# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mr S. Grewal** |
| **Respondent:** | **(1) Astha Limited**<br>**(2) Ms S. Chakraborty** |
| **Heard at:** | **East London Hearing Centre (by Cloud Video Platform)** |
| **On:** | **24 and 25 September 2020** |
| **Before:** | **Employment Judge Massarella** |
| **Members:** | **Ms. H. Bharadia**<br>**Ms. T. Alford** |
| **Representation** | |
| **Claimant:** | **In person** |
| **Respondent:** | **Mr. R. Chaudhry (Solicitor advocate)** |

# JUDGMENT

**With regard to the Claimant's reconsideration application, the judgment of the Tribunal is that:**

1. **it is in the interests of justice to reconsider the Tribunal's findings in relation to PIDA detriments (1) and (3);**

2. **having done so, the Tribunal concludes that it lacks jurisdiction to determine those complaints, because they were not presented within a reasonable period from the point at which it became reasonably practicable to do so; the claims are dismissed.**

**As for the remedy to which the Claimant is entitled:**

3. **the Respondents are ordered to pay to the Claimant the sum of £41,046.82;**

4. **the calculation of this sum is set out in Appendix 1 to this Judgment.**

# REASONS

*This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.*

1. By a judgment sent to the parties on 22 November 2019, the Tribunal concluded as follows:

    1.1. the Claimant's claim (s.47B Employment Rights Act 1996 ('ERA')) that he was subjected to detriments on the ground that he had made protected disclosures failed, and was dismissed;

    1.2. the Claimant's claim (s.103A ERA) that he was automatically unfairly dismissed by reason of having made public interest disclosures failed, and was dismissed;

    1.3. the Claimant's claim (s.94 ERA) that he was unfairly dismissed succeeded;

    1.4. the Claimant's claim (s.15 Equality Act 2010) that he was treated unfavourably, in that he was dismissed because of something arising in consequence of his disability succeeded against both the First and Second Respondents;

    1.5. the Claimant's claim of unauthorised deduction from wages was dismissed.

2. On 3 December 2019, the Claimant made a reconsideration application in relation to two of the PIDA detriments, which the Tribunal found did not occur by reason of the fact that he had made a public interest disclosure. I reviewed that application and, by letter dated 13 December 2019, decided that the application should proceed. I gave directions that the Respondent should set out its position on the application by 11 February 2020; it eventually did so on 27 February 2020.

3. I ordered that a hearing be listed, at which that application would be heard and judgment given by the full Tribunal. The Tribunal would then proceed to deal with remedy. I gave directions for exchange of documents, preparation of the bundle and witness statement. The hearing was listed for 11 and 12 June 2020.

4. Because of the Covid-19 pandemic, the hearing could not go ahead in June; the first day was converted to a telephone preliminary hearing for directions. At that hearing, it was agreed that the reconsideration/remedy hearing was suitable to be heard remotely (by CVP). The hearing was then re-listed for 24 and 25 September 2020, and a Notice of Hearing sent out.

5. The Claimant asked me to consider making an interim award, as he was experiencing financial difficulties. I explained that I did not have the power to do so, in circumstances where there was no identifiable award which the Tribunal was bound to make in any particular amount. However, I observed to Mr Chaudhry that the Claimant would be entitled to an injury to feelings award, and the applicable guidance suggests that the minimum award would normally

be around £800. If the Respondents were minded to make a payment in that amount to the Claimant voluntarily, it would have the effect of stopping interest accruing on that sum at the rate of 8%.

