



# EMPLOYMENT TRIBUNALS

**First Claimant:** Mr Arvind. Patel

**Second Claimant:** Mrs J. Patel

**Respondent:** Mr. Vasaf Ali trading as Bulwell Convenience Store and Bulwell News

**Heard at Region:** Midlands East

**On:** 17 October 2021

**Before:** Employment Judge Broughton (sitting alone)

## JUDGMENT

Following the liability judgment on 25 June 2021 and following further information presented on remedy, the Claimants are awarded the following sums:

### First Claimant :

- 1. Unfair dismissal and discrimination: financial losses**
  - 1.1 Basic Award: **£10,899.72 (gross)**
  - 1.2 Loss of statutory rights : **£500 (net)**
- 2. Discrimination – financial loss: £3,166. 22 (net)**
- 3. Discrimination - Injury to feelings and aggravated damages: £17,500 (net)**
- 4. Acas Uplift : 22.5% : £6,309.12**
- 5. Interest : £1,491.34**
- 6. Unlawful deduction of wages: £2489.62 (net)**
- 7. Holiday pay : £298.53 (net)**
- 8. wrongful dismissal: £4,149.44 (net)**

### Second Claimant:

**9. Unfair dismissal and discrimination: financial losses**

1.3 Basic Award: £5,894.72 (gross)

1.4 Loss of statutory rights : £500 (net)

**10. Discrimination – financial loss: £ 6,314.07**

**11. Discrimination - Injury to feelings and aggravated damages: £15,500 (net)**

**12. Acas Uplift : 22.5% : £5,843.77**

**13. Interest : £1406.45**

**14. Unlawful deduction of wages: £1035.45 (net)**

**15. Holiday pay : £175.61 (net)**

**16. Wrongful dismissal: £2,447.16 (net)**

## REASONS

### Background

1. The Respondent failed to enter a response to the claims. The case was listed for a hearing which the Respondent failed to attend.
2. At the commencement of the hearing, the Claimants' representative confirmed that the claim was for unfair dismissal, discrimination with respect to the dismissal only i.e. a claim under section 39 (2)(c) Equality Act 2010 (ERA), notice pay, holiday and unpaid wages. It was not asserted that the issues included any act of discrimination pursuant to section 39 (2)(d) ERA.
3. I heard evidence from the Claimants given under oath. The Claimants' produced a bundle of documents numbering 190 pages.
4. By a Judgment dated 25 June 2021 it was adjudged that all the claims were well founded and succeeded. The Judgment on liability was made against the Respondent at the hearing and the reasons were given orally by the Tribunal, which included a finding that the date of dismissal in respect of both Claimants was the 18 September 2020. The Judgment was served on both parties. Neither party requested written reasons.
5. The Tribunal was presented with impact statements for each of the Claimants at the hearing, the truth of which they confirmed under oath. The Tribunal was also presented with documents relating to remedy however, it was deemed necessary to make Orders for the Claimants' to provide further information including revised schedules of loss. It was agreed with the Claimants that the decision on remedy, would be determined by the Tribunal on the papers.
6. Since the hearing the Claimants' have now produced further information copied to the Respondent, which includes a further bundle of documents, amended schedules of loss and written submissions in support of an award for injury to feelings, aggravated damages and an Acas uplift. The Respondent has not commented on the information.

