Case Number: 3313818/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr James Gentle	**v**	Flare Products Limited

Heard at: Cambridge (by CVP) **On:** 29 & 30 April 2021

Before: Employment Judge Dobbie

Members: Mrs J Costley and Mr R Eyre.

Appearances
For the Claimant: Adam Griffiths (Counsel).
For the Respondent: Suhayla Bewley (Counsel).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which had not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

1. The Respondent shall pay to the Claimant the sum of £2,500.00 in respect of injury to feelings, referable to the claim for detriment under ss.47E and 48 Employment Rights Act 1996 ("ERA").

2. The Respondent shall pay to the Claimant £501.92 in interest on the award for injury to feelings.

3. The Respondent shall pay to the Claimant 5 weeks' pay in respect of its breach of s.80G ERA, in the sum of £2,625.00.

REASONS

1. Under s.80I ERA, the tribunal has the power to make an award of compensation to an employee in respect of a claim under s.80H (for breach of s.80G) albeit there is no obligation to do so. Under s.80I(2) ERA, any such award will be at a level that the tribunal considers just and equitable in all the circumstances but not exceeding the permitted maximum. Under Regulation 6 of the Flexible Working Regulations 2014, the maximum is 8 weeks' gross pay (capped at the statutory maximum week's pay for the relevant year).

2. In reaching our decision on any compensation to award, the Tribunal took into account the fact that the Respondent is a small company with no dedicated HR support and it had never handled an application for flexible working prior. However, we also noted that the Respondent did receive legal advice on its obligations under the flexible working regime. We further considered that the Respondent had taken some steps to comply with its requirements under the s.80G ERA, by inviting the Claimant to a meeting to discuss his application. Therefore, it had not completely failed in its obligations.

3. However, based on our findings on liability, we took the view that the Respondent was displeased with the application and was resistant to it from the outset, becoming angry with the Claimant when he raised it. We also had regard to the fact that the application itself was a well-worded and compelling application which merited real consideration and might well have been granted by an employer that kept an open mind.

4. We had regard to similar cases of which we were aware, taken from commentary in IDS Employment Law Handbooks. Such cases were: British Airways v Starmer [2005] IRLR 862 and the unreported tribunal-level cases of Coxon v Landesbank Baden-Wurttemberg ET Case No.2203702/04 and Watton v RBS Insurance Services Ltd ET Case No.2803908/10*.* We reminded ourselves that these are not binding on us, but that nonetheless they assisted in our assessment of what was just and equitable.

5. We did not think that the default in the instant case was similar to that in Starmer and Watton, where 1-2 weeks were awarded for technical breaches that had no real prejudicial effect on the claimants. However, we also did not consider the default to be quite as serious as in the case of Coxon (a case in which the Tribunal stated it was minded to award the full 8 weeks) and we noted that the instant case differs in that the application itself was meritorious.

6. Taking all of the above into account, we decided it was just and equitable to award 5 weeks' pay for this claim. The maximum pay for each week is capped under s.227(1)(zz) ERA to the statutory maximum of £525.00 for the relevant year. The Claimant's gross weekly pay exceeded this cap and therefore the cap applies. The award is therefore £2,625.00 (5 x £525.00).

7. In respect of the injury to feelings award for breach of s.47E ERA, we were mindful that the Claimant had claimed £4,000 in his schedule of loss. The Respondent contended for a nominal award in the sum of £500.00. This is less than the lowest end of the lower band in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 as revised (i.e. as applicable for the date the claim form was presented in this case). In the instant case, the correct range for the lower band is £900 up to £8,800. According to the Court of Appeal in Vento, the lower band is for "less serious cases, such as where the act of discrimination is an isolated or one-off occurrence". We agreed that this case fell within the lower band.

8. We reminded ourselves that we were compensating the Claimant solely for the injury to feelings arising from the act of detriment, not for any hurt or upset occasioned by the dismissal. We recalled that the performance review was unplanned and unexpected and that this would therefore have caused alarm to the Claimant. We also reminded ourselves that Natasha Lawrence was present as a note-taker, despite the Claimant's wishes. Further, that we found a performance review was not merited. We recalled that the tone of the meeting itself was not aggressive, albeit that it was unpleasant and uncomfortable for the Claimant, trying to justify himself. The Claimant must have been aggrieved by the fact of the meeting and how it went because he took time to draft his reply to the Respondent's formal note of the meeting. This was at pages B37-B38 of the bundle. In that note, he stated that he felt the performance meeting was only instigated in response to his flexible working request. He also defended certain criticisms of his work.

9. Accordingly, he felt sufficiently aggrieved by the meeting to set this out in writing with a view to sending it to the Respondent. In the end, his notes were intercepted by the Respondent when they investigated his computer and he never completed this record / note or sent it to the Respondent.

10. We had regard to the evidence presented by the Claimant that he had suffered stress and anxiety (requiring beta blockers) and had 18 months of counselling, but we also noted that this was following his dismissal (per paragraph 28 of his witness statement). Therefore, we took the view that some of this stress would have been caused by the performance review, but the vast majority of this was most likely caused by the dismissal, which we were not compensating him for. Accordingly, taking all matters into account, we considered the appropriate award for injury to feelings was at the lower end of the lower band of Vento in the sum of £2,500.00.

11. We noted that claims under s.48 ERA fall within the uplift scheme under the ACAS Codes by reason of Sch A2 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) and s.207A of that Act. We considered that the Claimant had intended to raise a written grievance about the performance meeting having been instigated as a result of the flexible working request (as stated above, he raised this in his draft response to the notes of the performance meeting which were intercepted by the Respondent). We also noted that he had raised this orally, but that he had not in fact presented a grievance in writing. In these circumstances, we did

not consider it just and equitable to reduce the compensation in respect of him failing to raise a written grievance in respect of the s.48 ERA claim and we do not find that such failure was unreasonable.

12. Similarly however, we do not find that the Respondent unreasonably failed to follow the ACAS Code on Disciplinary and Grievance Procedures in respect of any such complaint, because it never in fact received a written grievance from the Claimant. Therefore, we decided it was not just or equitable to adjust the award in either direction.

13. The Claimant claimed and is entitled to interest on the award for injury to feelings. Interest is calculated from the date of the act to the date of calculation, namely from 9 November 2018 until 13 May 2021 at a rate of 8%, which is £501.92 on the sum of £2,500.00.

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Employment Judge Dobbie

Date: ……24th May 2021..

Sent to the parties on: ..9th Aug 2021..
THY
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For the Tribunal Office