Tribunals Act 1996 and Regulation 9(3) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, replacement members were appointed.

**Issue at commencement of hearing**

**8.** After it was explained to the claimant that the tribunal would be considering remedy only, and therefore not determining the fraud issue, the claimant sought to accept an open offer made at the substantive hearing in May 2017. According to the claimant, the offer was extant and therefore capable of acceptance. Subsequently, it transpired the claimant was only willing to accept the offer if he was permitted to continue to pursue different causes of action against the same respondent relating to the facts of this case. It then transpired that subsequent offers were made by the respondent, all phrased in terms of full and final settlement of all claims arising out of the claimant's employment with the respondent. After some discussion, and some delay to the proceedings, the claimant withdrew his purported acceptance.

**Factual background**

**9.** The findings of fact are contained in the liability judgment.

**10.** In brief summary, the Claimant was employed as a security guard by the Respondent company, which is a small family firm, on a zero-hours contract as a seasonal security guard from 29 July 2014. His role was to provide security for Welsh Water at a remote reservoir site and to deter the unauthorised use of the reservoir's large body of water. He worked alone on shifts of between 12-15 hours overnight and drove around the reservoir for approximately 30 minutes in the course of his working week. The Claimant has Type 1 diabetes which he did not disclose to the Respondent. As of June 2014 he had had no record of hypoglycaemic attacks in the previous year, but in 2013 had crashed his car after a dip in his blood sugar level had caused him to blank out.

**11.** On 10 October 2014 the Claimant had a hypoglycaemic attack on account of low blood sugar whilst at work at the reservoir and was found by the site contractor. He had appeared "completely out of it" wandering around in a disoriented state within 12 to 30 m from the reservoir bank, appeared to be wobbling or drunk and incapable of logical thought and an ambulance was called.

**12.** After that incident he explained to the Respondent that had diabetes. As a result of the incident he was removed from the site by the Respondent and as there were no other vacancies or positions for him elsewhere within the company no alternative work was immediately found for him. Since he was on a zero-hours contract he was not entitled to remuneration if he was not working. The Tribunal found that the Claimant requested his P45 on 21 October 2014 so that he could sign on for state benefits, which he then did from 27 October 2014, and that he had tendered his resignation. The Tribunal, having heard the evidence, decided that he was not dismissed but that he resigned.

**13.** He then brought a grievance against the Respondent, which was heard on 16 December 2014. The Claimant secretly recorded the grievance hearing. The Respondent wrote with the outcome of the grievance on 22 December 2014 and stated that the Claimant would be offered work in future if it became available, but that January was usually a quiet month and no current positions were available. After the grievance meeting and on discovering the Claimant's extensive litigation history, the Respondent made a decision not to re-engage the Claimant.

**14.** The aspects on which the claimant succeeded are:

i. The claimant succeeded in his section 20 and 21 Equality Act 2010 claim for failure to make reasonable adjustments. The tribunal noted that the respondent employed about 50 guards and had a turnover of approximately 15 employees per year. The tribunal concluded that even in the immediate aftermath of the incident it would not have been difficult to swap the claimant’s job with someone else’s. For those reasons the respondent failed to make a reasonable adjustment by moving the claimant to another site.

ii. The claimant succeeded in his section 15 Equality Act 2010 claim for discrimination because of something arising in consequence of his disability. The respondent accepted that, in deciding that the claimant could no longer work at the Llandegfedd Reservoir in Pontypool and not offering him other work, it did subject him, for the purposes of section 15(1)(a), to unfavourable treatment because of something arising in consequence of his disability. The tribunal concluded that a more proportionate response would have been to relocate the claimant to another site or swap the claimant's job with that of another security guard. Accordingly, the tribunal also concluded that the claimant's section 15 claim succeeded.

iii. The claimant succeeded in his section 27 Equality Act 2010 claim for victimisation. It was decided that the Respondent withdrew the offer of re-engagement and of continuing to search for future employment because it was thought that re-engaging the claimant could lead to a claim for discrimination.

**Facts relating to remedy**

**15.** We were provided with a bundle of documents and heard evidence from the claimant and Mr Trevivian, both of whom provided written statements and were cross-examined.