6. The Respondents made an interim payment to the Claimant in the amount of £690 on 14 August 2020.

**The reconsideration application**

The basis of the application

7. At paras 69-72 in its findings of fact, the Tribunal found as follows:

> 'The First Respondent did its banking with Santander, through an account to which the Claimant as Finance Manager had access. In September 2015 he transferred £16,000 from the account to his personal account, purporting to be £6,000 by way of salary and £10,000 by way of loan repayment. We find he did so because he was frustrated by the lack of progress being made in achieving a final reconciliation in respect of money which he considered was owed to him through other routes, including the arbitration process referred to above. Several days later he was persuaded to pay the money back into the Santander account.
>
> In October 2015 Ms Chakraborty and Mr Fergusson opened a new bank account with Barclays on behalf of the First Respondent. They did so because of the Claimant's actions described in the previous paragraph. They wished to ensure that he could not do anything similar in the future.
>
> On 30 October 2015 Ms Chakraborty wrote to the Claimant informing him that his request for access to the new Barclays account [original format retained]:
>
> > 'has been declined on the grounds of an unnecessary requirement for Astha Limited and also Barclays stipulation for signatories to be directors of the company… I understand the need for clarification regarding the Barclays account, for your held position as finance manager and therefore would instruct monthly statements to be available to you'.
>
> The Claimant did not in fact receive any statements in relation to the Barclays account until January 2016. Again, the Tribunal finds that Ms Chakraborty's aim was to restrict the Claimant's access to, and knowledge about, the Barclays account because of his earlier action in withdrawing money from the Santander account (indeed, the Claimant positively advanced this explanation during his questioning of Mr Fergusson).'

8. The only public interest disclosure which the Tribunal found that the Claimant made was disclosure C:

> 'Disclosure (C) – The Claimant disclosed that the Respondent failed to pay care workers money due to them. The date on which the disclosure was made was not specified by the Claimant.'

9. The Tribunal went on (para 163):

> 'The Tribunal finds that in January and September 2015 the Claimant disclosed information which he reasonably believed tended to show a breach of a legal obligation: the obligation to pay holiday pay to workers/employees. We further find that he subjectively believed that the disclosure of that information was in the public interest. We further find that that belief was objectively reasonable. It was reasonable to disclose the information for the purpose of ensuring workers/employees received the remuneration to which they were entitled and we find that was the Claimant's purpose. We find that, in this respect, he did not act in pursuit of his private financial reckoning with Ms Chakraborty.'

10. The Tribunal concluded (para 166):

> *'Preventing the Claimant from accessing the Respondent's Barclays bank account on the 30 [October] 2015*
>
> *Denying the Claimant Barclays bank statements from 30 October 2015*
>
> The Tribunal has already found (paras 70 and 72 above) that the reason why Ms Chakraborty sought to prevent the Claimant accessing the Barclays bank account, and restrict his access to information relating to it, including bank statements, was because he had accessed the Santander account and temporarily transferred funds to himself. We find that the Respondent's actions had no connection whatsoever with the Claimant's disclosure about holiday pay.'

11. In his application for reconsideration, the Claimant submits that this conclusion cannot stand because it is irreconcilable with the chronology: he withdrew the £16,000 from the Santander account on 2 November 2015, and returned the money on 4 November 2015. That is after the alleged detriments, and his actions cannot, therefore, be the reason why Ms Chakraborty acted as she did.

12. The Claimant is correct that the chronology which the Tribunal set out in its judgment on liability is mistaken. Consequently, the Tribunal considers that it is in the interests of justice to reconsider those claims afresh.

13. A limitation issue was specifically identified in the original list of issues in relation to the PIDA detriment claims. Because, in our original findings, the claims failed on their facts, we did not go on to consider the question of time limits. However, jurisdiction falls to be considered at all stages of the proceedings. Given that the conduct alleged occurred in October 2015, and the claim was not issued until January 2018, a limitation issue plainly arises.

14. Because the Tribunal rejected the other, later allegations of PIDA detriment and automatically unfair dismissal, there can be no question of an act extending over a period, linking these two detriments with a later, meritorious claim, which was presented in time. We must consider whether the Tribunal has jurisdiction to deal with these claims in isolation; the Claimant requires an extension of time.