### Findings at the June hearing relevant to remedy

7. The First and Second Claimant presented claims on 2 December 2020 which included complaints of unfair dismissal, discrimination based on marriage, wrongful dismissal, holiday pay and arrears of pay. There had been a period of Acas early conciliation from 2 October to 2 November 2020. The Claimants' brought the claims against two respondents but at the hearing, withdrew the claim against the second respondent and proceeded with the claims against the first respondent, now referred to as the Respondent.
8. The First Claimant was employed from 28 October 1996. He was employed at the store called Bulwell News, located at 5 Commercial Road , Nottingham NG6 8HD (Store) as Branch Manager. Following a transfer pursuant to the Transfer of Undertakings (Protection of Employment ) Regulations 2006 (TUPE) , his employment transferred to the Respondent. The Claimant's wife and Second Claimant, was also employed at the Store.
9. On the 24 August 2020 the Claimant received a text message from the new manager at the Store, Mr Sajed Ali informing him that the Second Claimant, was not to come into work the following day. On the 25 August, the Second Claimant arrived for her shift whereupon Mr Sajed Ali became aggressive with the First Claimant telling him to shut the Store and go upstairs and prodding him on the shoulder a number of times, to make him move more quickly. The second Claimant was then forced to enter the Store by the back door.
10. The First Claimant was told that he was being dismissed for theft and that a husband and wife must be treated as a 'package' . Mr Ali was ' forceful and aggressive' and was 'ranting'. The First Claimant left the Store before things 'escalated'. The First Claimant was made to hand over his keys and fob and leave the premises and was told that he was suspended without pay. The First Claimant denies and I accepted his undisputed evidence, that not only had he not stolen anything but that this treatment was not because of any alleged theft, but because he was married and his wife also worked with him, at the Store. Mr Ali stated to the First Claimant, as he left the Store that it was "illegal to have a husband and wife team".
11. There was no investigation or disciplinary proceedings.
12. The Claimants' both raised a formal grievance. On 26 August 2021 to which Mr Sajed Ali replied by email on 27 August 2020 stating 'sue me' in response to the grievance email from the First Claimant. There was no response to the Second Claimants' grievance letter.
13. The Claimants both requested an appeal. No appeal was granted.
14. The First Claimant's grievance letter referred to the First Claimant having made contact after having left the Store, enquiring whether he was required to come into work on 26 or 27 August 2020. The Second Claimant referred to waiting to hear from the Respondent after the 26 August about what was happening with her employment.
15. The First and Second Claimants then instructed a solicitor who wrote on 18 September 2021 confirming that they were treating their employment as terminated and submitting an appeal . The response from Mr Sajed Ali on 18 September 2020 was that the First and Second Claimants had been absent without leave for 3 weeks and stolen company protect and had tried to sabotage the business.
16. I determined on the evidence, that the date of termination on a balance of probabilities, was the 18 September 2020, the date when the Claimants confirmed that they were treating their employment as at an end.

17. The First Claimant obtained new employment with Amazon as a warehouse operative on 12 December 2020. Prior to that, he received state benefits. The Second Claimant has not secured new employment.

**Findings of fact – remedy information**

18. Reference in square brackets are to the page numbers; where the number is preceded by the initial 'R' it is a reference to the additional documents set out in the remedy only bundle and where it is preceded by the initial 'L', this is a reference to a document in the original bundle referred to at the hearing in June 2021. All findings are based on a balance of probabilities.

19. I have considered the information provided since the last hearing as well as the evidence presented at the hearing, including the evidence given under oath by the Claimants.

**First Claimant**

20. I have reviewed the contract of employment (Contract) which the First Claimant signed on 29 October 2003 and which provides that his employment commenced on 28 October 1996. The Contract provides that the holiday year runs from 1 January to 31 December and that he is entitled to 4 weeks annual holiday. It provides at clause 6 [L.P.3] as follows;

*“ Should you leave, your entitlement will be calculated pro- rata for completed calendar months of service in that holiday year...”*

21. In respect of sick pay the Contract provides at paragraph 7 [L.P.4];

*“Your entitlement to Company sick pay in any 12 month consecutive period is as follows;*

...

*Over 10 years' service 7 weeks”*

22. The Contract also refers at paragraph 8, to the company operating a Stakeholder Pension Scheme.

23. The Contract also provides at paragraph 10. That the notice period is after 1 years' service, 1 additional weeks' notice for each completed years' service up to a maximum of 12 weeks.

24. The First Claimant has produced payslips for his employment with the Respondent for the months of July and August 2020. The payslips for July 2020 confirm a gross months' pay of £1816.67 and net pay of £1502 after deductions including for pension. The payslip for August 2020 shows no salary paid but what appears to be refund of income tax.

25. The First Claimant produced an impact statement and gave evidence under oath at the hearing in terms of the emotional impact. The First Claimant refers to feeling mistreated and not respected.

26. I accepted the First Claimant's undisputed evidence that he was subject to some harassing and threatening behaviour from Mr Sajed Ali when he called the First Claimant at home on about 6 occasions from 25 August to 10 September 2020, accusing him of theft and threatening to come to his home. He had not explicitly threatened physical violence but given how physical he was on 25 August 2020; the First Claimant was concerned that if he came to his home, he may be physical with him again.

27. The First Claimant has a new role as a warehouse operative working 50 plus hours a week, which is very different to the management position he had held with the

Respondent. He refers to sleepless nights and anxiety which is spiralling into depression. The First Claimant has not however provided any medical evidence in support of his health concerns and I do not find on a balance of probabilities, that although upset and worried, in the absence of any satisfactory explanation for not producing medical evidence, that the First Claimant's mental health was impacted to the extent that he was actually suffering with depression. I have also taken into account that the written submissions (addressed further below) on the amount sought for injury to feelings, make no mention of a depressive illness and do not assert that the impact gave rise to any personal injury as opposed to injury to feelings. The First Claimant has not produced evidence that he has been prescribed medical treatment of any sort.

28. In terms of financial impact; the First Claimant refers to the loss of his and his wife's income, the worry and anxiety this has caused and his apprehension about finding permanent employment.
29. I accept the undisputed evidence of the First Claimant that the annual leave year ran 1 January to 31 December and that he is owed annual leave accrued from 24 July 2020 to 18 September 2020 which equates to 38.77 hours which he is entitled to be paid at £7.70 per hour.
30. I accept the undisputed evidence of the First Claimant that he was not paid his salary from 1 August 2020 until the effective termination date of 18 September 2020 and that the last payment to him from the Respondent on 30 August 2020 was a refund of tax only, as supported by the payslips disclosed by the First Claimant. I accept the undisputed evidence of the First Claimant that he was not paid any notice pay.

#### **Mitigation**

31. The First Claimant had produced payslips for the showing payments of salary from his new employer, Amazon from November 2020 to July 2021 showing an hourly rate of £9.70 per hour and total pay from 18 December 2020 to 2 July 2021 of £11,041.42.
32. The First Claimant was only out of work for a short period. I am satisfied that the period of loss sought is supported by the evidence presented.

#### **Second Claimant**

33. The Second Claimant was employed by the Respondent at the Store from 19 January 1999, as a Sales Assistant.
34. The Second Claimant prepared a statement setting out the impact of the discrimination and at the hearing gave evidence under oath. She referred to an increase in her blood pressure because of the stress and associated anxiety. Her oral evidence under oath was that she began to experience really high blood pressure as soon as it happened and it continued due to concern about her financial situation. However, within her impact statement the Second Claimant refers to being diagnosed with high blood pressure while working for the Respondent although she refers to this having worsened. There was no evidence and no explanation for the failure to provide any evidence from her GP, about when she began to suffer high blood pressure, over what period and when it deteriorated, to what extent it deteriorated and the cause of that. I accept that she suffers high blood pressure and accept that in the circumstances and on a balance of probabilities, this worsened after her dismissal however, I am not in a position to make a finding as to the extent of that deterioration given the lack of information from the Claimant and absence of any medical evidence in support.
35. I accept her undisputed evidence however, that she has suffered anxiety, upset and was affronted by the treatment and that not working has caused her to feel isolated, has impacted on her confidence and increased her social anxiety.

#### **Findings of fact – remedy information**

36. The Second Claimants contract of employment (Contract) provides that with respect to Holiday;

*“The Company’s holiday year runs from 1 January to 31 December . Your entitlement is based on 28 days per annum ( pro – rata for part time staff) and include public/bank/customary holidays...Should you leave, your enlistment will be calculated pro – rata for completed week’s service in that holiday year”*. [L.P 96]

37. The Contract provides that with respect to sick pay [ L/P96];

*“There is no Company sick pay scheme applicable to your employment.”*

38. The notice provision in the Contract [L.P96] provides that notices is 1 week for every full year of service.

39. I have been presented with a letter confirming receipt of jobseekers allowance.

40. I have also been presented with evidence of job applications which the Claimant has applied for as Sales or Customer Assistant with a variety of businesses, since her employment ended.

41. I accept the undisputed evidence of the Second Claimant that she was not paid her salary after 9 August 2020 which is supported by the payslips provided and that she was entitled to outstanding holiday, and that she had accrued 22.4 hours holiday from 24 July 2020 up to the date of termination, which at £7.84 per hour equates to £175.62. I also accept her undisputed evidence that she did not received any notice pay.

#### **Submissions – injury to feelings**

42. The written submissions in support of an injury to feelings award repeat the same points in respect of both Claimant’s and invite a finding of an award of ‘around £25,000’ .The submissions refer to the seriousness of the acts of discrimination, the aggressive behaviour of the Respondent and unreasonable responses which warrant, it is submitted, the upper end of the Vento band.

43. It is submitted that informing the Claimants that they were to be treated as a ‘package’ and that it was a ‘conflict of interest’ to have a husband and wife working within the same store, is akin to a policy that no husband and wife should be working together and the Claimant’s representative therefore likens the case to the facts in **Boswell v Ministry of Defence ET/1401879/12** where the employee was awarded £25,000 for injury to feelings including aggravated damages. In Boswell there was a policy in place that was detrimental to the claimant as a married man. It is submitted that this case is comparable , albeit the Respondent’s actions are it is submitted, worse.

44. Reference is also made to the failure to reply to the Claimants’ grievance, or appeal or engage with the litigation process.

45. In support of any award for aggravated damages, reference is made to **Base Childrenswear Ltd v Otshudi [ 2019] 2 WLUK 722** where the ET considered a claim for aggravated damages, finding that the Respondent’s failure to respond to the Claimant’s grievance / appeal, its conduct during the litigation and the failure to apologise, had aggravated her injury to feelings, warranting an award of £5,000. It is asserted that there are similarities such that an award for aggravated damages of £5,000 is warranted.

#### **Legal Principles**

46. Pursuant to the Working Time Regulations 1998 a workers basic entitlement is set out in regulations 13 and 13 A which provides as follows

*13.— Entitlement to annual leave*

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

#### 13A.— Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

...

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) ...

47. Under Regulation 14 (1) and (2) Reg 14(1) and (2) a worker is entitled to a payment in lieu where his or her employment is terminated during the course of the leave year, and on the termination date, the proportion of statutory annual leave he or she has taken under Regs 13 and 13A is less than the proportion of the leave year that has expired. Where a worker is entitled to a payment in lieu of holiday entitlement, Reg 14(3) provides that the sum due shall be determined either by the terms of a relevant agreement or by reference to a statutory formula set out in Reg 14(3)(b).

#### Mitigation

48. The burden of proof lies on the employer to show that the employee failed to mitigate loss. If the employer fails to show that the employee ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply : **London and South of England Building Society v Stone 1983 1 WLR 1242, CA.**

#### Injury to feelings

49. Pursuant to section 119 Equality Act 2010;

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

50. The Tribunal is required to focus on compensating the claimant rather than on punishing the wrongdoer: **Corus Hotels plc v Woodward and anor EAT 0536/05.**

51. The onus is on the claimant to establish the nature and extent of such injury: **Murray v Powertech (Scotland) Ltd 1992 IRLR 257, EAT.**

52. The size of the award for injury to feelings depends on the facts of each case and the

degree of hurt, distress and humiliation : **Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA**

53. Lord Justice Mummery identified three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury:

- a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
- a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and
- a lower band of between £500-5,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence

54. These bands have been updated to reflect inflation and the decision reached in the personal injury case of **Simmons v Castle 2012 EWCA Civ 1288, CA**

#### **Presidential guidance**

55. The Presidential guidance March 2020 provides that In respect of claims presented on or after 6 April 2020, the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000. These bands take account of the 10 per cent **Simmons v Castle**.

56. With respect to awards in similar cases, I have taken into account the following cases;

57. In **AA Solicitors Ltd t/a AA Solicitors and anor v Majid EAT 0217/15** The claimant awarded £14,000 for injury to feelings resulting from sexual harassment.

58. In **Miles v Gilbank and anor 2006 ICR 1297, CA**: the Court of Appeal upheld an employment tribunal's award of £25,000 for injury to feelings to a pregnant employee who had suffered unlawful sex discrimination. The Tribunal described the behaviour thus;

*“As salon manager we find that on the balance of probability [Miss Miles] consciously fostered and encouraged a discriminatory culture to grow up which targeted [Miss Gilbank]. She did so by this behaviour and by the example she herself set other managers ...”*

*“All in all, there was a catalogue of behaviour towards [Ms Gilbank] on the part of [Ms Miles] and the other Managers named above which goes beyond malicious and amounts to downright vicious. It was an inhumane and sustained campaign of bullying and discrimination which could not, in the circumstances on the facts found as above, be reasonably seen to have been accidental or merely insensitive. It was targeted, deliberate, repeated and consciously inflicted ....”*

59. In **Sullivan v Contal Plant Ltd (in administration) ET Case No.3301375/08** an employee with almost ten years' service, informed his employer that he had been diagnosed with cancer of the gum and was going into hospital for an emergency operation. While he was in hospital the company sent him his P45, with no warning or consultation. An employment tribunal awarded him £20,000 for injury to feelings, describing this as 'a particularly devastating and capricious way to deal with any



employee’.

60. **Egan v Kingsborough Family Church t/a Coat of Many Colours Nursery ET Case No.3301496/15**: The claimant was awarded £10,000 for injury to feelings for pregnancy discrimination when she was dismissed because she was pregnant.
61. **Guzikowska and ors v Apollo Cleaning Services Ltd ET Case No.3300772/15**: An employment tribunal found that all the claimants except one were discriminated against because of race, in that they were dismissed because of their nationality. Each of the six successful claimants was awarded £7,500 for injury to feelings, which took into account the arbitrary nature of the dismissals and the fact that some of the dismissals were carried out in front of other employees. Although each dismissal was a one-off incident, it was a matter that was serious enough to place the injury to feelings award in the middle band of Vento.
62. It has been held that the size and resources of an employer’s business should not be taken into account by tribunals when assessing the appropriate level of an injury to feelings award: **Evans v Oaklands Nursing Home Group Ltd EAT 0331/99**
63. I have considered The Judicial Studies College Guidelines for the assessment of general damages for personal injury (15<sup>th</sup> edition) provides that for moderate psychiatric injury to appropriate awards is between £5,500 to £17,900.

#### **Aggravated damages**

64. **Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT**: aggravated damages are compensatory only and should not be awarded to punish the respondent. Tribunals must not lose sight of the ultimate purpose of aggravated damages, which is to compensate for the *additional distress caused to the claimant by the aggravating features in question*.
65. Court of Appeal in **Alexander v Home Office 1988 ICR 685, CA**, where it held that aggravated damages can be awarded in a discrimination case where the defendants have behaved ‘in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination’.
66. Mr Justice Underhill, then President of the EAT, in **Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT**, identified three broad categories of case:
  - *where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in Alexander meant when referring to acts done in a ‘high-handed, malicious, insulting or oppressive manner’*
  - *where there was a discriminatory motive — i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity.*
  - *where subsequent conduct adds to the injury — for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or ‘rubs salt in the wound’ by plainly showing that it does not take the claimant’s complaint of discrimination seriously.*

#### **Interest**

67. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give employment tribunals the power to award interest on awards made in discrimination cases. The parties can agree the amount of interest to be awarded under regulation 2(2). If they do not agree, interest is calculated under the rules set out in regulation 3. In general terms, interest is to be calculated as simple interest which accrues from day to day.
68. Under regulation 3(2) the rate of interest is, in England and Wales, the rate fixed, for the time being, by section 17 of the Judgments Act 1838. The rate is currently eight per cent.

#### **Acas uplift**

69. Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), Employment Tribunals have the power to increase or decrease awards for compensation by up to 25 per cent in cases where there has been an unreasonable failure, by either party, to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures ('Code');

*(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 per cent.'*

70. The Employment Tribunal's power to adjust compensation is engaged only where the employee's or employer's failure to comply with the Code is 'unreasonable'
71. Section 207A (2) and (3) allows for an adjustment if the Tribunal considers it 'just and equitable in all the circumstances.'
72. By virtue of S.124A ERA, any adjustment made in accordance with S.207A only applies to the compensatory award. The adjustment does not apply to the basic award.
73. In **Lawless v Print Plus EAT 0333/09** Mr Justice Underhill, then President of the EAT, gave guidance that although the phrase 'just and equitable in all the circumstances' connoted a broad discretion, the relevant circumstances were confined to those which were related in some way to the failure to comply with the statutory procedures and the relevant circumstances to be taken into account by Tribunals when considering whether and what uplift to award should always include the following:
- *whether the procedures were applied to some extent or were ignored altogether*
  - *whether the failure to comply with the procedures was deliberate or inadvertent, and*
  - *whether there were circumstances that mitigated the blameworthiness of the failure to comply*
74. Furthermore, the size and resources of the employer are capable of amounting to a relevant factor but it should not be thought that failures by small businesses were always to be regarded as "venial".
75. In **McKindless Group v McLaughlin 2008 IRLR 678, EAT**, : one important factor in determining the level is the degree of culpability on the part of the defaulting party.

76. Elias LJ in **Wardle v Crédit Agricole Corporate and Investment Bank 2011 ICR 1290, CA**; the maximum uplift should be 'very exceptional indeed' and should apply only in the most serious cases.

### **The Acas Code**

77. The paragraphs of the Code which I consider to be relevant, are as follows;

*Discipline: Keys to handling disciplinary issues in the workplace*

#### **Establish the facts of each case**

*5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

*8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.*

#### **Inform the employee of the problem**

*9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

*10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting. Hold a meeting with the employee to discuss the problem.*

*11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*

*12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by*

witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

**Decide on appropriate action**

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

**Provide employees with an opportunity to appeal**

26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

**Grievance: Keys to handling grievances in the workplace**

**Hold a meeting with the employee to discuss the grievance**

33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

**Decide on appropriate action**

40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

**Conclusions**

**First Claimant**

**Loss of earnings**

78. In conclusion, the First Claimant was only out of work for a short period. I am satisfied that the period of loss in respect of loss of earnings post dismissal, is supported by the evidence presented and that it would be just and equitable to compensate him for that period. He was on sick leave for a week after securing new employment, and I accept he would have received full sick pay had he remained employed with the Respondent at the rate of £346.62 x 1 week less £130.15, which equates to £216.47. The Claimant has new employment but this is on a temporary basis and does not provide full pay during sickness absence. Other than the one week of sick leave he does not claim ongoing losses despite his contract with his new employer being a temporary one, which has been extended to January 2022.

**Loss of statutory rights**

79. Given his length of service, I consider it just and equitable to award £500 for loss of his statutory rights, both as to notice and protection from unfair dismissal.

### Injury to feelings

80. I accept the Claimant's evidence, that he experienced anger, upset and was affronted by the act of discrimination and that it injured the Claimant's feelings.
81. I am required to do the best I can on the available material to make a sensible assessment and I remind myself that regard should be had to the 'overall magnitude' of the sum total of the awards of compensation for non-pecuniary loss.
82. Looking at the impact that the act of dismissing the Claimant as an act of discrimination had on the Claimant and whether I accept the impact is as described, I have taken into account his extremely long service with the Respondent. At the date of termination the First Claimant had been employed by the Respondent for almost 24 years. Further, I accept that this was a job which was very valuable to him, for his self- esteem and financially to support his family.
83. An award for injury to feelings is intended to compensate for the hurt and humiliation suffered and depends not on the seriousness of the discrimination but on the nature of the reaction to it, however the seriousness of the discrimination can assist in determining how severely the Claimant's feelings have been injured. This was an unpleasant and no doubt humiliating and hurtful experience, it was not however a long campaign of discriminatory treatment, it was a one off act of dismissal but while that is relevant, it is not of itself, determinative of what award is fair and reasonable.
84. I accept that the act of discrimination, lead to a loss of confidence; and that the First Claimant continues to suffer as a result of the discrimination in that he no longer has a management role and this has impacted on his confidence and he remains concerned about securing another permanent role. The discrimination was clearly very disruptive to his life.
85. The treatment involved allegations which were clearly upsetting to the Claimant and the manner in which the Respondent managed the act of dismissal was extremely hurtful and aggressive.
86. I have considered the case of *Boswell v Ministry of Defence* which is a first instance decision, however I do not accept that it is, in material respects, similar to the case in hand. The *Boswell* case concerned a policy about housing accommodation and included claims of indirect discrimination (albeit those were dismissed) and direct discrimination relating to a policy which was applied to the claimant in that case, over a period of several months. Other than that the case related to marriage discrimination the facts are very different. The Claimant's case I consider, is more akin to the cases of **Egan** and **Guzikowska**, in that they concerned arbitrary acts of dismissal however, I do find that in this case, there are aggravating features and I have taken those into account.
87. I take into account, in terms of aggravating factors; how the Respondent reacted when the Claimant sought to complain, the failure to engage with the appeal and the way the Respondent has failed to engage in these proceeding. The Respondent has not entered a response to the claim or made any attempt to participate in the process. I consider that the Respondent has behaved in a 'high handed' and insulting manner toward the Claimants.
88. The conduct toward the Claimants was based on a prejudice toward their marital status and the way the tribunal proceedings have been conducted has aggravated that offence by not taking their complaints seriously.