**16.** Most helpfully, at the start of the remedy hearing the parties agreed a number of salient facts and issues. Net weekly pay at the respondent was on average £288.31. Net monthly pay was therefore £1249.34. The date at which the section 15 and 20/21 discrimination occurred was 13 October 2014 and the relevant date for victimisation was 25 October 2014. These dates are relevant for the purposes of interest. It was also agreed that, for the purposes of the compensatory award, losses commenced on 21 October 2014.

**17.** As set out below, the claimant received a previous compensatory award from a different tribunal with an overlapping compensatory period. In addition, as a set out below, the updated amounts for the middle banding of Vento awards was agreed in that the RPI All Items Index as at 13 February 2015, when the claim was issued, was 256.7. Therefore, the middle band of £6,000-18,000 changes to £7,909 – £23,728.

**18.** The claimant's schedule of loss gives credit for £13,491.87 for "RAS payments and monies earned and deducted" but provides no breakdown as to what was earned, from whom and when. It was agreed at the commencement that the total amount which could potentially be set off from this remedy judgment was £13,102.10.

**19.** The claimant worked as a security guard from 2009 up until he started work for the respondent. His CV, which is in the bundle, shows that he also has 20 years of experience in the retail sector. His academic qualifications include a law degree, being called to the bar and an MSc. He was a CIPD member in 2014. Included in

his personal statement is the following: "I can turn my hand to pretty much anything and am willing to do pretty much any job".

**20.** Prior to commencing employment with the respondent on 29 July 2014, the claimant worked for RAS, as a security guard starting, on 9 August 2013 before the termination of that employment on 27 December 2013. The claimant brought proceedings which were heard in the Cardiff Employment Tribunal on 2 February 2015 relating to this previous employment. This was three months after the end of his employment with the respondent in this case. Loss of earnings for the period post 21 October 2014 were claimed and awarded.

**21.** The response to those proceedings was struck out and the respondent did not attend the hearing. The claimant succeeded claims of automatic unfair dismissal, disability discrimination, victimisation and harassment. He received a compensatory award of some £28,303. and a total award of over £55,000. The period for the prescribed element of the award was 28 December 2013 until 2 February 2015, which overlaps with the period claimed here.

**22.** It is not in dispute that the claimant has already received compensation for the period 26 October 2014 until 2 February 2015 together with a further eight weeks of losses and partial losses ongoing for another 44 weeks.

**23.** The tribunal judgment in the RAS hearing noted at paragraph 77 and 78 that since his dismissal from RAS on 27 December 2013 the claimant worked as a security guard for two different employers during the period 1 June 2014 until 26 October 2014. The tribunal go on to say that the claimant had, at the time of that hearing, been applying for Human Resources jobs but without success. He indicated to the Cardiff Tribunal that his age and lack of experience in HR made it difficult for him to obtain such appointments. Consequently, it was recorded that in that week, namely in February 2015, the claimant would commence a search for a retail warehouse role, a position he had previous experience of. It was also noted that the tribunal considered that warehouse work was likely to be paid at the National Minimum Wage, which was at that time £6.50 per hour.

**24.** The claimant had been earning gross weekly wage at RAS of £429.74 which was said to net down to £346.41.

**25.** After leaving the respondent in this case the claimant retrained as a plumber. He received a level II diploma in plumbing studies on 12 July 2016 and level II diploma in electrical installation on 19 July 2016. The claimant explains that the college he was attending had no connections with industry and the apprentice route was unavailable for him. Nonetheless, he continued to take courses in electrical installation and inspection and on 27 July 2017 and 12 July 2018 he received further certificates in this regard.

**26.** Although the claimant is claiming losses for nearly three years up until 5 September 2017, he says that throughout this period he did not receive any money at all from plumbing work. In fact, the only monies earned are said to be some

£389.77 which was more than 6 months after he left the respondent. This came from a short stint in a meat factory.

**27.** However, he explains in his statement that, had he remained with the respondent, he could have earned "more than enough to have a more meaningful existence and, if [he] had taken courses in,….. being an electrician, he would have been able to have bought [his] own van and tools".

