Case Number: 3312414/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs M Szalkowska	v	HC-One Limited

Heard at: Watford (via CVP) **On**: 10 and (in private) 27 May 2021

Before: Employment Judge Hyams **Members:** Mr M Kaltz
Mr S Woodward

Appearances:

For the claimant: Ms L Millin, of counsel
For the respondents: Mr I McGlashen, Representative

UNANIMOUS RESERVED REMEDY JUDGMENT

1. The claimant is entitled to a basic award in respect of her unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996") in the sum of £4,064.00.

2. The claimant is entitled to £5,194.42 by way of damages for breach of contract arising from her wrongful dismissal.

3. The claimant is entitled to compensation for financial losses of £22,143.02 and £15,000 by way of compensation for injury to her feelings in respect of her unfair dismissal within the meaning of section 103A of the Employment Rights Act 1996 and the detrimental treatment within the meaning of section 47B of that Act to which she was subjected by the respondent before that dismissal.

4. The total of the awards under the preceding 3 paragraphs above is £46,401.44. That sum will be subject to income tax in the sum of £4,100.36, to which the claimant is entitled by way of grossing up to take account of the incidence of such tax.

REASONS

Introduction

1 Having found in favour of the claimant in our reserved judgment which was sent to the parties on 18 March 2021, we held a remedy hearing on 10 May 2021, having postponed it on the application of the claimant from the original date of 20 April 2021.

2 On 10 May 2021 we heard oral evidence from the claimant, who had made a further witness statement concerning her losses and her efforts to mitigate her losses. She was cross-examined briefly by Mr McGlashen, who did not submit that she had not made reasonable efforts to mitigate her losses.

3 We spent much time during 10 May 2021 trying to ascertain from the documents before us what were the claimant's losses. We had to do that because there were inconsistencies in some of the documents before us relating to those losses. We were in the event unable on that day to come to a clear conclusion on those losses because of those inconsistencies. An application for costs on the basis that the respondent had acted unreasonably in regard to the provision of a bundle and witness statements for the liability hearing by providing them late was then made by Ms Millin. She made that application by reference primarily to what was said by the claimant in an email of 12 January 2021. After we had, through Employment Judge ("EJ") Hyams, pressed her on the impact of the late provision of a final version of the bundle and the respondent's witness statements, Ms Millin suggested that the claimant had instructed her (on a direct public access basis) because of that late provision. However, we heard no evidence from the claimant in that regard.

4 We heard oral submissions from both parties on the principles to be applied in determining the losses, and EJ Hyams had extensive discussions with both parties' representatives about those principles and the statutory provisions from which they were derived or (as the case may be) the case law on which they were based. One matter which was the subject of much discussion was whether the ACAS code of practice on disciplinary matters had been breached and whether there should as a result be an increase in the compensation of up to 25%, applying section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA"). Another matter which was the subject of discussion was whether or not aggravated damages should be awarded.

5 We therefore state below (1) our conclusions on the claimant's losses in principle, (2) the sums which we award by way of compensation for financial losses and injury to feelings, and (3) our decision on the claimant's application for costs.

The financial losses in principle caused to the claimant by her dismissal and other relevant determinations of principle

The claimant's losses in principle

6 The claimant was out of work until 1 April 2019. She did not claim any state benefits during the period between the date of her (as we found) wrongful dismissal (21 December 2018: see paragraph 113 of our liability judgment) and 1 April 2019.

7 The claimant had (the parties agreed) the right to 7 weeks' notice. Mr McGlashen accepted that the claimant should (in the light of our finding that the claimant was wrongfully dismissed) receive net pay for that period, together with pension losses in the form of her own pension contributions (treated as having been deducted from her gross pay, along with national insurance contributions and income tax) and the pension payments for the claimant's benefit that the respondent would have made for that period. We agreed. For the avoidance of doubt, we agreed that the claimant had made reasonable efforts to mitigate her losses.

The claim for aggravated damages

8 As for the question whether or not the claimant should receive aggravated damages, Ms Millin relied on the decision of the EAT (Underhill P presiding) in *Commissioner of the Police of the Metropolis v Shaw* [2012] ICR 464, and we took it into account in deciding that since, as there stated, the award of aggravated damages is compensatory and not penal, we should not award a separate sum for aggravated damages since we had already (see below), in deciding the award for injury to feelings, taken into account the matters on which the claim for aggravated damages was based.

