



EMPLOYMENT TRIBUNALS

Claimant: Mr D Rowe

Respondent: David Wood Baking Limited

Heard: by video

On: 1 October 2021

Before: Employment Judge Jenkins
Ms S Atkinson
Mrs H Hinkin

Representation

Claimant: Ms L Rowe

Respondent: Mr A Willoughby (Counsel)

RESERVED REMEDY JUDGMENT

The Respondent is ordered to pay the Claimant the sum of £47,595.22 by way of compensation for his successful claims as noted in the Liability Judgment sent to the parties on 9 June 2021.

REASONS

Background

1. This Judgment is issued following the remedy hearing on 1 October 2021. That arose following our Judgment in favour of the Claimant at a hearing between 1 and 3 June 2021, written Reasons having been sent to the parties on 6 August 2021, following a subsequent request by the Respondent. This Remedy Judgment should be read in conjunction with our original Judgment and our Reasons.
2. In that Judgment, we concluded that the Claimant's claim of disability discrimination relating to a failure to comply with a duty to make reasonable adjustments succeeded, as did his unfair dismissal claim. We also concluded that any compensation payable to the to the Claimant would be subject to a deduction of 50% to reflect the principle in Polkey v A E Dayton Services Limited [1987] UKHL 8, on the basis that there was a 50% chance that the Claimant would have subsequently been fairly dismissed in any event. We noted, for the avoidance of doubt, that that deduction should not

apply to any basic award of compensation for unfair dismissal or to any injury to feelings award.

Issues

3. The issues for us to address in relation to matters of remedy were as follows:
 - a. The amount of the basic award for unfair dismissal.
 - b. The amount of compensation to be awarded in respect of the Claimant's financial losses.
 - c. The amount of any injury to feelings award.
 - d. The amount, if any, in respect of any uplift in respect of any failure by the Respondent to comply with the terms of the ACAS code.
 - e. Interest.
4. We heard evidence from the Claimant on his own behalf, albeit not by way of a witness statement but by way of questions from the Respondent's representative, and from the Tribunal, relating to the Claimant's Schedule of Loss and his mitigation activities. We also heard evidence from Mr Brett Podmore and Mr Sam Reynolds on behalf of the Respondent.

Findings

5. Our findings in relation to the remedy matters we needed to consider, on the balance of probabilities where there was any dispute, were as follows.
6. The Claimant was employed by the Respondent for two complete years whilst he was under the age of 41.
7. It was agreed between the parties that the Claimant's average gross weekly wage was £506.43 and his average net weekly wage was £393.20.
8. The Respondent did not challenge the Claimant's contention in his Schedule of Loss that he was a member of its pension scheme. In that Schedule, the Claimant had listed the employer pension contribution obligation as being 2% of salary. We noted, however, that the minimum employer contribution for an auto-enrolled scheme is 3%, and concluded therefore, that the Claimant had been entitled to contributions at that rate.
9. As we noted in our Reasons for our Liability Judgment, the Claimant had suffered with anxiety and depression which had led to him being significantly unwell in 2016. He had however recovered to the extent that he could commence employment with the Respondent in January 2018, and he undertook that job effectively for a period of over two years, up until late March 2020, when his ill-health flared up.
10. We had no specific medical evidence from the Claimant, but saw his GP notes from the relevant period, and they indicated that the Claimant sought medical assistance on 14 April 2020, the note saying that the Claimant was "*not sleeping well, and felt suicidal*". The Claimant was prescribed mirtazapine at that point, having not taken any such medication since September 2017. The dosage of that medication increased in May 2020,

and the Claimant was referred to his local primary care mental health support service in July.