**28.** While working for the respondent the claimant was making an approximately 60 mile round trip to work each shift. He lives within 5 miles of a shopping centre. Within 20 miles of his address are many shops, supermarkets, stores, warehouses, shopping centres, industrial parks, care homes and retail parks.

**29.** Despite what the claimant told the Cardiff Tribunal he continued to make applications for HR roles on a fairly regular basis until November 2015. Evidence of the many such applications was provided to us in the bundle.

**30.** Although the claimant says he made applications for warehouse and other agency work he accepts he has provided "not a shred of evidence" relating to these applications. We find that he made minimal attempts to obtain warehouse or agency work.

**Injury to feelings**

**31.** Injury to feelings awards compensate for non-pecuniary loss. They are available where a tribunal has upheld a complaint of discrimination. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. Tribunals have a broad discretion about what level of award to make.

**32.** Where the discriminatory acts overlap as they arise from the same set of facts, such as where a dismissal is on grounds of both race and disability, a tribunal will not be expected to separate the injury to feelings and attribute parts to each form of discrimination.

**33.** The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (see **Komeng v Creative Support Ltd UKEAT/0275/18/JOJ**). The general principles that apply to assessing an appropriate injury to feelings award have been set out by the EAT in **Prison Service v Johnson [1997] IRLR 162**, para 27:

i. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator'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 antidiscrimination 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 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 – not to any particular type of personal injury but to the whole range of such awards;

iv. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

v. Tribunals should bear in mind the need for public respect for the level of awards made. 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 (see **Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102**).

**34.** In **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings and gave the following guidance (however, see below for revised figures): 1) 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; 2) 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; 3) 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. Within each band there is considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

**35.** The boundaries of the bands have been revised in several subsequent cases, culminating in the decision in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, which held that the 10% uplift in **Simmons v Castle [2012] EWCA Civ 1288** should apply to awards for injury to feelings.

**36.** It is agreed that the banding pertinent at the relevant time in this case was that set out in **Da'bell v NSPCC [2010] IRLR 19**: the EAT revisited the bands and uprated them for inflation. The lower band was raised to between £600 and £6,000; the middle band was raised to between £6,000 and £18,000; and the upper band was raised to between £18,000 and £30,000.

**37.** In a separate development in **Simmons v Castle** the Court of Appeal declared that with effect from 1 April 2013 the proper level of general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress would be 10% higher than previously. This followed upon changes to the rules governing the recovery of costs in personal injury litigation in the civil courts in England & Wales.

**38.** The Presidents of the Employment Tribunals in England & Wales and Scotland have issued 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd'.

**39.** This Guidance, the third addendum of which was released on 27 March 2020 taking into account changes in the RPI All Items Index released on 25 March 2020, updated the bands as follows:

i. Upper Band: £27,000 to £45,000 (the most serious cases);
ii. Middle Band: £9,000 to £27,000 (cases that do not merit an award in the upper band); and
iii. Lower Band: £900 to £9,000 (less serious cases). The 'most exceptional cases' are capable of exceeding the maximum of £45,000.

**40.** These bands take account of the 10% Simmons v Castle uplift.

**41.** However, this guidance applies only to cases issued on or after 11 September 2017. At paragraph 11 of that document it states that in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the Simmons v Castle 10% uplift).

**42.** The RPI All Items Index as at 13 February 2015, when this claim was issued, was 256.7. Therefore, the middle band of £6,000-18,000 changes to £7,909 – £23,728. As set out above, this was agreed with the parties at the start of the hearing.

**Submissions on injury to feelings**

**43.** The respondent says that perversely it is the allegations of fraud in the claimant's witness statement which underpin his injury to feelings claim. They also say there are good reasons to question the claimant's veracity which may impact on any findings about the scale of any alleged injury to feelings. They suggest the tribunal has a difficult task in identifying the cause and extent of any such injury and, in any event, the relevant category of award would be minimal and at the bottom of the lowest band. The submissions emphasise that the case law highlight that the claimant must be caused injury to feelings as a consequence of unlawful conduct found to have occurred. The respondent says each head a claim needs to be considered separately in determining the figure for compensation for injury to feelings, unless they arise out of the same facts. It is emphasised the section 15 and 20 claims arise out of the same facts. Further, the victimisation claim also relates to the respondent not seeking alternative work for the claimant.

