EMPLOYMENT TRIBUNALS

Claimant: **Mark Harris**

Respondent: **Colchester United FC Football in the Community**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **22 June 2021**

Before: **Employment Judge Housego**
Members: **Ms J Clark**
Mr P Lush

Representation
Claimant: In person
Respondent: Mark Greaves, of Counsel, instructed by Nicholas West of Birketts LLP

JUDGMENT

The Respondent is ordered to pay the Claimant the sum of £13,822.91.

REASONS

Background, and hearing

1. By a judgment dated 22 March 2021, promulgated on 23 March 2021, the Respondent was found to have victimised the Claimant by dismissing him on 05 April 2019 by reason of a protected act on 20 December 2018. This hearing is the remedy hearing. Mr Harris gave oral evidence and was cross examined. Mr Greaves provided a written submission, to which he spoke, and Mr Harris made submissions. There was a bundle of documents of 199 pages.

Facts found

2. Mr Harris has not found alternative employment, apart from three very short temporary jobs in the summer immediately following his dismissal. He has limited his search for work for a variety of reasons.

2.1. He has always worked with children, and this is his passion. He wanted to work in this area of work, and as it was two days a week and not well paid, to work in the same geographical area.

2.2. He felt unable to seek work in this field, because he felt that his DBS check would reveal the Community Resolution Order which resulted from Mr Cowling's allegation that Mr Harris had headbutted him (the Tribunal's findings of fact about this are set out at paragraph 71 of the liability hearing). He would feel ashamed and embarrassed for people to read this, and as he had lived and worked in the area for 30 years, and taught many thousands of children (many now parents of the children he might now teach) he felt unable to put himself forward for any such role.

2.3. He would only have looked for 2 days a week, the same as he worked with the Respondent, as he did not want to give up his business helping people with grievance hearings.

2.4. From January 2020 he decided to devote all his time to that business. Initially his income did not increase, partly since he did some work without charging for it, if people could not pay, but since April 2021 he was seeing an increase in income. The extra 2 days had enabled him to set up a website and use FaceBook, and that had led to an increase in work, although the costs have largely used up the income in the first year since he was dismissed.

2.5. He thought, at about the age of 60, he had earned the right to do a job he liked, not one he did not. He accepted that it would have been possible for him to get a job at national minimum wage or above in about 6 months.

2.6. At his age the odds of getting a job were less good.

2.7. He was able to draw his teacher's pension early, and while he had intended to let it accrue until he was 65, the income from it gave him the freedom to do as he wished, particularly as his wife worked.

2.8. He is doing some voluntary work, particularly those with dyslexia and Asperger's syndrome.

2.9. He did not want to work for anyone else, by reason of his experiences at the Respondent and before.

3. Mr Harris feels very deeply that there was a false allegation of headbutting which has in effect deprived him of his vocation. That is not part of the claim which succeeded.

4. Mr Greaves' written submission was full, but in essence was that:

4.1. Mr Harris could have got a job paying something similar in a relatively short period of time.

4.2. He needed to look wider than coaching or teaching.

4.3. Covid is not relevant as it was all before the pandemic.

4.4. Mr Harris would very likely have been dismissed by September by reason of the incident in the car park.

Injury to feelings

5. The Tribunal considered the guidance in Armitage Marsden and HM Prison Service v Johnson [1997] ICR 275, summarised by Eady J in Base Childrenswear Ltd v Otshudi [2019] UKEAT 0267_18_2802 as:

"an ET must keep in mind that the intention is to compensate, not punish. It must, therefore, be astute neither to conflate different types of awards nor to allow double recovery. The ET should, moreover, not allow its award to be inflated by any feeling of indignation or outrage towards the Respondent. On the other hand, awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation."

The Tribunal was also cognisant of the need to ensure that the award is proportionate with personal injury awards, and to stand back and assess overall whether its award is proportionate to what happened and its effect on Mr Harris.

6. Base Childrenswear Ltd v Otshudi [2019] UKEAT 0267_18_2802 is also a helpful guide to the approach to be taken to injury to feelings in dismissal cases, and the Tribunal applied its guidance.

