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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111404/2019

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Hearing Held by Cloud Video Platform (CVP) on 20 September 2021

Employment Judge - A Strain

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Mr P Strickland

**Claimant
Represented by:
Mr S Smith-
Solicitor**

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All Job Trading Limited

**Respondent
Not Present and
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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- (1) the Claimant was unfairly dismissed by the Respondent;
- (2) the Claimant is entitled to repayment of deductions made by the Respondent;
- (3) the respondent has unreasonably failed to comply the ACAS Code of Practice on Disciplinary and Grievance Procedures and 10% increase shall be applied to the compensatory award;

(4) the Respondent discriminated and harrassed the Claimant contrary to sections 13, 15 and 26 of **Equality Act 2010**;

(5) The Respondent is ordered to pay the Claimant a Basic Award of £9,069.20.

5 (6) The Respondent is ordered to pay the Claimant a Compensatory Award of £15,886.60;

(7) The Respondent is ordered to pay the Claimant the sum of £5000 in respect of injury to feelings.

Background

10 1. The Claimant was represented by Mr S Smith, Solicitor. He asserted claims of Unfair Dismissal and Disability Discrimination under sections 13, 15 and 26 of the **Equality Act 2010 (EA 2010)**. The Claimant seeks a Basic Award, Compensatory Award and damages for injury to feelings as detailed in his schedule of loss.

15 2. The Respondent was neither present nor represented. The Response by the Respondent had been struck out.

3. The Claimant had lodged a Bundle of Documents with the Tribunal for the purposes of the Hearing.

4. The Tribunal heard evidence from the Claimant.

20 Findings in Fact

5. Having heard the evidence of the Claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:

25 5.1 The Claimant is an experienced courier driver working mainly for the DX Document Exchange through his employer.

5.2 The Claimant was employed from continuously from September 2002 with JFX Logistics/Courier Logistics. His employment then transferred through successive tenders on 7 September 2009 to BST Ltd; on 15 February 2010 to DX Contact; on 6 May 2013 to Rainbow Delivery Service Ltd and on 2 April 2018 to All Job Trading Ltd.

5.3 His transfer to the Respondent was confirmed in a letter of 24 January 2018 from Rainbow Delivery Service Limited (Page 62).

5.4 The Claimant was never provided with a contract of employment or payslips from the Respondent.

10 5.5 The Claimant's last written contract of employment was with Rainbow Delivery Service Limited (Page 43 – 56) which transferred with him to the Respondent.

15 5.6 In or around 13 November 2018 the Claimant suffered from an M1 Myocardial infraction followed by a heart attack. This necessitated surgery and the Claimant had 3 stents inserted into his heart.

20 5.7 Whilst hospitalised (14-17 November 2018) the Claimant suffered a focal seizure. He suffered blackouts and became unaware of what was happening around him or periods of time. He required to disclose this to DVLA who revoked his driving licence for 1 year from November 2018 (Pages 93-94).

5.8 The Claimant's Consultant Dr Alasair Pell produced a report detailing treatment received by the Claimant dated 20 November 2018 (Pages 84 – 85).

25 5.9 A further medical report was produced by Dr Heath on 12 January 2019 (Pages 88-89).

5.10 Following the Claimant's heart attacks he has suffered from ischemic heart disease.

5.11 The heart attacks and ischemic heart disease constitute a physical impairment which has a substantial and long term adverse effect on his ability to perform normal day to day activities. He has a tightening, aching sensation in his chest, nausea, shortness of breath, cold sweats, fatigue and sudden dizziness.

5.12 In addition the Claimant has a mental impairment (anxiety and depression) which has a substantial and long term adverse effect on his ability to perform normal day to day activities. He has become anxious about experiencing further heart attacks and needs to be accompanied when going out in public. He is less independent. He becomes agitated and angry due to frustration at his physical limitations. He also suffers from insomnia.

5.13 The Claimant's physical and mental impairments endured from 13 November 2018 until the date of termination of his employment on 2 June 2019 and beyond.

5.14 The Claimant has produced a disability impact statement (Pages 69-71). The Claimant cannot undertake shopping without assistance and requires to take taxis to and from shops due to his physical limitations. He struggles to read and write or follow tv programmes due to lapses in concentration. He becomes angered easily. He struggles with washing and dressing due to breathlessness. He used to play golf but can't do so now due to the physical exertion involved.

5.15 The Claimant has been in receipt of a variety of medication for his impairments such as Atorvastatin, Ticagrelor and Aspirin (Pages 79 – 81).