**44.** In his statement at paragraph 16 the claimant says his faith that people will act with integrity and within the law has been damaged by the respondent. He goes on to

say their actions were extremely hurtful and that his confidence was sapped and options narrowed.

**Conclusions on injury to feelings**

**45.** The respondent is right that in his statement the claimant refers to many things which are not relevant to the injury to feelings award in this case. For example, he refers to being called dishonest many times by the Cardiff Employment Tribunal which he describes as distressful, untrue and hurtful. He also makes reference, on various occasions, to allegations of fraud said to be perpetrated against him by the respondent.

**46.** However, the tribunal accepts that the claimant is and was genuinely concerned and upset by the discrimination which he suffered in this case. He had been previously ground down by other incidents of discrimination. He was at a particularly low point when this discrimination occurred and, as he explains, this adversely impacted on the trust and faith he had in people. Although he was and has been upset by other things and incidents this does not deter from the injury he felt by the discrimination in this case.

**47.** We regard the totality of the injury to feelings claim as being in the middle band. The failure to make reasonable adjustments claim relates to work being taken away from him. This was then compounded by the victimisation claim when offers of further work were effectively withdrawn. Losing work and money heightened the sense of injustice he felt.

**48.** Taking all this into account, and bearing in mind the new banding, we regard the claimant's assessment of his injury to feelings in his schedule of loss as being an accurate one. Therefore, we find the appropriate level of award as being £13,000 for the claims relating to failure to make reasonable adjustments and discrimination arising in consequence of disability. In addition, we award the claimant a further £4,000 in relation to the victimisation element of the claim. We accept there is some overlap between these two claims. Therefore, the total award for injury to feelings is that claimed by the claimant in his schedule of loss, namely £17,000.

**Compensatory award:**

**49.** Any award of compensation will be assessed under the same principles as apply to torts (see s124(6) and s119(2) Equality Act 2010). The central aim is to put the claimant in the position, so far as is reasonable, that discrimination he or she would have been had the tort not occurred.

**50.** The tribunal's assessment should be based on findings of fact, and then 'to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice' (see **Software 2000 Ltd v Andrews [2007] IRLR 568**, per Elias P).

**51.** It is a fundamental principle that any claimant will be expected to mitigate the losses they suffer as a result of an unlawful act by giving credit, for example for

earnings in a new job (mitigation in fact), and that the tribunal will not make an award to cover losses that could reasonably have been avoided (mitigation in law). The burden of proving a failure to mitigate is on the respondent. It is insufficient for a respondent merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondent has to prove that the claimant acted unreasonably.

**52.** The tribunal will consider: 1) what steps the claimant should have taken to mitigate his or her losses; 2) whether it was unreasonable for the claimant to have failed to take any such steps; and 3) if so, the date from which an alternative income would have been obtained.

**Submissions on compensatory award**

**53.** The claimant says he acted reasonably in mitigating his loss. Because of previous bad experiences in the security industry he decided not to apply for other jobs in that sector. He claims losses from 21 October 2014 until 5 September 2017. Although he continued to look for HR roles after the Cardiff Tribunal he says he did not do this exclusively. For parts of the period of loss claimed he spent large amounts of time on litigation related work. For example, he says he sat in the car park of RAS for a period of two months seeking to establish the comings and goings of his former employer in an effort to recover substantial damages from them. This was around March 2015, eventually culminating in receipt of monies by early June 2015.

**54.** The respondent says, bearing in mind the claimant was engaged in low-paid work at £6.31 per hour, it is hard to fathom how he failed to secure any other work in a period of nearly 3 years after the ending of his employment with the respondent other than a week or so in a meat factory. The claimant's mitigation evidence (screenshots of emails relating to applications made) demonstrates an unstinting and particular focus on HR roles. Reference is made to the findings of the Cardiff Employment Tribunal in February 2015 when the claimant seems to acknowledge that his lack of experience in HR made it difficult for him to obtain such roles and accordingly that week he would commence a search for work in a retail warehouse role. The respondent therefore says the claimant has failed to mitigate has loss either in respect of warehousing work or any other work broadly at the same rate. In relation to retraining as a plumber, the respondent accepts that compensation may include time taken out of the job market to pursue essential training or study. However, they say the tribunal should be astute to an employee taking themselves out of the labour market altogether as a matter of course. In such circumstances, the employee ought to be compensated up to the date when the employee ought to obtain another position.