89. The size of the Respondent is not a consideration.

90. In assessing the level of hurt and humiliation suffered I consider that a fair and reasonable award is £15,000 plus £2,500 for aggravated damages, resulting in total compensation for injury to feelings of **£17,500**.

### **Second Claimant**

#### **Loss of earnings**

91. I am satisfied that on the evidence the Second Claimant has taken reasonable steps to minimise her losses and applied for suitable other roles. Although she has not yet secured a role, she is not seeking losses beyond a 12 month period from the date of termination, which, taking into consideration the impact of the Covid pandemic and in the absence of any challenge by the Respondent, I am satisfied that it is reasonable to award losses for that period.

#### **Loss of statutory rights**

92. Given the Second Claimant's length of service, I consider it just and equitable to also award her, £500 for loss of his statutory rights, both in recognition of the loss of her right to statutory notice and the protection from unfair dismissal.

#### **Injury to feelings**

93. The Second Claimant was not subject to the same aggressive behaviour from the Respondent. She was not subject to the physical aggression (the prodding of the shoulder), the accusation of theft or the telephone calls at home.

94. The Second Claimant, while also having a considerable period of service, was not in a management position, although clearly her job was important to her. I have however also considered that the Second Claimant has not secured other employment and that she continues to suffer from anxiety and low self esteem as a consequence. I accept her undisputed evidence as to the impact in terms of injury to feelings although for the reasons set out above, I am not in a position to make a finding as the extent the discrimination caused a deterioration in her blood pressure.

95. I am satisfied however that the impact has been considerable and consider that an award of £14,000 for injury to feelings with an award for the aggravated features, of £1,500 is a sensible assessment of what is fair and reasonable in all the circumstances.

#### **Acas Uplift**

96. In terms of the Acas uplift, the default was egregious; the Respondent did not hold an investigation meeting, there was no disciplinary hearing, the Claimants were suspended without pay and ultimately accused of having committed acts of misconduct without a right of reply, intimidated and their appeal and grievances ignored.

97. The Respondent failed to take any steps to act toward the Claimants' in a fair and reasonable manner and their failure to comply with the Code is 'unreasonable'

98. Although the Claimants have not identified which paragraphs they contend to have been breached in their submissions, I have nonetheless set out above, what I consider to be the relevant paragraphs of the Acas code which the Respondent breached and took

those into consideration. A number of other paragraphs were not breached only because no hearings took place.

99. This is a case where I consider a substantial uplift is appropriate, considering the extent of the default. I have taken into account that the Respondent is a small and it appears, unsophisticated employer with no apparent internal HR support. Nonetheless, the procedures were not applied to any extent, the failure to comply with the procedures appears to have been deliberate considering the 'sue me' response to the grievance, and the Respondent has not engaged in this tribunal process, not even to make written submissions which may have mitigated the blameworthiness of its failure to comply.

100. Making a nominal reduction to reflect the size of employer, I consider it is 'just and equitable' in all the circumstances, to uplift the compensatory awards by 22.5%, in respect of both Claimants.

### **Compensation Awarded**

101. The sums awarded and the calculation of those awards, are therefore as follows:

#### **First Claimant**

1. Basic Award: 26 x £419.22 : **£10,899.72 (gross)**
2. Loss of statutory rights : **£500**
3. Loss of earnings during notice period: 12 x £346.62 : £4,149.44( net) = **£4,149.44(net)**
4. Loss of earnings – discrimination ( sums sought pursuant to the Equality Act 2010)

**4.1 Loss of earnings from end of notice period to the hearing:** Claimant was entitled to 7 weeks sick pay at full pay under the contract of employment with the Respondent following by SSP;

- 12.12.20 – 17.05.21: £346.62 X 22 weeks : £7,625.64 (net)
- 18.05.21 – 25.06.21 : £346 x 6 = £2,079.72 (net)
- £9,705.36 less sums earned through put new employment during period 12 .12.12.20 – 25.06.21 : £10,911.27 (net)
- Claimant also received job seekers allowance/ income support ( £541.10) from 27.09.20 – 20.11.20.