The claim for an uplift in the compensation by reason of the claimed failure to comply with the ACAS code of practice

9 Turning to the question of the alleged failure to comply with the ACAS code of practice, we record that Ms Millin relied on various passages in our liability judgment as showing that there had been a failure to comply with that code. Ms Millin did not submit that the respondent had not taken the required procedural steps: her submissions were instead to the effect that the respondent had not complied with the code because it had acted in bad faith and otherwise unreasonably, in the ways which we had in our liability judgment found as a fact had occurred, when doing the things that the code stated should be done.

10 Section 207A(2) of TULRA provides:

> "(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

11 Mr Kaltz and Mr Woodward agreed that the respondent had breached the code in failing to comply with its spirit. Employment Judge Hyams, however, concluded that the steps required by the code were procedural only, and that as long as a relevant step was taken, even if it was taken in bad faith or only after the decision to dismiss the claimant had been made (but before that dismissal occurred), there will have been no failure to comply with the code. However, we were unanimous in concluding that it was not just and equitable here to increase the compensation payable by the respondent for the failures to comply with the code (as found by the majority) since, for the reasons to which we now turn, those failures were taken into account by us fully when deciding on the amount of the award for injury to feelings that we should make.

What the award for injury to feelings should cover

12 Mr McGlashen submitted to us that the claimant should receive compensation for injury to her feelings arising only from detrimental treatment which preceded her dismissal, and that, by reason of the decision of the House of Lords in *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36, [2004] IRLR 727, [2004] ICR 1052, she should not receive compensation for injury to her feelings arising from her dismissal.

13 As EJ Hyams pointed out during the hearing, however, the award of compensation for injury to feelings for detrimental treatment for whistleblowing, i.e. for detrimental conduct done on the ground of the making of a public interest disclosure, is not based on an express statutory provision, since there is no reference to such an award in section 49 of the Employment Rights Act 1996 ("ERA 1996"). Rather, the award of compensation for injury to feelings in that regard is based on the decision of the EAT (HHJ Ansell presiding) in *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268, [2004] ICR 210, which was applied by the EAT in *Shaw*. In *Boyle*, the EAT decided that compensation under section 49 of the ERA 1996 should include an award for injury to feelings: it did not in terms rule that an award of compensation only under section 49 and not also under section 103A of the ERA 1996 could, or should, include an award of compensation for injury to feelings, although at first sight it might be taken to have done so. That can be seen from the following passage in the judgment of the EAT in *Boyle*:

‘39. In *Cleveland Ambulance NHS Trust v Blane* [1997] ICR 851 this court (Judge Peter Clark presiding) held that in a complaint of action short of dismissal, contrary to section 146(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 , the tribunal had power under section 149(2) to award compensation for injury to feelings. Judge Peter Clark said, at pp 858-859:

> “(2) However, there is a significant difference. Section 149(2) adds the words: ‘having regard to the infringement complained of and ...’ It seems to us that those words grant the industrial tribunal a power to award compensation over and above the pure pecuniary loss suffered by the applicant. Given the scope for awards to complainants who have suffered by way of sex or race discrimination to reflect injury to feelings, we see no reason in principle why the words of the section cannot extend to such award. Put another way, what do the words add to the normal formulation of available pecuniary loss claims for unfair dismissal, if not to include an award for non-pecuniary loss including injury to feelings?
> “(3) It is not fatal to our construction that the Sex Discrimination Act 1975 and the Race Relations Act 1976 contain specific references to awards for injury to feelings, and section 149(2) of the Act of 1992 does not. Those provisions were inserted ‘for the avoidance of doubt,’ not to create an otherwise otiose head of claim.
> “(4) We are unimpressed by the argument advanced by the employer in *National Coal Board v Ridgway* [1987] ICR 641, and implicitly adopted by Ms Pitt before us. It is nothing to the point that an award for injury to feelings cannot be recovered in a wrongful dismissal or unfair dismissal claim. They are different claims, compensated in different ways. We do not accept that a complaint under section 146(1) of the Act of 1992 can simply be categorised as less serious and therefore cannot allow of a head of compensation not provided for in claims of unfair dismissal or wrongful dismissal. Apart from the different wording of the section, the intention behind it is clear; an employee who is unfairly dismissed will normally suffer pecuniary loss, and that, Parliament has decided, will adequately compensate him for the wrong. In a case of action short of dismissal it may very well be that he can point to no pecuniary loss; nevertheless, Parliament has decided that he should be able to recover financial compensation ‘having regard to the infringement complained of’. That must, in our judgment, include injury to feelings occasioned by the unlawful act.”