**55.** The respondent also says that had the claimant remained with them he would not have continued to be employed indefinitely. They say security guards who had been with them for longer were released as winter 2014 approached. The respondent says it is likely the claimant would have been released shortly after the events in question anyway.

**Conclusions on compensatory award**

**56.** We accept that seeking to obtain money from a previous judgment and discrimination within the mitigation period amounts to reasonable mitigation of loss. He received a substantial award and was only able to receive the said monies by his work tracking down RAS and enforcing his award.

**57.** We also accept that because of the claimant's age and previous litigation history he might have some difficulty in obtaining alternative employment.

**58.** Nonetheless, bearing in mind the claimant was earning at or close to minimum wage we do not think it would have been difficult for him to mitigate his losses. We note that close to where the claimant lives are a variety of retail businesses warehouses, stores and industrial parks.

**59.** Insufficient efforts were made to look for low paid work. It was unreasonable of him not to make regular and multiple applications for agency work.

**60.** We consider that the claimant would have been able to mitigate his loss at the six-month point. This takes into account the need for him to spend significant time obtaining the RAS monies.

**61.** We do not accept what Mr Trevivian says in his statement at paragraph 25. It is suggested that had the claimant not left the respondent's employment as a result of this incident he would have gone anyway. We have seen no disclosure in relation to how many employees were released at or around this time.

**62.** Six months net loss comes to £7,496.04. Losses in this case run from the agreed date of 21 October 2014.

**63.** The undefended Employment Tribunal hearing in the RAS Security case took place in Cardiff Employment tribunal on 2 February 2015. The claimant was employed by RAS from 9 August 2013 until, as the tribunal found, 27 December 2013. His claim form in that case was presented on 26 March 2014. His average pay at RAS over a period of 12 weeks was £429.74 gross or £346.41 net. In summary, the Cardiff Tribunal concluded that the claimant would be able to obtain a retail warehouse role after 8 weeks of research and interviews. Such a job, they found, would be likely to be paid at the then National Minimum Wage of £6.50 per hour. They then went on to conclude that it would take a further 44 weeks for the claimant's pay to rise to the same level as it was with RAS.

**64.** Past loss of 57 weeks at £356.41 from 28 December 2013 until 2 February 2015 was awarded (less wages earned). Loss to date of the hearing on 2 February 2015 was awarded at £13,149.22. Future loss from 2 February 2015 was calculated as being 8 weeks at £346.41 and then 44 weeks ongoing loss at the net rate of £121.53.

**65.** Past loss has been awarded at the rate of £356.41 per week until 2 February 2015 by the RAS case. These monies should therefore be deducted from the

compensatory award in this case. From 2 February 2015, a further 8 weeks falls to be deducted at £346.41. From 30 March 2015 until the 6 month point in this case, 20 April 2015, losses were awarded at the rate of £121.53 per week.

**66.** Accordingly, for the 6 months from 21 October 2014 the claimant has already received compensation for same period in the sum of:

66.1.22.86 weeks at £346.41 = £8,147.53
66.2.3.14 weeks at £121.53 = £381.60

**67.** The total in this period (£8,529.13) exceeds the amount awarded. This figure was then also subject to a 25% uplift for failure to comply with the ACAS code. Therefore, the compensatory award is reduced to nothing.

**68.** We should say that there was some confusion at the remedy hearing because the claimant pointed out that during the 6-month period awarded the overlap in compensation was 8 weeks at £346.41 plus another 13 weeks at £121.53. This came to a deduction of 4351.17, leaving some £3,146. 67. The respondent made no countervailing submission in relation to this level of deduction. However, as set out above, this is not the correct level of overlap.