11. The Claimant was dismissed on 1 July 2020, and his appeal against that dismissal took place on 23 July 2020. The letter informing him of the outcome of that appeal was issued on 31 July 2020, a Friday, and we anticipated that he would have received that letter either on Saturday, 1 August 2020, or Monday, 3 August 2020. The Claimant was then hospitalised for a period, following a suicide attempt, being discharged on 6 August 2020.
12. The Claimant's evidence, which we accepted, was that he had continued to suffer with anxiety and depression, and continued to take medication. That was supported by the decision, in relation to the Claimant's entitlement to Universal Credit, that he had limited capability for work and work-related activity, and therefore would not be asked to search for work or prepare for work. The letter confirming that was undated, but was understood to have been received by the Claimant in September 2020.
13. The sums received from the Claimant by way of Universal Credit increased from that point on, and, for the four months prior to this hearing, it was being paid at the rate of £755.14 per month. We considered that payments would continue at that level for the foreseeable future.
14. The Claimant contended that the state of affairs regarding his health and its impact on his ability to work would continue for a further two years. In light of the medical and benefits evidence, and the Claimant's presentation to us, we did not disagree with that. It seemed to us that, whilst there may be a prospect of the Claimant re-entering the workplace earlier than that, equally, there was a prospect that it could take longer. Therefore, assessing the future as best we could, we concurred with the Claimant's contention that he is not likely to be able to obtain regular employment to mitigate his loss for the period of two years after the remedy hearing.
15. The Respondent contended that the fact that the Claimant's health prevented him from working meant that the period of loss for which it should be responsible should be limited to the period between July and September 2020, i.e. the period from the Claimant's dismissal to the point where he was certified as having limited capability for work and work-related activity. However, we considered that that did not take account of the impact of the dismissal on the Claimant.
16. As we have noted, we had no direct medical evidence of that, but we noted that the Claimant attempted suicide in early August, a matter of days, possibly even only one day, after the receipt of the appeal outcome letter. It therefore appeared to us that the dismissal clearly had had an impact on the Claimant, and had exacerbated, potentially significantly, his health and ability to work.
17. We also noted that we had factored in the potential ongoing impact of the Claimant's ill-health in our assessment that there should be a 50% Polkey deduction to reflect the prospect that the Claimant may not, regardless of the dismissal, have remained in work.

18. Overall, therefore we considered it appropriate to factor in a two-year period of future loss.
19. In terms of the Claimant's mitigation, both in the period up to the hearing and the future, the evidence of the Respondent's witnesses, and the focus of much of the Respondent's representative's cross-examination of the Claimant, was on his selling of vaping products. The Respondent contended that the Claimant was running a small business, or at least was earning material sums of money from that.
20. However, we noted that the evidence of the Respondent's witnesses was that the Claimant had sold vaping products to them during the course of his employment and we did not consider that any income that the Claimant derived from that materially increased after the Claimant's employment ended. The Claimant's bank statements, which he disclosed during the hearing at the Respondent's request, suggested only occasional income from vaping sources.
21. We also accepted the Claimant's evidence that, whilst he did, on occasions, make small amounts of money from selling vaping products which he had bought himself or had received through participation in raffles and competitions, he also acted as something of a "go-between", buying products from sellers on behalf of others. Therefore, not all the receipts on the Claimant's bank statement referable to vaping products involved income for the Claimant in terms of profit.
22. Overall, in our view, the evidence of the Claimant's bank statements supported the Claimant's contention that he was not involved in any business, and we considered that the small sums the Claimant received were no different to the sums he had received in previous years. Therefore, the sums did not need to be brought into account by way of mitigation. We also concluded that that state of affairs would prevail in the future.
23. The other area of challenge made by the Respondent, arising from entries in the Claimant's bank statements, related to payments the Claimant received from "Clayton and Watkins". When answering the Respondent's representative's questions, the Claimant contended that these payments, which totalled £1,075.00, principally received in the months of January, February and March 2021, had been loans from Mr Watkins to tide him over when he was short of money. He indicated that they had then stopped due to a falling out that he had with Mr Watkins.
24. However, we noted that the entries in the Claimant's bank statement relating to some of the payments referred to periods of time, e.g. "1DY 6 HRS", "2 DAYS" and "15H". We also noted the Claimant's contention in his oral evidence that several of these payments arose just before the fifth of the month, the day on which he received his benefits, at times when he was most acutely short of money, but we noted that some payments from this source were received shortly after the fifth day of the month.
25. We also noted that the majority of the sums paid were divisible by eight, which led us to conclude that the payments were referable to payments to

the Claimant for services provided of some sort, at a rate of £8.00 per hour.

26. In our view, the sums were receipts by the Claimant in return for services provided to Mr Watkins, and therefore we considered that the total sums received of £1,075.00 should be taken into account in respect of the Claimant's immediate losses up to the date of this hearing. We accepted, however, that there appeared to have been a falling out between the Claimant and Mr Watkins as the payments had ceased, and we therefore did not find that it was likely that these payments would continue in the future.
27. With regard to non-financial losses and any injury to feelings, we noted, and accepted, the Claimant's evidence that, following his dismissal, he had felt in desperation, leading to thoughts of suicide, and that, when he knew that he was not going to go back to work for the Respondent having read the appeal letter, he "*spiralled into despair*".