40. Thus, *Cleveland Ambulance NHS Trust v Blane* makes it clear that a distinction has to be drawn in trade union cases between action short of dismissal, where compensation for injury to feelings will be allowed, and those cases where the detriment complained of is dismissal, where an award for injury to feelings cannot be recovered.

41. In *Dunnachie v Kingston upon Hull City Council* [2003] ICR 1294 , 1302, para 14, Burton J (President), having referred to the *Cleveland* decision, went on thus:

> "There is a similar distinction to be found in the wording of section 49 of the 1996 Act, which provides a remedy where a complaint has been proved that an employee has been subjected to a detriment in the context of his having made complaints or claims relating to health and safety, Sunday working and time off for reasons dealt with in sections 44, 45, 46, 47, 47A and 47C of the 1996 Act. In such circumstances section 49(2) provides in material terms: 'The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to-(a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.' In such circumstances too there may be no economic loss suffered. Once again there are clear words following a wider ambit of recovery."

42. In *Hackney London Borough Council v Adams* [2003] IRLR 402 Elias J, giving the judgment of this court, applied the guidelines in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318 to trade union discrimination cases.'

14 The decision in *Boyle* was arrived at in part in reliance on the decision of the EAT in *Dunnachie* which was eventually approved by the House of Lords. That might well be said to support Mr McGlashen's contention set out in paragraph 12 above. Nevertheless, the appeal in *Boyle* was advanced on the basis that the employment tribunal against whose judgment the appeal was made had awarded too much compensation for injury to feelings, and that the *Vento* guidelines (i.e. the guidelines in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318) should have been applied to limit the amount of that compensation. Thus, the issue of whether or not compensation for a dismissal resulting from a whistleblowing disclosure could (or should) include an award of compensation for injury to feelings did not arise in *Boyle.*

15 The nub, or *ratio decidendi*, of the decision in *Boyle*, is in paragraph 44(b) of the judgment of the EAT, where it said this:

> "[D]etriment suffered by trade union members was clearly accepted in *Hackney London Borough Council v Adams* [2003] IRLR 402 as another species of discrimination and it is therefore important as far as possible that there is consistency in awards throughout all areas of discrimination ... We see no reason for detriment under section 47B of the Employment Rights Act 1996 to be treated differently; it is another form of discrimination."

16 We ourselves could see no justification for a conclusion that while an award of compensation for injury to feelings is available under section 49 of the ERA 1996, no such award can be made under section 103A of that Act, not least

because compensation for injury to feelings is capable of being awarded for a discriminatory dismissal under the Equality Act 2010 as well as for a detriment other than dismissal. In addition, it would be odd if compensation for injury to feelings could be awarded for detriments which are (applying *Melia v Magna Kansei Limited* [2005] EWCA Civ 1547, [2006] ICR 410) not part of a dismissal which follows those detriments, but not for that dismissal. Furthermore, a dismissal which is unfair within the meaning of section 103A of the ERA 1996 is likely to be even more hurtful than action short of dismissal for whistleblowing, as the dismissal must, in order to contravene section 103A, be principally for whistleblowing. So, if a discriminatory dismissal within the meaning of the EqA 2010 (the principal reason for which might not be the unlawful discriminatory motive) can result in an award of compensation for injury to feelings, then surely a dismissal which is in breach of section 103A of the ERA 1996 should all the more obviously be capable of being the subject of an award of compensation for injury to feelings.

17 However, the following passage from section DII of *Harvey on Industrial Relations and Employment Law* ("*Harvey*") suggests that the situation is far from clear:

> '**[466.01]**
> Ever since the decision in *Boyle* it was argued in the above paragraph that the same rule (permitting injury to feelings damages in an appropriate case) should apply to all the heads of detriment in Part V. This was eventually accepted (and para [466] approved) by the EAT in *South Yorkshire Fire and Rescue Service v Mansell* UKEAT/0151/17 (30 January 2018, unreported) in a case which raised the point directly, in which the arguments were fully considered and which seemed to resolve the matter once and for all.
>
> **[466.02]**
> Unfortunately, however, only weeks after the decision in *Mansell* uncertainty was reintroduced here by obiter dicta in *Santos Gomes v Higher Level Care Ltd* [2018] EWCA Civ 418, [2018] IRLR 440. The case actually concerned compensation for breach of working time rights under the Working Time Regulations 1998 SI 1998/1833 reg 30, upholding the decision of the EAT that injury to feelings damages are not available on such a complaint (see CI [242]). That determined the point at issue, but at the hearing the argument had been put that such damages are available in a detriment action (including a working time detriment case) and there was no good reason why that should not be read over into reg 30. Although it was not necessary to deal with that argument as part of the ratio, Singh LJ at [61] volunteered the following opinion:
>
> > ''In my view, the time has come to stand back and review the line of authority in the EAT which forms the foundation of [counsel for the claimant's] argument in the present case. In my respectful view, that line of authority is arguably wrong and should certainly be confined to its

> particular context. In my view, the reasoning in it is difficult to reconcile with what was said by the House of Lords in *Dunnachie*.''