7. The *Vento* bands applicable to this case are set out in the Second Addendum to the Presidential Guidance first issued on 05 September 2017:

"In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a ***lower band of £900 to £8,800*** *(less serious cases); a* ***middle band of £8,800 to £26,300*** *(cases that do not merit an award in the upper band); and an* ***upper band of £26,300 to £44,000*** *(the most serious cases), with the most* ***exceptional cases capable of exceeding £44,000****."*

8. The Respondent says that this was a one-off incident – dismissal - and that it was in the lower band. The Respondent identified as an example of a similar case a recent case: Witt v New Quay Honey Farm Ltd and others (Cardiff) (Case No 1602264/2019) (11 February 2021, unreported), set out at [1146-1148] of Harvey [**130**]. In that case an award of £6,000 for injury to feelings was made. The circumstances were that the dismissal was found to amount to victimisation and calling W 'old woman' to harassment on the ground of age. In relation to injury to feelings, both acts were considered as a whole. Mr Greaves submitted that £5,000 was entirely adequate as compensation. Mr Harris had not shown any significant worsening of his mental health as a result of his dismissal. He had not visited his doctor about it for a couple of months, and his medication had not been increased. Contrary to the evidence of Mr Harris, his prescription was not at the upper end of the NICE guidelines for that medication.

9. The Tribunal finds that this was a middle *Vento* band matter. Each case is to be assessed on its own factual matrix. That one case (even most cases)

is (or are) within the lower band does not mean that this one is. The facts were plainly very different.

10. The case is not, as Mr Harris said, a higher band matter. Any successful Claimant with a real sense of injustice will feel that it is very serious: the role of the Tribunal is to make an objective assessment of what happened and place it in its correct place in the spectrum.

11. Mr Harris lost a job which he loved, for which he was well suited, at which he would have stayed indefinitely, and which was irreplaceable: it was a unique job. The legal term for this is *"loss of congenial employment"*, and that is plainly applicable in this case.

12. Mr Harris also realised that there had been a course of action which led up to his dismissal. That was apparent to him when he was dismissed, as his appeal made clear.

13. Mr Harris' previous mental health issues made him vulnerable to the effect of his victimisation. The Respondent points out that there is no evidence of increased medication by reason of this effect. Mr Harris did not go to the doctor about it for some months. These two submissions miss the point: such an effect is not like the infliction of a physical injury, which is immediate. Injury to feelings can grow and deepen as the mind contemplates it. That medication remains the same does not mean that the injury to feelings does not exist. It may just be that someone coping well with medication before the incident copes far less well after it. The Tribunal judged Mr Harris a witness of truth. He said that his GP was not willing to increase his medication, even if it was below the NICE guideline maximum, and the Tribunal so finds. Mr Harris did suffer substantial injury to feelings. His oral evidence was given unemotionally, but that, as Mr Harris pointed out, was by means of considerable effort not to be emotional. The oral evidence clearly displayed, without hyperbole or exaggeration, just how devastating this had been for him. His whole career and passion has been in the teaching of children and sport, and in his particular situation the job he loved, even if modestly paid and limited in its time commitment, was taken away from him, and could never be replicated. There really are no other such jobs available to him.

14. Mr Harris felt betrayed by his employer, a feeling that was the deeper because the reason for it was that he was advocating for a colleague with mental health issues.

15. The Tribunal did not consider the effect of the car park incident could give rise to compensation, because it is not part of the claim which succeeded. That includes the effect of the allegation by Mr Cowling to the police of being headbutted by Mr Harris. (As stated, the Tribunal's findings about this are at paragraph 71 of the liability decision.) That effect is not relevant to the assessment of injury to feelings, because it is not causally connected with the claim (of the detriment of dismissal) which succeeded.

16. Accordingly, while it is impossible to segment the injury to feelings into compartments, the Tribunal has discounted the exacerbating effect of that episode, and has assessed the amount of compensation holistically,

considering all the relevant circumstances, in deciding on the extent of the injury to Mr Harris' feelings arising from his dismissal.

17. The Tribunal decided upon the figure of **£10,000**. The Tribunal is satisfied that this is proportionate, and conforms to the legal guidance set out above.

18. Interest is due on that figure at 8% (simple interest) for the 810 days from 05 April 2019 to today, which is agreed at **£1,763.62**.

19. Mr Harris did not make a separate personal injury claim (*cf* Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] EWCA Civ 1663).

20. Mr Harris sought aggravated damages. This is applicable where a Respondent has behaved *"in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination"* (Alexander v Home Office [1988] ICR 685, CA). It is compensatory, not punitive. It amounts to additional compensation for additional injury to feelings caused by such actions. Underhill P (as he then was) described the parameters of such claims in DeBique v Ministry Of Defence (Sex Discrimination : Other losses) [2011] UKEAT 0075_11_1509. However it is categorised, the responsibility of the Tribunal is to look at what happened, what effect it had on the Claimant, and assess the appropriate level of compensation having first decided into which *Vento* band the case falls.