Conclusions

28. We concluded that the Claimant should be awarded a basic award equivalent to two weeks' gross pay, referable to his two complete years of service whilst under the age of 41.
29. With regard to compensation for the Claimant's financial losses, we concluded that his losses to the date of hearing should reflect his loss of net earnings during the relevant period, and the pension contributions that would have been paid by the Respondent during that period. We also concluded that a sum in respect of loss of statutory rights should be awarded.
30. Although the Recoupment Regulations do not apply to awards of compensation in respect of financial losses arising from discrimination, we still needed to account for the benefits received by the Claimant during the period as otherwise he would be doubly compensated.
31. With regard to future loss, we assessed that by reference to the Claimant's net weekly pay over the two-year period, together with a sum in respect of the pension contributions that would have been made on his behalf during that period. We similarly, however, took into account the benefits that we anticipated that the Claimant will receive during the period to avoid double compensation.
32. From the total sum awarded in respect of compensation for financial losses, we then had to take into account the Polkey deduction of 50%, as noted in our Liability Judgment and Reasons.
33. However, we also considered that it would be appropriate to apply an uplift to the compensation for financial losses to reflect the Respondent's failure to follow the required statutory procedures. The Claimant, in his Schedule of Loss, contended that an uplift of 10% should be applied and, for the reasons set out in paragraph 87 of our Liability Reasons, we had no reason to disagree with that.

34. We also applied interest to the compensatory award at the rate of 8% in respect of the period calculated as the mid-point of the overall period.
35. Turning to non-financial losses, we noted that the Claimant, in his Schedule of Loss, had assessed injury to feelings at £16,000.00, i.e. a little below the mid-point of the middle Vento band. In our view, the Respondent's treatment of the Claimant did indeed fall within the middle Vento band. The Respondent did not subject the Claimant to a course of conduct, but, nevertheless, its treatment of the Claimant was insensitive and clearly more than minor. We therefore saw no reason to disagree with the Claimant's assessment of the hurt caused to him, and directed that an award of injury to feelings at £16,000.00 should be made.
36. We then applied interest at the appropriate rate for the entirety of the period of loss.
37. Finally, as the total sum awarded exceeded £30,000, we needed to gross up the excess over £30,000 to reflect the tax that the Claimant will be required to pay.
38. Overall, therefore, our total award of compensation was as set out in the following schedule.

SCHEDULE OF COMPENSATION

1. Details

Date of birth of Claimant	23/06/1980
Date started employment	19/01/2018
Effective Date of Termination	01/07/2020
Period of continuous service (years)	2
Age at Effective Date of Termination	40

Remedy hearing date	01/10/2021
Date by which employer should no longer be liable	01/10/2023

Net weekly pay at EDT	393.20
Gross weekly pay at EDT	506.43

2. Basic award

Basic award	1,012.86
Number of qualifying weeks (2) x Gross weekly pay (506.43)	

Total basic award	1,012.86
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3. Compensatory award (immediate loss)

Loss of net earnings	25,675.96
Number of weeks (65.3) x Net weekly pay (393.20)	

Plus loss of statutory rights	500.00
Less non-recoupable benefits	-8,243.42
Less Earnings in mitigation	-1,075.00
Plus loss of pension contributions	991.91

Total compensation (immediate loss)	17,849.45
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4. Compensatory award (future loss)

Loss of future earnings	41,010.76
Number of weeks (104.3) x Net Weekly pay (393.20)	
Plus loss of pension contributions	1,584.32
Less non-recoupable benefits	-15,046.32

Total compensation (future loss)	27,548.76
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5. Adjustments to total compensatory award

Less Polkey deduction @ 50%	-22,699.10
Plus failure by employer to follow statutory procedures @ 10%	2,269.91
Plus interest (compensation award) @ 8% for 229 days	491.67

Compensatory award before adjustments	45,398.21
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Total adjustments to the compensatory award	-19,937.52
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Compensatory award after adjustments	25,460.69
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6. Non-financial losses

Injury to feelings	16,000.00
Plus interest @ 8% for 457 days	1,602.63

Total non-financial award	17,602.63
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7. Summary totals

Basic award	1,012.86
Compensation award including statutory rights	25,460.69
Non-financial loss	17,602.63

Total	44,076.18
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8. Grossing up

Tax free allowance (£30,000)	30,000.00
Basic award	1,012.86
Balance of tax free allowance	28,987.14
Compensatory award + injury to feelings + wrongful dismissal	43,063.32

Other salary (net)	0.00
Figure to be grossed up	14,076.18
Personal allowance	0.00

GROSSED UP TOTAL	47,595.22
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Employment Judge S Jenkins

Date: 13 October 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 14 October 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche