Case Number: 3201050/2018 A

RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Sinelkova**

Respondent: **Activtrades Plc**

Heard at: **East London Hearing Centre**

On: **25 January 2021**

Before: **Employment Judge A Ross**
Members: **Mrs L Conwell-Tillotson**
Mr M Rowe

Representation

Claimant: No attendance

Respondent: No attendance

JUDGMENT

The Remedy Judgment promulgated on 9 June 2020 is confirmed.

REASONS

Introduction

1 By letter sent by email on 23 June 2020, the Claimant applied for a reconsideration of the Judgment on Remedy. The grounds for reconsideration included that the Tribunal had not taken into account the Claimant's further written submissions dated 15 May 2020. For the reason we explain below, this proved to be correct.

2 By email dated 25 September 2020, the Respondent did not object to a reconsideration. The parties were content for the reconsideration to be dealt with on the papers.

3 For this purpose, a reconsideration hearing in chambers was originally listed to take place on 17 November 2020. For unavoidable reasons, one member of the Tribunal was unable to attend. The date was vacated. A further reconsideration was listed for today.

4 For the reconsideration, the Tribunal met remotely (by telephone) for a chambers discussion of the issues raised by the application for reconsideration. We considered, in particular, the Judgment on Remedy, the Claimant's written submissions dated 15 May 2020 and the Respondent's submissions filed on 15 May 2020.

The issues on the Reconsideration

5 The application for reconsideration contained three basic grounds:

5.1 The Claimant's further written submissions dated 15 May 2020 had not been taken into account. The Respondent had had no regard to the ACAS Code of Practice in respect of her grievance and there was a calculated effort to cause the Claimant distress and suffering because she had complained about the Respondent's actions. An uplift of 25% should be awarded.

5.2 The agreed figure for the loss caused by the Claimant incurring expenses of £750 was not included in the total amount payable by the Respondent.

5.3 The award for loss of statutory rights, £500, was not included in the total amount payable by the Respondent.

Ground 1

6 As paragraph 7 of the Judgment on Remedy makes clear, the Tribunal invited the parties to make written submissions on the whether the uplift under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 should apply to the basic award for unfair dismissal and the awards for the victimisation found proved under section 27 Equality Act 2010 and section 47B Employment Rights Act 1996.

7 Due to administrative oversight, the Tribunal were not given a copy of the Claimant's further submissions sent to the Tribunal Office on 15 May 2020 and no copy was placed on the file. Therefore, the Tribunal proceeded to reach its conclusions on the further chambers day (22 May 2020) without sight of the Claimant's further submissions.

8 In its Judgment on Remedy, the Tribunal decided to reconsider its Judgment on liability in respect of the awards for the victimisation found proved under section 27 Equality Act 2010 and section 47B Employment Rights Act 1996. At the chambers day on 22 May 2020, the Tribunal decided to add a statutory uplift of 20% to those awards for victimisation. Our reasons are set out at paragraphs 160 – 183 of the Reasons for the Remedy Judgment.

9 In the interests of justice, on reconsideration of the Remedy Judgment, the Tribunal took into account the Judgment and Reasons particularly the paragraphs referred to above. We noted as follows:

9.1 We had directed ourselves correctly in law. In particular, we had directed ourselves to section 207A TULR(C)A, relevant parts of the ACAS Code of Practice 1 on grievance procedures, and considered each of the questions identified as necessary by Lady Smith in Allma Construction Ltd v Laing [2012] UKEAT/0041/11.

9.2 As a result, we had concluded that the Respondent had failed to comply with the ACAS Code in several respects, outlined in our decision at paragraphs 165 – 176. Then, we concluded that these failures were unreasonable failures; we concluded that the Respondent did not carry out a proper investigation into any allegations made by the Claimant, despite their gravity and her role as Head of Compliance.

9.3 After this, the Tribunal had considered whether it was just and equitable in the circumstances to increase the award. We found that the award should be increased; our conclusions on this issue are at paragraphs 178-183. We concluded that the breaches of the Code were very serious and the nature of the breaches were grave.

9.4 Finally, we had considered by what percentage the award should be increased. In considering this issue, we had directed ourselves to the guidance of the higher Courts in the leading cases, including Cannock, Credit Agricole Corporate Investment Bank v Wardle [2011] IRLR 604, and Base Childrenswear v Otshudi UKEAT/0267/18.

9.5 At paragraphs 184-189 of the Reasons, the Tribunal explained its decision to uplift the award by 20%. In those paragraphs, we explain why we did not award the maximum uplift of 25%. In particular, applying the guidance provided by the Employment Appeal Tribunal in the case of Otshudi, we concluded that there would be double-counting of matters that were relevant to both the awards of aggravated damages and the ACAS uplift if the maximum uplift were awarded: see paragraph 184.4.

9.6 The Reasons explained that the nature and gravity of the breaches of the Code were very serious, there was a high degree of aggravating features, and that the Respondent had acted maliciously towards the Claimant: see, for example, paragraphs 184.1 – 184.2, and 186.1.

10 In addition, the Reasons explained that the Tribunal need to take into account the "totality principle", which meant that it had to take a step back, and consider whether the total compensation award was proportionate or involved over-compensation. We found that the Public would consider the overall award of compensation of £47,500 general damages and £9,500 statutory uplift (amounting to £57,000) to be proportionate: see paragraph 192.