<u>The law to be applied</u>

15. With regard to time limits, s.48(3) and (4) ERA 1996 provide (as relevant):

> **(3) An employment Tribunal shall not consider a complaint under this section unless it is presented–**
>
> **(a) before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
>
> **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)**
>
> **(a) where an act extends over a period, the "date of the act" means the last day of that period**

16. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

17. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

18. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.'**

Conclusion

19. The Claimant's evidence was that he did not bring proceedings in October 2015 for two main reasons: because he was not aware of his right to do so; and because he wished to try and resolve matters amicably with the Second Respondent. He accepted that he had access to legal advice at the time, if he required it, but that he did not take advantage of it. Asked when he became aware of his rights, he explained that this was in November 2016, when he took legal advice. At that point, he had access to a barrister, who was representing him in relation to other aspects of his disputes with the Second Respondent.

20. The Tribunal is prepared to accept that it was not reasonably practicable for the Claimant to issue his claim in relation to these alleged detriments until November 2016, when he took legal advice and became aware of his rights. However, we then asked ourselves whether he issued proceedings within a reasonable period thereafter. He waited over a year. His only explanation as to why he did not issue his claim until January 2018 was that 'that is when things started to go to court, and the trials became very serious'. We infer from that that he elected not to issue proceedings earlier, but when he decided to bring a complaint in relation to his dismissal, he chose also to include complaints in relation to these earlier detriments, which by then were long out of time.

21. The Tribunal concludes that the Claimant did not present these claims within a reasonable period after the point at which it became reasonably practicable for him to so. The Tribunal lacks jurisdiction to determine these claims, and they are dismissed.

**Remedy: discrimination**

22. Having heard evidence from the Claimant and the Second Respondent, and having read the documents to which we were referred in the remedy bundle, we make the following findings of fact, and draw the following conclusions. The relevant law is set out under each sub-heading.

Losses flowing from the dismissal: the correct approach

23. Where a dismissal is both discriminatory and unfair, the Tribunal should make the award for compensation under the discrimination legislation, but may also make a basic award (see *D'Souza v London Borough of Lambeth* [1997] IRLR 677).

24. Compensation for discrimination is assessed on tortious principles (ss.119(2) and 124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that he would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable, as would be the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

25. The First and Second Respondents are jointly and severally liable for the compensation for discrimination awarded to the Claimant.

26. Recoupment does not apply to awards for discrimination.

Sums claimed by the Claimant which are not recoverable

27. In his schedule of loss, the Claimant claimed a number of heads of loss, which are not properly recoverable in these proceedings, or at all (referred to below by the Item number in the updated schedule of loss).

    27.1. Item 3.04: the Claimant accepted that there was no pension loss, because the First Respondent terminated its pension scheme in around 2006.

    27.2. Item 3.05: the Claimant agreed that a claim for 'expenses incurred for 2017' could only have been pursued as a claim for unauthorised deduction from wages/breach of contract, and there were no such claims.

    27.3. Item 3.07 to 3.13: these were claims that the Second Respondent paid herself more than the Claimant and/or sums to which she was not entitled; this related to decisions taken before the dismissal; any loss was not consequent on it.

    27.4. Item 3.14, the Claimant's claim that, as a result of dismissal, he incurred interest charges because he had to take money out of his credit cards, was potentially recoverable. However, the claim was not properly particularised, and was unsupported by any documentary evidence.

Accordingly, the Tribunal declines to make an award under this head of loss.

The Claimant's net salary and benefits

28. We consider first what the Claimant's net salary was. In his schedule of loss, the Claimant gave two figures:

    28.1. 'net weekly basic wage pay: £230.95';

    28.2. 'net weekly basic dividend pay: £461.90'.

29. The Respondent did not dispute the net weekly 'basic wage' figure, and we accept it.

30. The Tribunal made reference to the dividend payments in its liability judgment, and found (at paragraph 92 onwards) that the Respondents stopped paying these to the Claimant in September 2016. It will be apparent from the Tribunal's finding at para 2 of the judgment on liability, that the Tribunal understood the dividend payments to be sums paid to the Claimant in his capacity as a shareholder, rather than salary paid to him as an employee.

31. In his submissions before us at this remedy hearing, the Claimant contended that his salary as an employee comprised both these elements. He contended that the arrangement was a sham, and that the dividends were to all intents and purposes salary.