5.16 The Claimant's wife informed the Respondent of the Claimant's heart attack on 14 November 2018.

5.17 The Claimant submitted sick notes and received sick pay during his absence (pages 72-78) which detailed he was unfit to work due to his myocardial infarction.

5.18 The Respondent was informed that the Claimant could not drive.

5.19 In or around May 2019 the Claimant discovered from HMRC that the Respondent had not been paying tax and national insurance contributions despite having deducted these from his pay. This was confirmed in a letter from HMRC dated 19 November 2019 (Pages 67-68).

5.20 The deductions for Tax, National Insurance and Pension made by the Respondent totalled £2,512.36.

5.21 On 2 June 2019 the Claimant discovered that he had not been paid his monthly sick pay. He called the Respondent's Director Tomas Jajko to query this and was told he was too busy to speak to him.

5.22 The Respondent's Depot Manager Alan Turner called at the Claimant's house in June 2019 and requested copies of all sick line which the Claimant gave to him.

5.23 The Claimant made several further attempts to contact the Respondent about his employment status and sick pay. He received no response. He sent emails and texts to the Respondent's Directors David Gibson and Tomas Jajko. Eventually he did get to speak to Mr Gibson in June 2019 by telephone. Mr Gibson told the Claimant "we're not a charity you know".

5.24 The Respondent did not make any further payment of sick pay to the Claimant and the Claimant considered that his employment had been terminated with effect from 2 June 2019.

5.25 The effective date of termination of the Claimant's employment with the Respondent was 2 June 2019.

5.26 The Claimant earned £453.46 Gross per week and £381 Net whilst employed by the Respondent. The Respondent also contributed £594.36 per annum to the Claimant's pension.

5.27 The Claimant was unfit to work due to his impairments until 1 January 2020 as certified by Fitness or Work Statements (Pages 72 – 78). The Claimant had his licence returned in November 2019 (Pages 97-98).

5.28 The Claimant was not in receipt of recoverable benefits during the period 2 June 2019 to 1 January 2020.

5.29 The Claimant is currently working as a self-employed courier driver.

The Relevant Law

6. The claimant asserts unfair dismissal.

Unfair Dismissal

7. Section 94 of the Employment Rights Act 1996 (“the ERA”) provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reasons) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of an employee,

(c) is that the employee was redundant, or

(d) or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

5 (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

10 (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) shall be determined in accordance with equity and the substantial merits of the case."

8. In terms of Section 98(1) it is for the employer to establish the reason for
15 dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

9. The Tribunal should first examine the facts known to the employer at the time
20 of the dismissal and ignore facts discovered later. The onus of proof is on the employer.

10. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

25 11. The Tribunal must also consider whether the respondent carried out a fair procedure taking into account the terms of the ACAS Code of Practice. In that regard, any procedural issues identified by the Tribunal should be considered alongside the other issues arising in the claim, including the reason for dismissal (***Taylor v OCS Group Ltd [2006] EWCA Civ 702, paragraph 48***).

Disability Discrimination

12. The starting point for a Tribunal is whether or not a Claimant has a qualifying disability under section 6 of the EA 2010. Section 6 provides:

Disability

- 5 (1) A person (P) has a disability if—
- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

- 10 13. The onus of proof of impairment is upon the Claimant on the balance of probabilities.

Impairment

14. **Royal Bank of Scotland v Morris UKEAT/0436/10** at paragraph 63 and 55 the EAT emphasised the importance of expert medical evidence for the existence or not of a mental impairment where an alleged disability takes the form of “depression or (similar) a cognate medical impairment.”
- 15 Further, that “the issues will often be too subtle to allow [the Tribunal] to make proper findings without expert assistance.” (paragraph 63)

15. In the case of **J v DLA Piper UK LLP UKEAT/0263/09** paragraph 42 noted that the distinction between symptoms of mood and anxiety caused
- 20 by clinical depression and those that derive from a ‘medicalisation of work problems’ or ‘adverse life events’.

16. In **Herry v Dudley Metropolitan Council and Governing Body of Hillcrest School UKEAT/0101/16** at paragraph 56 the EAT noted:
- 25 “Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers

no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

Long-term effect

17. Schedule 1 paragraph 2.(1) of the EA 2010 provides:

The effect of an impairment is long-term if—

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months, or
- (c) it is likely to last for the rest of the life of the person affected.