**69.** Since oral judgment the parties have both written in querying the figures. £3,146. 67 was the figure announced at the hearing in light of the submissions made by the claimant without any further comment by the respondent.

**70.** To the extent that there is any need to reconsider our initial judgment in this regard, we do so. The correct figures are as set out in this written judgment. The Tribunal takes full responsibility for the miscalculation made on the day.

**71.** The claimant now says no deductions should be made at all to the 6 month period. He emailed the tribunal in the late evening of 3 November 2020 saying:

> In the Chamberlains' case that loss of wages began on 21/10/2014. So, far so good. But, the error in the RAS judgment is that the judge appears to have began the wage compensation element straight after the judgment. Indeed, she says that I should be able to get a warehouse job in 8 weeks from then. But, that's the wrong starting point and the wrong job. So, although I was dismissed 9 months before I started with Chamberlains, the compensation didn't start running until 3 months after I left Chamberlains. There should never have been a cross-over in time regarding the wage compensation. The starting point, the day my wages were stopped and I was dismissed by RAS was 27th December 2013, see para 51.Therefore, clearly, the wrong starting point has been applied, because the time allowed for finding a new job in a warehouse, began ticking either on the date of the hearing, 3rd February 2015, or from the publication of the judgment on 12th February 2015. In truth, the judge should not have been interested in what job I was going to be searching for in the future.

**72.** In contrast, the respondent emailed on 6 November saying the whole of the £13,491.87 should be deducted from any loss of earnings awarded by this tribunal. In fact, as set out above, it was agreed that a maximum of £13,102.10 should be set off from the RAS award.

**73.** Therefore, both parties have made subsequent submissions which differ from points made at the culmination of the remedy hearing.

**74.** The claimant did not appeal or apply for reconsideration of the Cardiff Tribunal compensatory award in RAS. He says the wrong starting point has been applied to the starting date for the compensatory period in that case. However, as set out above, the Cardiff Tribunal awarded him full past loss from 28 December 2013 until the date of the hearing on 2 February 2015. They then went on to award future loss at varying rates for a further 52 weeks (44 + 8). It is now not open to the claimant to say that the tribunal applied the wrong starting point or the wrong job. He was awarded and has received the said monies. He received compensation for both past and future loss.

**Interest**

**75.** A tribunal is able to award interest on awards of compensation made in discrimination claims brought under s124(2)(b) EA 2010, to compensate for the fact that compensation has been awarded after the relevant loss has been suffered (see s139 EA 2010, EA 2010 (Commencement No 4 etc.) Order SI 2010/2317 and IT(IADC) Regs 1996).

**76.** The tribunal may award interest to the following types of discrimination award: past financial loss and Injury to feelings. Interest is calculated as simple interest accruing from day to day (Reg 3(1)). The interest rate now to be applied is 8%.

**77.** Injury to feelings: interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Reg 6(1)(a) IT(IADC) Regs 1996).

**78.** Tribunals are required to consider interest whether or not an application has been made by a party (see **Komeng v Creative Support Ltd UKEAT/0275/18/JOJ**). Reg 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996/2803 provides that the period over which interest accrues begins with the date of the discrimination and ends on the date the tribunal calculates compensation.

**79.** Regulation 6(3) provides as follows:

> Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may—

(a) calculate interest, or as the case may be interest on the particular sum, for such different period, or
(b) calculate interest for such different periods in respect of various sums in the award,
as it considers appropriate in the circumstances, having regard to the provisions of these Regulations

**80.** We have decided that awarding 8% interest until the date of the remedy hearing would result in a serious injustice. The claimant caused delay to this remedy hearing by a series of unmeritorious appeals. Had the claimant not appealed a remedy hearing would have been likely to take place on or before 10 December 2017. Accordingly, we award interest until that date.

**81.** The calculations are as follows:

i. £13,000 at 8% is £2.849 per day: 1154 days = £3,287.75
ii. £4,000 at 8% is £0.877 per day: 1142 days = £1,001.53

**Regional Employment Judge Pirani**
18 November 2020
Sent to the parties on:
……25 November 2020…….
For the Tribunal:
……..