32. The Claimant confirmed in evidence that PAYE was paid only on the 'basic wage' element; that dividend payments were only declared to HMRC at the end of year, not on a monthly basis. We were taken to the Claimant's tax return for the 2015/16 year, in which only the basic wage sum is identified as 'pay from employments'; there is then a separate declaration in relation to 'dividends from companies etc.' The Tribunal concludes that the dividends are a benefit to which the Claimant was entitled as a shareholder, rather than as an employee. Further, since the stopping of the dividends was not consequent on the dismissal, we cannot award compensation in relation to it.

33. The Claimant complains that this was an arrangement which was imposed upon him by the Second Respondent. Whether that is the case is not a matter which this Tribunal is required to determine; it may be an issue in the High Court proceedings.

Benefits

34. We accept the Claimant's evidence that, as an employee, he was entitled to a car allowance of £5,232 gross per year. The Respondent accepts that the Claimant had that benefit, but rightly contends that it must be netted down. Applying a basic rate of 20%, the net sum is £4,185.60. Dividing by 52.143, the weekly net is £80.27.

Past loss of earnings, subject to mitigation

35. The total of the net weekly wage and the net car allowance is £311.22.

36. The effective date of termination was 9 October 2017; the calculation date was 25 September 2020. The period between those two dates is 154.57 weeks.

37. The past loss, subject to mitigation, is £48,105.28.

Earnings which have mitigated the Claimant's losses/sums which reflect any unreasonable failure by him to mitigate

38. It is a fundamental principle that any Claimant will be expected to mitigate the losses he suffers, 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).

39. The burden is on the Respondent to prove a failure to mitigate (*Fyfe v Scientific Furnishing Ltd* [1989] IRLR 331). If the Claimant has failed to take a reasonable step, the Respondent must show that any such failure was unreasonable (*Wright v Silverline Car Caledonia Ltd*, UKEATS/0008/16).

40. The Claimant received job seekers allowance in the amount of £1,900.61, for which he gives credit.

41. Between 13 August 2018 and 7 August 2020, he earned £29,695.57 as a minibus driver, driving elderly people to day centres, and he gives credit for that. The Respondents did not submit that he unreasonably failed to mitigate his loss up to that point.

42. The Respondents did submit that he had unreasonably failed to mitigate his losses thereafter.

43. The Claimant was dismissed from his driving role as a direct consequence of the Covid-19 pandemic. He has serious underlying health conditions, and was shielding thereafter. The jobs market was, and remains, extremely challenging. The Claimant is sixty-four years old and in poor health. In the Tribunal's judgment, it is extremely unlikely that the Claimant would have been successful in finding alternative employment after August 2020. Moreover, the burden to prove an unreasonable failure to mitigate is squarely on the Respondents. They led no evidence at all of jobs which they contended the Claimant ought to have applied for. We reject the Respondent's submission that the Claimant has failed unreasonably to mitigate his losses.

44. Accordingly, the Claimant's past loss of earnings is £16,509.10, subject to any deductions, which we consider below.

Future loss of earnings

45. The Claimant's date of birth is 15 November 1955. His state retirement age is sixty-six years and two months, which is 15 January 2022.

46. In his schedule of loss, the Claimant claimed two years' future loss of earnings. In the course of his oral evidence, however, his evidence was somewhat more equivocal: at one point he said that he would have retired at his state retirement age; he then maintained that he would have continued working until he was seventy, or even seventy-five. The Tribunal does not accept that latter evidence. Given the Claimant's serious underlying health difficulties, the

Tribunal finds that, on the balance of probabilities, he would not have worked beyond state retirement age. That is more consistent both with his original claim for loss of earnings, and his initial oral evidence.

47. The period between 26 September 2020 and 15 January 2022 is 68.14 weeks.

48. The future loss, by reference to the weekly net loss, would therefore be £21,206.53, subject to any deductions.

Should a *Chagger/Polkey* deduction be made to reflect the chance the employment would have ended, had there been no unfairness and no discrimination?