The reference to *Dunnachie* is of course to *Dunnachie v Kingston Upon Hull City Council* [2004] UKHL 36, [2004] IRLR 727 the leading authority ruling out non-pecuniary loss such as injury to feelings for unfair dismissal (see DI [2629]). The suggestion was that it might be necessary to construe detriment in the same way to ensure consistency. However, potentially introducing even more uncertainty, the judgment goes on at [66] to decline to rule any further on the point:

> ''Nevertheless, I would prefer to leave for decision in another case, in which the issue arises directly, whether cases such as *Brassington* and *Blane* were correctly decided in their own context. This is because (i) those cases have a longstanding pedigree, going back around 40 years; (ii) they were decided by judges with long experience of employment law; (iii) the House of Lords had the opportunity to say that the cases of *Brassington* and *Blane* were wrong since they were cited in *Dunnachie* but did not say anything about them; (iv) this Court did not have the benefit of full argument on the point, since [counsel for the employer] came to the hearing to distinguish the earlier EAT line of authority, not to bury it; and (v) they appear to relate to situations in which there may be no financial loss at all and so the purpose of Parliament in conferring the rights in question may be frustrated if compensation for injury to feelings were not available either. This is a point mentioned by Judge Clark in particular, in *Blane* ….''

With respect, these seem to be pretty good reasons not to call these authorities into question. Moreover, this may be seen as doubly unfortunate for the law here because it came so shortly after the decision in *Mansell*. That decision is cited in the judgment in the instant case but dismissed as not being helpful in determining it. Presumably, however, it would stand or fall along with *Brassington* and *Blane* in future litigation over this previously established issue which is now made likely by these open-ended dicta.

[466.03]
Finally on this aspect, it should be noted that the statutory provisions which specifically exclude awards for injury to feelings in relation to part-time workers, fixed-term employees and agency workers (Part-time Workers Regs 2000 SI 2000/1551, reg 8(11); Fixed-term Employees Regs 2002 SI 2002/2034 reg 7(10); Agency Workers Regulations 2010 SI 2010/93 reg 18(15)) do not relate to detriment claims under SI 2000/1551 reg 7(2), SI 2002/2034 reg 6(2) and SI 2010/93 reg 17 respectively. They only exclude such awards in claims of less favourable treatment under SI 2000/1551 reg 5, SI 2002/2034 reg 3 and SI 2010/93, regs 5, 12 or 13 respectively (see *South Yorkshire Fire and Rescue services v Mansell* (above) at [61] ff).'

18 As we say in paragraph 12 above, Mr McGlashen's submission that an award of compensation for a dismissal which was unfair within the meaning of section 103A of the ERA 1996 could not include an award of compensation for injury to feelings was based on the decision of the House of Lords in *Dunnachie*. However, despite what Singh LJ said in *Mansell* about the impact of the decision of the House of Lords in *Dunnachie*, that decision concerned only compensation for an "ordinary" unfair dismissal, i.e. within the meaning only of section 98 of the ERA 1996, the compensation for which is limited by section 124(1) of that Act, and for the making of which an employee must (as a result of section 108(1) of that Act) have acquired a minimum of 2 years' continuous employment. A discriminatory dismissal is in our view quite a different matter. The fact that there is (as a result of section 108(3)(ff) of the ERA 1996) no requirement of any particular length of service for the making of a claim of unfair dismissal within the meaning of section 103A reinforces the proposition that a distinction both can and should be drawn in this context between such a dismissal and a dismissal which is unfair only within the meaning of section 98. The same is true of the fact that section 124 does not (as a result of section 124(1A)) limit the compensation for a dismissal which is in breach of section 103A.

19 We were forced here to grab the bull by the horns. We concluded that if it is correct, as we were bound by the decision of the EAT in *Boyle* to find, that compensation can be awarded for injury to feelings caused by detrimental treatment within the meaning of section 47B of the ERA 1996, then as a matter of the application of the principle behind *Boyle*, compensation for injury to feelings must be available also for a dismissal which is unfair within the meaning of section 103A of that Act.