Losses from EDT to hearing less mitigation from new employment and job seekers/ income support: £14,354.80 (net) - £10,911.27 - £541.10= **£2,902.43 ( net)**

#### **4.2 Loss of pension benefit:**

18.09.20 – 11.12.20 ( notice period) = £9.04 x 12 weeks = £108.48

12.12.20 – 25.06.21 (£9.04 x 28 weeks ) : £253.12

less pension benefits received during mitigation £17.46 x 18 weeks = £314.28 :

Total loss of pension benefit : **£47.32 (net)**

**4.3 Future loss of earnings.**

Claimant on sick leave for a week, had he remained employed with the Respondent he would have received full pay £346.62 x 1 week :£346.62 less £130.15: **£216.47 (net)**

5. Arrears of Earnings/ unlawful deduction claim

5.8.20 – 18.09.20 [ EDT] : £346.62 x 7 weeks = **£2,426.34 (net)** plus pension loss  
**£63.28 ( £9.04 x 7 weeks) =** **£2,426.34 (net)**

6. Holiday Pay

Accrued holiday claimed from 24.07.20 to 18.09.20 : £346.62/45 hours - £7.70 per hour  
net . 38.77 hours x £7.70 = **£298.53 ( net)**

7. Injury to feelings :

**£15,000**

8. Aggravated Damages:

**£2,500**

9. Acas Uplift : 22.5% (excluding basic award)

22.5% x £28,040.53 = **£6,309.12**

10. Interest on discrimination;

12.1 on injury to feelings plus 22.5% uplift : from 18 September 2020 to 25 June 2021  
(40 weeks) @ 8%: **£1,372.00**

12.2 on financial losses with 22.5% (£3166.22 x 22.5 % =£3,878.62) uplift from mid-  
point of 4 Feb 2021 (20 weeks)@ 8%: **£119.34**

**Second Claimant**

1. **Unfair dismissal**

1.1 Basic Award: 26 x £226.72 : **£ 5,894.72 (gross)**

1.2 Loss of statutory rights : **£500**

2. **Wrongful dismissal – notice period : 18.09.20 – 11.12.20**

**12 weeks x 203.93 =** **£2,447.16 (net)**

3. **Loss of earnings – discrimination ( sums sought pursuant to the Equality Act 2010)**

**3.1 From end of notice period to hearing 25 June 2021 :**

- 28 weeks x 203.93 (net) £5,710.04
- Less benefits 27.09.2020 – 03.04.2021 (£2,007.45)
- Subtotal: £3,702.59 (net)
- Plus loss of pension benefits £126.40



£3,828.99 (net)

3.2 Future loss of earnings: 25 June 2021 to 18 .09 2021 12 months from EDT

£203.93 x 12 weeks £2,447.16 (net)

£3.16 x 12 weeks £37.92

:

4. Arears of Earnings/ unlawful deduction claim

Unpaid salary from 10.08.20 up EDT : £ 1,019.65 (net)

Unpaid pension contributions at 3.16 X 5 weeks: £ 15.80

5. Holiday Pay £175.61 ( net)

6. Injury to feelings : £14,000

7. Aggravated Damages: £1,500

8. Acas Uplift : 22.5% (excluding basic award)  
22.5% x £25,972.29 £5,843. 77.

9. Interest on discrimination;

12.1 on injury to feelings plus 22.5% uplift : from 18 September 2020 to 25 June 2021  
(40 weeks) @ 8%: £ 18,987.05 x 8% x 40 weeks : £1,168.46

12.2 on financial losses with 22.5% (£) uplift from mid-point of 4 Feb 2021 (20 weeks) @  
8%: £6314.07 x 22.5% = £7734.73 x 8% x 20 weeks: £237. 99

Grossing up

101. The Claimants have not included within their schedules of loss any calculation for grossing up the awards to take into account the tax which will be paid on the net awards. The Claimants are to provide **within 14 days** from the date of this Judgment, their calculation in writing to the Tribunal copied to the Respondent, of the grossed up figures. The Respondent should provide any comments within 7 days thereafter, following which I will decide whether to reconsider the calculations as set put above.

17 October 2021

Sent to the parties on:

28 October 2021

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For the Tribunal Office:

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