49. In assessing compensation for discriminatory acts, it is necessary to ask what would have occurred had there been no unlawful discrimination. For example, in a dismissal case, if there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss (*Chagger v Abbey National PLC and another* [2010] IRLR 47).

50. Accordingly, we went on to consider what the chance was that the employment relationship would have continued and, if so, for how long.

51. In the Tribunal's view, the Claimant's conduct in sending what was referred to as 'the inflammatory email' and hacking into his colleagues' email was certainly serious, and probably gross, misconduct. The Claimant sought to justify both acts. By reference to the inflammatory email, he maintained that he had only sent this to individuals who might be able to take some action to resolve the dispute between him and the Second Respondent. In the Tribunal's view, that scarcely mitigated the inappropriateness of the email, which referred, by way of example only, to the Second Respondent's 'ego, arrogance and selfishness'. The recipients were colleagues and/or business associates of the Claimant and the Second Respondent and, in our judgment, the email plainly sought to undermine the Second Respondent in their eyes.

52. However, the circumstances of this case are highly unusual. The inflammatory email was sent in August 2016. The hacking of the Second Respondent's and Mr Fergusson's emails took place in November 2016, and came to the attention of the Respondents in December 2016, when the Claimant voluntarily disclosed that he had done it. The Respondents did not take action until some six months later, in May 2017. This suggests to the Tribunal that they may not have considered that these matters, in their own right, were sufficient to justify the dismissal which (we have found) the Second Respondent so emphatically wanted by this stage. They then went on the hunt for other matters which could be used against the Claimant.

53. Further, the toxic nature of the relationship between the Claimant and the Second Respondent was both unusual and unpredictable. The employment relationship had survived other events, some of which might usually be regarded as breaches of the implied term of trust and confidence on both sides: for example, the Claimant taking £16,000 out of the Santander account; and the Second Respondent stopping the payment of dividends to the Claimant. Yet the relationship continued. Moreover, it might have been difficult for the Second Respondent to justify dismissing the Claimant by reason of the inflammatory email because she herself had been guilty of similarly derogatory treatment of

the Claimant, for example at the meeting when she required the Claimant to step down as registered manager in Leeds, and at the dismissal meeting itself, when she subjected the Claimant to humiliating verbal abuse. No disciplinary action was taken against her. A dismissal of the Claimant might have been unfair for inconsistency.

54. Doing the best we can, in circumstances which are quite out of the ordinary in the experience of this Tribunal, we think that there is a high likelihood that the Claimant would have been fairly dismissed, absent any unfairness and any discrimination. However, we consider that there is still a significant chance that he would have remained in the First Respondent's employment up to his state retirement age. We estimate that chance at 25%. We note that that accords with the 75% deduction which, in his closing submissions, Mr Chaudhry contended would be appropriate in the circumstances.

55. Consequently, the figures for past and future loss of earnings have been reduced by 75% in the calculation set out below in Appendix 1 to this judgment.

Reduction by an amount to reflect contributory conduct

56. Compensation for discrimination may be reduced for contribution: *Way v Crouch* [2005] ICR 1362 at para 11. The power to reduce discrimination damages arises under the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act"). In summary, what must be shown is that the individual contributed to his own injury by his own careless conduct.

57. S.1(1) of the 1945 Act, so far as relevant, provides:

> **Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons… the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage ...**

58. In an unfair dismissal case, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy, in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish, perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

59. Where there is a significant overlap between the factors taken into account when making a *Chagger/Polkey* deduction, and when making a deduction for contributory conduct, the ET should consider expressly, whether, in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and if so, what its amount should be. This is to avoid the risk of a Claimant being penalised twice for the same conduct (see *Lenlyn UK Ltd v Kular* UKEAT/0108/16/DM).

60. Because the Tribunal has made a *Chagger/Polkey* reduction based on the Claimant's blameworthy conduct, the Tribunal considers that it would not be just and equitable to make a further reduction for contribution to the awards for loss of earnings, because that would lead to the Claimant being penalised twice for the same conduct.