Substantial Adverse Effect

18. Substantial means more than minor or trivial (***Goodwin v The Patent Office [1999] IRLR 4 EAT***). If an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur (Schedule 1, paragraph 2.(2) of EA 2010). Likely to recur is interpreted as "could well happen" (The ***Guidance on***

the Equality Act 2010 (published by the UK Government). It is not assessed on the balance of probabilities.

Normal day to day activities

19. The focus of the EA 2010 is things that the Claimant either cannot do or
5 can only do with difficulty, rather than on the things the Claimant can do. The *Guidance on the Equality Act 2010* (published by the UK Government) states at page 34 “in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the
10 telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews,
15 preparing written documents, and keeping to a timetable or a shift pattern.”

20. ***Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT***, Langstaff P said, “It is clear first from the definition in section 6(1)(b)
20 of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or
25 mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more
30 than minor or trivial.”

21. A tribunal considering the question of disability should ensure that each step is considered separately and sequentially and that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it **Goodwin**.

5 22. A tribunal should look forward from the date of the alleged discriminatory act in considering whether the adverse effect was likely to last at least 12 months or recur. The position must be considered looking forward as at that date because likelihood is not something to be determined with the benefit of hindsight (**Parnaby v Leicester City Council**
10 **UKEAT/0025/19/BA**).

Direct Discrimination

23. Section 13 of EA 2010 provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would
15 treat others.

Unfavourable Treatment

24. Section 15 of EA 2010 provides:

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in
20 consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

25 Unfavourable treatment can include dismissal.

Indirect Discrimination

Section 19 of the EA 2010 provides:

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- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- 10
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- © it puts, or would put, B at that disadvantage, and
- 15
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Harrassment

25. Section 26 of EA 2010 provides:

26 Harassment

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- (1) *A person (A) harasses another (B) if—*
- (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) *the conduct has the purpose or effect of—*
- (i) *violating B's dignity, or*

(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

Compensation

5 Section 124(2)(b) of EA 2010 makes provision for the Tribunal to award compensation where it finds there has been a contravention of section 15.

An award in discrimination cases can include:

i. *Financial Loss*

Such as past and future loss of earnings.

10 ii. *Injury to Feelings*

A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039)***.

Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

20 **Submissions**

26. The Claimant's solicitor made oral submissions at the conclusion of the case and referred to the Schedule of Loss. The Claimant sought a Basic Award, Compensatory Award of a year's lost pay plus tax, national insurance and pension contributions the Respondent had failed to pay, 25 an ACAS uplift of 25% and damages for injury to feelings. He later, on 15 November 221, produced updated information on the benefits received by the Claimant which were not recoverable benefits for the purposes of recoupment.

Discussion and Decision

27. The Tribunal accepted the Claimant's evidence. It was unchallenged by the Respondent. The Claimant presented as a credible and reliable witness who gave his evidence in a straightforward manner. At times he found it emotionally difficult to continue.

28. The Tribunal then considered the various claims advanced.

Unfair Dismissal

Effective Date of Termination

29. The Tribunal accepted the Claimant's evidence that he had made several attempts to contact the Respondent without success. He was, in essence, being ignored. He did not receive his sick pay for June 2019 and when he queried this with Mr Gibson he was told the Respondent's were not a charity. He received no further payments from the Respondent.

30. The Tribunal considered this conduct to constitute repudiation of the contract by the Respondent. The Claimant was entitled to consider his employment terminated as a consequence of that repudiatory conduct with effect from 2 June 2019.

Reason for dismissal

31. The Tribunal considered the evidence in order to determine the reason, or principal reason for dismissal, at the point when that Claimant was dismissed.

32. The Respondent had not followed any process nor had it provided any reason for the dismissal.

33. On the basis of the evidence given by the Claimant the Tribunal accepted and found that the reason, or principal reason, for the termination of his

employment was the Claimant's absence from work due to his myocardial infraction.

34. This was not a potentially fair reason under section 98 and the dismissal was unfair.

5 35. The Tribunal noted that there had also been a complete lack of contact with the Claimant. The Claimant had been dismissed without any prior warning or notice. The first he was aware of the Respondent's repudiatory conduct was when he made numerous attempts to clarify his status with the Respondent which were ignored and was met with hostility and derision by Mr Gibson.

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36. The Tribunal concluded that, in all the circumstances, the termination of his employment in this manner was substantively and procedurally unfair.

Disability

15 37. The Tribunal considered whether or not the Claimant had a disability as defined in section 6 of EA 2010.

38. In this regard the Tribunal adopted and followed the approach in **Goodwin** that each step has to be considered separately and sequentially, and, that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it.