The compensation which the claimant should receive from the respondent

20 The claimant (through Ms Millin) accepted that her pension rights in the respondent's employment were of the same sort as those which she had subsequently accrued, as all of her pension rights were accrued as a result of automatic enrolment (via the NEST scheme). We regarded that acceptance as correct.

21 Precisely what the claimant's net weekly income was, and to what extent we should include in it the clamant's own pension contributions, was on the evidence before us a difficult question. In the end, we concluded that we should be prepared, if there was sufficient evidence before us on the matter, to take into account (i.e. include in the calculation of the claimant's net income) the claimant's own pension contributions. That is because they were income which was not taxed as it was paid into a pension fund. We also concluded that we should calculate the claimant's net income in her employment with the respondent by reference to the 3 months of her employment with the respondent preceding the month in which she was suspended. She was suspended in November 2018, so the 3 months' figures for her net income were those for August, September and October 2018, which were, respectively (see pages 21-23 of the pdf bundle put before us for the remedy hearing; any reference below

to a page is to a page of that bundle), £3,342.28, £3,478.02 and £2,597.81, i.e. £9,418.11 plus (respectively) £80.64, £80.64 and £67.36 by way of pension contributions made by her. That gave a total net income figure for those 3 months of £9,646.75. That gave a net weekly figure of £742.06 including pension contributions. If one ignored the pension contributions then the net weekly income was £724.47.

22 The claimant's net income in her employment with Fonthill Care was in the circumstances potentially best calculated by reference to the 3 months of January, February and March 2021 for which there were pay statements in the remedy hearing bundle before us at pages 30-32. The net pay in those months was £3,016.59, £3,089.21 (taking into account the fact that expenses of £20 were reimbursed) and £2881.11 respectively. The total was therefore £8,986.91. However, the pension contributions that the claimant made for the first 2 of those months were not shown: only the pay statement for the month of March 2021 showed a pension contribution made by the claimant, which was in the sum of £139.07. The NEST contributions had, we were told, increased since the claimant had left the respondent's employment. If they were all of the same sort as the one for March 2021, i.e. in the same proportion, then the claimant's income in the new employment was still slightly lower than it was in the respondent's employment. In any event, if pension contributions in the three months of January to March 2021 inclusive were ignored, then the net weekly figure was £8,986.01/13 = £691.30.

23 After the hearing had ended, Ms Millin sent us documents relating to the claimant's NEST pension. They showed that in the year ending on 31 March 2021, the claimant had made pension contributions of £905.62. If that was averaged over the whole of the year, then the monthly contribution that the claimant had made was £75.47. If we took 3 times that figure and added it to the claimant's net income for the first 3 months of 2021, that was £226.41 plus £8,986.91, i.e. £9,213.32. That was less than the 3-month total for the claimant in the months of August, September and October 2018 (£9,646.75: see paragraph 21 above). However, for the reason stated in paragraphs 28 and 29 below, we did not rely on this figure.

24 The claimant's monthly basic gross pay in her new employment was (see page 32) £3,583.33, but she had no basic monthly gross pay in the respondent's employment, as her pay in her employment with the respondent varied according to the hours which she worked in the month.

25 The claimant's earnings in the 2019-20 income tax year were stated in the P60 which her employer in April 2020 had given her, of which there was a copy at page 5, as £47,092.38 before deductions. That was borne out by the pay statements for the claimant for that year.

26 Employee pension contributions were shown in all of the pay statements for the 2019-20 tax year in the bundle: £125.28 for May 2020 (page 68), £117.80 for June 2020 (page 69), £130.96 for July 2020 (page 69), £91.99 for August 2020

(page 70), £126.75 for September 2020 (page 70), £160.98 for October 2020 (page 71), and £25.40 for November 2020 (page 71). If the sum deducted in March 2021 shown on page 32 (£139.07) was added to those sums, then the total was £918.23, i.e. close to, but not the same as, the figure shown in the NEST document sent by Ms Millin as recorded in paragraph 23 above.

27 As a result, it was not entirely clear what was the claimant's pay for the 2019-20 tax year, i.e. her pay after the deduction of income tax and national insurance contributions but including the pension contributions that she herself made (from her gross pay) to NEST.