Injury to feelings

61. In *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102, the Court of Appeal gave guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise 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.**
>
> **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.'**

62. The bands were increased by the 2017 Presidential Guidance on awards for injury to feelings for cases issues on or after 11 September 2017 (this case was presented on 8 January 2018):

    62.1. lower band: £800 to £8,400;

    62.2. middle band: £8,400 to £25,200;

    62.3. top band: £25,200 to £42,000.

63. 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. Awards should not be too low, as that would diminish respect for the policy of the anti-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 be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

64. The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently (*Essa v Lang* [2004] IRLR 313).

65. A *Polkey*-type deduction should not be applied to an award for injury to feelings (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615).

66. Awards for injury to feelings unrelated to termination of employment are tax-free, as are awards related to the termination of employment prior to 6 April 2018 (*Moorthy v HMRC* [2018] EWCA Civ. 847).

67. It is clear from the Claimant statement that *part* of his injured feelings related to treatment he experienced at the hands of the Respondents before the dismissal (what he refers to in his statement as 'the psychological warfare waged against me by these disgraceful individuals'), and events which occurred after the dismissal (for example, their conduct of the civil proceedings). We have discounted that evidence in considering what award to make under this head, since we must focus on the injury to feelings caused by the dismissal itself.

68. The Claimant described his hurt feelings, consequent on the dismissal, in some detail in his witness statement. We find that he suffered very significant upset, shock and anger as a result of the dismissal from his employment with the First Respondent. The loss of employment had a profound effect on him, particularly having regard to the fact that this was a company which he had originally set up himself, and in which he was still a shareholder: it was humiliating. He suffered severe anxiety, particularly in relation to the financial impact the dismissal would have on his family. He felt hopeless. That in turn led to weight loss, and to difficulty sleeping. Having worked from home for the majority of the time, he was required to seek work away from home, which in turn caused him further anxiety as to the impact this might have on his health, given his compromised immune system.

69. The Tribunal concluded that the appropriate award must fall into the middle *Vento* band. This was not a 'less serious case', such as to justify an award in the bottom band. Although the discrimination was a single act, dismissal is a serious act in the employment context. On the other hand, this case cannot properly be categorised as being among 'the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment', such as to justify an award in the upper band.

70. The Claimant submitted that an award of £15,000 would be appropriate. We accept that submission, having regard to the fact that it represents an award just below the middle of the middle *Vento* band. In our judgment, it is justified in all the circumstances.

71. Before finally settling on a final figure, we stood back and considered the award by reference to the value of money generally, as well as the need to ensure that respect for awards under the Equality Act is maintained. We are satisfied that this award is consistent with both considerations.

<u>Percentage increase up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS Code of Practice</u>

72. An award for compensation can be increased by up to 25%, if the employer has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s.207(A) TULRC(A) 1992). At present, the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) is the only relevant code of practice. The full list of Tribunal jurisdictions to which s.207A applies is detailed in Schedule A2 of TULR(C)A; it includes s.120 and s.127 EA 2010 (discrimination in work cases).

73. The Tribunal set out the various aspects of procedural unfairness, which it found to have occurred, at paragraph 179 of its judgment on liability. Those

findings in turn give rise to the following findings, in relation to breaches of the ACAS Code.

73.1. Ms Chakraborty's close involvement in both the investigation and disciplinary stages breached para 6 of the Code, which provides that, in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. Had Ms Chakraborty allowed the people who had been charged with carrying out the disciplinary hearing to do so, without interference from her, there may not have been a breach of this provision. However, as we have already found, Ms Chakraborty improperly dominated both stages of the procedure, sidelining the decision-makers, including taking the ultimate decision to dismiss the claimant herself. For the avoidance of doubt, the presence of those employees only serves to emphasise the practicability of the decision being taken by someone other than Ms Chakraborty.

73.2. The conduct of the investigation and disciplinary meetings (paras 179.4 and 179.7) breached para 12 of the Code, which provides that employees should be allowed to set out their case and answer any allegations that have been made, and should be given a reasonable opportunity to ask questions and present evidence. As we have already found, the Claimant was given no meaningful opportunity to state his case at the investigation meeting (para 179.4); and was hectored and interrupted by Ms Chakraborty throughout the disciplinary meeting (para 179.7).

73.3. The failure to allow the Claimant an appeal (para 179.9) was a breach of para 26 of the Code.

74. In all the circumstances, the Tribunal concludes that the breaches of the ACAS code were so serious as to merit the maximum uplift of 25%. We consider that that it is just and equitable to uplift both past and future losses of earnings, and the award for injury to feelings, to reflect these breaches of the Code. We then stood back and considered whether the total uplift was excessive, and concluded that, given the egregious nature of the breaches, it was not.

<u>What interest should be awarded on any compensation under the Equality Act 2010</u>

75. The Tribunal must consider whether to award interest on awards in discrimination claims, without the need for any application by a party, but an award of interest is not mandatory: reg. 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[1]

76. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[2] The interest rate now to be applied is 8%.

[1] SI 1006/2803
[2] SI 1996/2803

77. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

78. The Tribunal has decided to award interest in accordance with the usual principles. We have considered whether a serious injustice would be done to the Respondent by our calculation of interest including the period of delay caused by Covid-19 and/or because the Judgment Act rate of 8% no longer reflects financial reality. The Respondents did not submit that we should alter our approach from the normal calculation of interest in this case. We have concluded that the delay has been one of the uncertainties of litigation, for which the Claimant should not be penalised. We also had regard to the fact that the earnings figures relied on by the parties did not take into account any annual increase in earnings that may have occurred since the material period, and therefore the generous interest rate, as a matter of justice, is likely to incorporate that. For these reasons we award interest at the rate of 8% for the period is set out in the Regulations.

79. The interest figures are set out in Appendix 1.

**Unfair dismissal: compensatory award**

80. We do not make an award for loss of earnings as part of the compensatory award in the unfair dismissal claim, because to do so would be to double-count.

Award for a failure by the employer to provide written particulars of employment (s.38 Employment Act 2002 ('EA 2002'))

81. An employee is entitled to receive a written statement of employment particulars. At the material time, the employer had a period of two months in which to provide the statement. Where a Tribunal has upheld a claim within the list of jurisdictions in sch.5 Employment Act 2002 (which includes claims of unfair dismissal and discrimination at work), and when the proceedings were brought the employer was still in breach of the duty to give written particulars, the Tribunal will make an award of two weeks' net pay unless it would be unjust and inequitable do so, and may, if it considers it just and equitable in all the circumstances, make an award of four weeks' net pay (ss.38(1) to (5) EA 2002). Recoupment does not apply to awards under this head.

82. Not only did the First Respondent fail to provide the Claimant with a statement of particulars of employment (a situation which had lasted for many years and still prevailed at the point when proceedings were brought), the Respondents produced a fabricated contract of employment, which purported to contain particulars of employment, and sought to rely on it in the course of internal disciplinary proceedings, up to the point where the Claimant was able to demonstrate that it was manifestly false.

83. In these exceptional circumstances, in which the Respondents' dishonest conduct aggravated the original failure, the Tribunal considers that it would be just and equitable to make the maximum award of four weeks' net pay.

Loss of statutory rights

84. One of the heads of loss for which a Tribunal may award compensation is the value of accrued statutory rights that have been lost: where an employee begins a new job following the termination of their employment, they will need to accrue two years' continuous service before they will have acquired the right to claim unfair dismissal or a statutory redundancy payment, and may have lost the right to a lengthy statutory notice period if they have been employed for several years.

85. In all the circumstances, and given the length of the Claimant's service to the Respondent, the Tribunal considers it just to make an award of £500. We note that this sum was agreed by the Respondents in their counter-schedule. No separate award is made in relation to loss of long notice.