21. The Tribunal found that while the actions of the Respondent were such that the claim for victimisation succeeded, these actions are all within the Tribunal's assessment of £10,000 compensation as within the middle *Vento* band, and that aggravated damages were not appropriate.

22. Mr Harris also sought an uplift for breach of the Acas code on grievance and disciplinary matters. Plainly the procedure was not fair, as the claim succeeded. The Respondent says that dismissal was not disciplinary, and so the Acas guidelines do not apply. This is incorrect, as it was also a grievance. While the procedure was not fair, it was still the correct procedure. The provision for uplift is to encourage employers to follow a proper procedure, rather than make summary decisions. It is not to penalise an employer which follows the Acas procedure but does so either unfairly or comes to an unfair conclusion. Here there was a written grievance, a meeting held, and an outcome and an appeal. The complaints about everything other than the dismissal being victimisation for the protected act of 20 December 2018 did not succeed. In these circumstances no uplift is appropriate (for a parallel, see De Souza v Vinci Construction Uk Ltd (Disability Discrimination: Compensation) [2015] UKEAT 0328_14_2003).

Loss of income

23. The Tribunal agreed with the submissions of Mr Greaves for the Respondent, and decided upon a figure of 6 months' earnings, less the amount earned by Mr Harris in that period in 3 short periods of casual work. Mr Harris did not attempt to mitigate his loss; had he done so, this is the period that could have been expected to be compensated.

24. Mr Harris' net pay was £439.40 a month. Six times that is £2,636.40. The earnings were £745.00. The loss of earnings is therefore **£1,891.40**.

25. Interest of that from the mid-point at 8% is also due. That is 405 days and the figure is agreed at **£167.89**.

26. The reasons the Tribunal came to its decision are as follows:

    26.1. Mr Harris wanted to work with children but decided that this was now not possible, by reason of the fear that the enhanced DBS check would show his community resolution order. Even if not working directly with children he felt an enhanced check would be needed. If so, he felt this would be revealed. This would either prevent him getting the job, or would be so embarrassing and he would feel so ashamed by it that he felt unable to apply for any post that might need such a check. Mr Harris is probably right that a community resolution order for assault would show on an enhanced DBS check, and that any job where children were on the premises would probably need such a check. Because he wanted to work only in this field he did not apply for any jobs at all. He does, however, have the obligation to mitigate his loss, and as he did not do so he cannot successfully claim loss of earnings above the loss he would have been likely to suffer had he attempted to mitigate his loss.

    26.2. Nor did he want to work for anyone else after two bruising experiences in employment. Again, he does have the obligation to mitigate his loss. This effect on him is relevant to the assessment of the injury to feelings.

    26.3. Mr Harris is passionate about his work which he does for those with Asperger's syndrome and with dyslexia, in helping with grievances and to get better conditions at work to help with those conditions. He has expanded that work, first by investing time in setting up a website and in a FaceBook page, and secondly by helping people without charge. The choice to expand his business is a choice he made, and insofar as it replaces the time he spent working this means any loss of income is not the responsibility of the Respondent. Insofar as it is voluntary work, that again is a choice to spend time previously spent at work in a way that is not remunerative: income lost by undertaking work without charge is not compensatable by the Respondent.

    26.4. Mr Harris opted to take his teacher's pension early. Doubtless he has suffered an actuarial reduction by doing so, but he was clear that doing this liberated him from the need to work, particularly as his household income includes his wife's earnings. Mr Harris' choice to, in effect, take early retirement may well have been the result of being dismissed, but it was still a choice, and means that the income not earned is replaced by his pension. It affords him the ability to do the work he does for nothing. That is not a loss attributable to his dismissal.

27. The Tribunal decided that Mr Greaves' written submissions fairly and accurately set out the position had Mr Harris attempted to mitigate his loss.

That was that net pay was £439.40 a month, that 6 months was a reasonable time for Mr Harris to find alternative employment, and that he had earned £745 in 3 periods of short-term casual work. (439.40 x 6) – 745 = **£1,891.40**.

28. Mr Greaves said that Mr Harris would very likely have been fairly dismissed after the car park incident, and that, as a long stop, loss would have stopped by the end of September 2019 as a result of such dismissal. As the Tribunal accepted in full Mr Greaves' submissions as to loss of income the Tribunal does not deal with that submission.

29. Accordingly, the Tribunal ordered the Respondent to pay to the Claimant the sum of £13,822.91, which is the total of the injury to feelings, loss of income and interest on each.

Employment Judge Housego
Date: 28 June 2021