28 However, we had to do the best we could on the evidence before us. We concluded therefore that we would (taking the approach that Ms Millin took in her calculations in the schedule of loss that she had put before us) for the sake of simplicity take the claimant's net earnings for 2019-20 as stated by the claimant in her witness statement as determinative (i.e. necessarily ignoring for this purpose, and otherwise in calculating the claimant's losses other than her damages for her wrongful dismissal, her own pension contributions). Thus she earned, net, in that tax year a total of £3,196.18 with Aspen Village Ltd, and £30,337.62 - £189.45 (for expenses) = £30,148.17 with St Albans Care Ltd, i.e. a total of £33,344.35. In addition, the claimant earned net income in April to 22 November 2020 of £15,495.29. That was a total of £48,839.64. Thus, we calculated the claimant's losses to the date of the hearing in the following manner.

28.1 The claimant was entitled to £742.06 x 7 by way of net notice pay to 8 February 2019: £5,194.42.

28.2 In the period from 9 February 2019 to 22 November 2020, i.e. 653 days (including 29 February 2020), the claimant lost income of 93 weeks and 2 days' pay, calculated by reference to an annual salary of (£724.47 x 52), which is a total of £67,665.50 net.

28.3 She received income during that period of £48,839.64. Thus in respect of that period she lost income of £18,825.86.

28.4 As from 22 November 2020 onwards, the claimant lost income (as we calculated it) of (see paragraphs 21 and 22 above) £724.47 - £691.30 per week, i.e. £33.17 per week. To the date of the hearing, that was 168 days, or 24 weeks, which gave a figure of £796.08.

29 In addition, we had to take into account the pension contributions that would have been made by the respondent into the claimant's pension scheme, i.e. the NEST scheme. Those would have been 2% of gross income up to 5 April 2019 and 3% from then onwards. However, it was impossible on the evidence before us to ascertain what the claimant's gross income would have been during that period. Therefore, for the sake of simplicity and on the basis that it was probably going to be at least roughly correct, we simply added 3% to the claimant's past

net losses, so that the claimant's past pension losses were, we concluded, 3% of £5,194.42 + £18,825.86 + £796.08 = 0.03 x £24,816.36 = £744.49.

30 As for future losses, we estimated and therefore concluded that within a year the claimant would be earning as much in her new employment as she had earned with the respondent. That meant that we awarded her 52 x £33.17 plus 3% by way of employer's pension contributions, i.e. 1.03 x 52 x £33.17 = £1,776.59.

The basic award

31 The parties agreed that the basic award was in the sum of £4,064.00.

Injury to feelings

32 We had nothing by way of a direct comparison in deciding the appropriate award for injury to feelings. Mr McGlashen submitted that for the pre-dismissal detriments to which we had found that the claimant had been subjected she should be awarded a sum in the lower *Vento* band, of £5,000. Ms Millin submitted that the figure should be £25,000, at the top of the middle *Vento* band.

33 Having referred ourselves to the cases in *Harvey* concerning sex and race discrimination claims (in paragraphs L[956-985] and L[1025-1035.01]), we concluded that the award should be in the middle *Vento* band and that the award should be £15,000.

The application for costs

34 The application for costs was pursued because of delay in the provision of a final version of the hearing bundle and the late provision of witness statements. In our view, that was unreasonable conduct within the meaning of rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013. However, that conduct had not led to any financial loss, since, we concluded in the absence of evidence from the claimant about the impact, it had not caused any increase in costs. In fact, logically, the late arrival of the final version of the bundle and the witness statements would have at worst caused a postponement of the hearing, in respect of which the claimant could have sought costs, but she had not sought such an adjournment. In any event, we had a discretion whether to make an award of costs, even though we had decided that one of the grounds for the award of costs had arisen. In the circumstances, in part but not only because the claimant had not satisfied us that she had suffered any financial loss by reason of the respondent's late provision of the bundle and witness statements, we concluded that (1) such late provision did not mean that it was appropriate to award the claimant any costs and (2) we should therefore refuse the claimant's application for costs.

The total net award and the need to gross it up to take account of the impact of income tax

35 The total net award was therefore £46,401.44. The first £30,000 of that will be exempt from income tax. The rest will be taxable. We therefore (without knowing the claimant's actual income current income and therefore for the sake of simplicity) added income tax at the rate of 20%, i.e. 25% of £16,401.44, i.e. £4,100.36, so that the grand total payable by the respondent to the claimant is £50,501.80.

Employment Judge Hyams

Date: 3 June 2021

JUDGMENT SENT TO THE PARTIES ON

9 June 2021

.....

THY

.....

FOR THE TRIBUNAL OFFICE