86. Recoupment does not apply to an award under this head of claim.

**Unfair dismissal: basic award**

Basic award

87. The Claimant is entitled to a basic award: 1.5 weeks' gross pay for each year of employment in which he was not below the age of 41, here 13 weeks, subject to the statutory cap on a week's gross pay (currently £538). The basic award, subject to any reductions, is 1.5 x 13 x £370 = £7,215.

88. The basic award may be reduced where the Tribunal considers that any conduct of the complainant before the dismissal was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent (s.122(2) ERA).

89. In *Granchester Construction (Eastern) Ltd v Attrill*, UKEAT/0327/12/LA, the EAT considered a case in which a 50% Polkey deduction was made to the compensatory award, and both the basic and compensatory awards were also reduced by 10%. The EAT said

> **'whereas it may be appropriate to moderate what would otherwise be the degree of contributory conduct that would reduce an award because there have been matters of conduct taken into account in assessing the chances of a fair dismissal, so that it might be in effect double counting to impose upon the Claimant a further reduction by way of contributory conduct, that reasoning cannot apply to that part of the award to which the *Polkey* principle itself does not apply.'**

90. Since *Polkey* does not apply to the basic award, that reasoning does not apply to it.

91. We have already found that the Claimant conducted himself in a blameworthy manner, both by improperly accessing the emails of the Second Respondent and Mr Fergusson, and by sending out the inflammatory email. In the light of those findings, we consider that it is just and equitable to reduce the basic award to some extent. We then considered the level of the reduction, which is a matter of judgment for the Tribunal. Given our findings as to the procedure followed by the First Respondent in dismissing the Claimant, we conclude that, in being dismissed without a fair procedure/hearing, the Claimant had been deprived of an important right, and it would not be just and equitable to reduce

his basic award by more than a modest amount. The Tribunal concludes that it is just and equitable to reduce the award by 25%.

Grossing up

92. Because the award for injury to feelings is tax-free (the termination having taken place before 6 April 2018), and the first £30,000 of the compensatory award is tax-free, there is no requirement to gross up any part of the award of compensation in this case.

Employment Judge Massarella
Date: 26 November 2020

## APPENDIX 1: CALCULATION OF AWARD

| | |
|---|---|
| **A. Injury to feelings** | 15,000 |
| Less interim payment, paid on | (690) |
| Total owed | **14,310** |
| ACAS uplift (25% x 15,000) | **3,750** |
| Interest on element of award already paid (690) at 8% per annum from date of discriminatory act (9 October 2017) to date of payment (14 August 2020)<br>1041 days ÷ 365 x 8% = 22.82% x 690 = | **157.46** |
| Interest on balance of injury to feelings award (14,310) at 8% per annum from date of discriminatory act (9 October 2017) to date of calculation (25 September 2020)<br>1083 days ÷ 365 x 8% = 23.74% x 14,310 = | **3,397.19** |
| **B. Past loss of earnings** | 48,105.28 |
| Minus income received (29,695.57 + 1900.61) | (31,596.18) |
| | 16,509.10 |

| | |
|---|---|
| Applying *Chagger* reduction (75% x 16,509.10) | **4,127.27** |
| ACAS uplift (25% x 4,127.27) | **1,031.82** |
| Interest on past loss (4,127.27) from midpoint between date of discrimination (9 October 2017) and date of calculation (25 September 2020)<br>1083 ÷ 2 = 541.5 days ÷ 365 x 8% = 11.87% x 4,127.27 = | **489.91** |
| **C. Future loss of earnings** | |
| Future loss of earnings between 26 September 2020 and 15 January 2022 | 21,206.53 |
| Applying *Chagger* reduction (75% x 21,2016.53) | **5,301.63** |
| ACAS uplift (25% x 5,301.63) | **1,325.41** |
| **D. Failure to provide written particulars**<br>311.22 x 4 weeks | **1,244.88** |
| **E. Loss of statutory rights** | **500** |
| **F. Basic award** (1.5 x 13 x 370) | 7,215 |
| Applying 25% reduction for contribution | **5,411.25** |
| **Total award** | **£41,046.82** |