11 By her "Written Submissions on Remedy" sent on 15 May 2020, the Claimant argued for a statutory uplift of 25%. Her submissions included the following:

11.1 The Respondent did not carry out a genuine grievance process nor any genuine investigation. Instead, having received her grievance on 15 December 2017, it set in motion a campaign against her. The Claimant relied on the Tribunal's findings of fact in the Judgment and Reasons on liability, citing paragraphs 60-65, 95, 104, 149, 159, 170, 171, 172.

11.2 The Respondent refused to delay the grievance process due to her ill-health.

11.3 The Respondent failed to allow any appeal.

11.4 In summary, the Claimant's argument was as set out at paragraph 12 of her submissions:

"*Furthermore, I submit that the Respondent deliberately used the investigation process to discredit me, damage my career and earning capacity and cause tremendous stress and anxiety. There were multiple deliberate breaches of the Code, for which there was no mitigation and there I submit that a 25% uplift is awardable.*"

12 Having taken into account the Claimant's written submissions, the Tribunal concluded that it should confirm its original Judgment on Remedy for the following reasons:

12.1 The Tribunal had concluded, without sight of the Claimant's submissions, that the Respondent had made multiple breaches of the ACAS Code of Practice on grievance procedures, that these breaches were unreasonable, that it would be just and equitable to uplift the award, and that a 20% statutory uplift should be applied.

12.2 In reaching our conclusions on the percentage of the ACAS uplift, we had taken into account in substance all the points made by the Claimant in her further submissions. We had reached our conclusions at paragraphs 184-189 by taking into account almost all the points made by the Claimant in her written submissions. Importantly, we had concluded that the nature and gravity of the breaches of the Code were very serious. We recognised in our conclusions that the treatment of the Claimant's grievance was designed to damage her standing in the industry: see paragraphs 184.1 to 184.3 of the Reasons for the Remedy Judgment. In essence, we rejected the Respondent's submissions that there should be nil or only a modest uplift applied; and we proceeded on the basis that there was no mitigation for the breaches of the Code.

12.3 Insofar as we do not specifically refer to each of the paragraphs of our Reasons in the liability Judgment, nor to matters specifically referred to by the Claimant in her written submissions, the Tribunal are satisfied that, having now read the Claimant's further submissions, they would have made no difference to the outcome to our decision on the percentage uplift to be awarded. For example, insofar as we do not specifically explain the impact on our reasoning of the finding that the Respondent refused to delay the grievance process due to the ill-health of the Claimant, this finding is not a finding of breach of the Code, although it may not comply with the ACAS Guidance; but, in any event, it is a matter of relatively little if any significance when set against the serious nature and gravity of the breaches of the Code which the Tribunal found were deliberate and part of a plan against the Claimant. In respect of the alleged failure to afford the Claimant an appeal, this was not a finding of fact made; but, in any event, in the circumstances, such a failure paled into insignificance against the nature of the breaches found proved.

12.4 However, the fact that there was no mitigation for the serious, multiple, breaches of the Code did not mean that an uplift of 25% should be applied. The Tribunal were required to apply the relevant law, as explained in Cannock, Wardle, and, in particular, Otshudi, which essentially required the Tribunal to award compensation that was just and proportionate, and which avoided over-compensation. This required that the Tribunal must avoid double-counting when assessing compensation. The Tribunal had to avoid double-counting in this case because it had taken into account the Respondent's treatment of the Claimant's grievance when assessing the award for aggravated damages: see paragraph 120 of the Reasons on remedy.

12.5 We concluded that the Tribunal had fully explained at paragraph 184 of the Reasons why we had not awarded a statutory uplift of 25%. In reaching our conclusion on this issue, we could see no misdirection of law, nor any failure to take into account any relevant evidence or finding of fact.

13 In addition, the Tribunal confirmed the liability judgment in respect of whether the statutory uplift should apply to the basic award. At paragraph 18 of the Reasons for the Judgment on Remedy, we explained that Section 124A(a) ERA provides that an uplift for unreasonable failure to comply with the Code may only be applied to the compensatory award. Therefore, the statutory uplift cannot, as a matter of law, apply to the basic award.

Grounds 2 and 3

14 In the Grounds for the reconsideration, it is asserted that the Tribunal failed to include the £750 agreed sum for expenses and the £500 awarded for loss of statutory rights in the total amount awarded in the Judgment. These assertions are based on misunderstandings. They are incorrect for the following reasons.

15 It was agreed between the parties at the Preliminary Hearing on 23 September 2020 that the loss of earnings was £4171.05 plus the statutory uplift of 25%: see paragraph 19 of the Judgment and Reasons on remedy.

16 The parties agreed that the sum for expenses would be £750: see paragraph 20 of the Reasons for the Remedy Judgment.

17 The Tribunal awarded £500 for loss of statutory rights: see paragraph 108 of the Reasons for the Remedy Judgment.

18 The sums awarded for loss of earnings, expenses, and loss of statutory rights all form part of the compensatory award for unfair dismissal. The Tribunal calculated this award correctly, as follows:

Loss of earnings: £4171.05

Expenses: £750

Loss of statutory rights: £500

Total Compensatory award: £5421.05

19 The statutory uplift was applied to the total compensatory award: see 1.1.2 and 1.1.3 of the Judgment on Remedy.

Conclusion

20 For all the above reasons, the Judgment on Remedy is confirmed.

Employment Judge Ross

1 February 2021