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39. The Tribunal also noted that the Claimant's evidence was unchallenged by the Respondent.

Impairment

25 40. The Tribunal considered and accepted the Claimant's evidence as to his physical and mental impairments. These were corroborated by the medical reports produced and the Claimant had suffered from these impairments over the relevant period 13 November 2018 until 2 June 2019 and beyond.

Long-term effect

41. The Tribunal (as above) considered and accepted the Claimant's evidence as to the long-term effect of his impairments and also that of his Doctor.

5 42. The Claimant had been off long term from 13 November 2018 and unfit to work until January 2020. This was corroborated by the sick notes produced and the medical reports. The Medical reports corroborate the ongoing nature of his impairments and the medication he requires to take.

43. The Tribunal accepted the Claimant's evidence of the ongoing impact of his impairments on him as detailed in his disability impact statement.

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44. The Tribunal accordingly concluded that the Claimant's impairments were of long-term effect.

Substantial Adverse Effect on normal day to day activities

45. The Tribunal accepted the Claimant's evidence as to the impact upon his ability to perform normal day to day activities and tasks as defined in the **Guidance**. The Tribunal accepted that the adverse effect was more than minor or trivial and was in fact substantial (following **Goodwin v The Patent Office**).

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46. In the circumstances the Tribunal conclude that the Claimant had a qualifying disability as defined in section 6 of EA 2010 from the period 13 November 2018 to 2 June 2019 and that was continuing.

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Knowledge of Disability

47. The Tribunal considered whether or not the Respondent was aware of the Claimant's disability. The Claimant's wife had informed the Responent on 14 November 2018 of his heart attack and myocardial infraction. The Claimant provided certificates from his GP covering the period of absence from 13 November 2018 until November 2019. These certificates stated that the reason the Claimant was unfit for work was due to his myocardial infraction. The

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Respondent was clearly aware of his disability during his period of absence commencing 13 November 2018 and at the time of termination of his employment.

Was the Claimant discriminated against because of his disability (Section 13)

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48. The Tribunal accepted and found that the reason for the repudiatory conduct and termination of his employment arose from his absence from work due to his disability.

49. If he had been at work he would not have been treated in this manner. His employment would have continued.

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50. A comparator who did not share the Claimant's disability would not have been treated in this way.

51. The Tribunal conclude that the Claimant was treated less favourably because of his disability. The less favourable treatment was his dismissal.

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Unfavourable Treatment (section 15)

52. The Tribunal considered whether the Claimant had suffered unfavourable treatment because of something arising in consequence of his disability. The Tribunal considered that the unfavourable treatment commenced with the termination of sick pay in May 2018, continued with how they treated (and ignored/failed to communicate with) him and the comments by Mr Gibson in June 2019 and arose as a consequence of his disability. This was unfavourable treatment. The Respondent had clearly discriminated against him.

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53. Having found in favour of the Claimant in terms of sections 13 and 15 of the EA 2010 the Tribunal did not consider it necessary to make a finding in respect of section 19.

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Harassment (Section 26)

54. The Tribunal considered the assertion by the Claimant that the comments made by Mr Gibson in the telephone call in June 2019 were “harassment” under section 26.

55. The comments were made following repeated attempts by the Claimant to clarify his employment status and the failure to pay sick pay. Having placed the Claimant in such a difficult situation without any prior communication or notice was completely unreasonable. No reasonable employer would have acted in such a way.

56. The comments made to the effect that the Respondent were not a charity were insensitive, inappropriate and unreasonable. The remarks were clearly unwanted conduct related to his disability for the purposes of section 26 and the Tribunal had no doubt as to the impact of the comments on the Claimant. The comments had the purpose or effect of violating the Claimant's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for him.

57. The Tribunal accordingly find that the Respondent did harass the Claimant contrary to section 26.

Injury to Feelings

58. The Tribunal accepted the Claimant's evidence that the treatment of him by the Respondent had led to considerable distress and anxiety.

59. He had felt humiliated.

60. The Tribunal considered that an award at the lower end of the lower band in **Vento** was appropriate (taking into account **Simmons v Castle [2012] EWCA Civ 1039**).

61. The Tribunal make an award of £5,000 in respect of injury to feelings.

ACAS Uplift

62. There had been an abject failure by the Respondent to follow any process in the circumstances of this case. The Respondent had not engaged or communicated in any meaningful way with the Claimant. The Tribunal considered that any termination arose from his absence from work and should have been dealt with in conformity with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

The Tribunal award an uplift of 10% in respect of the Respondent's failure to follow the Code.

Tax, National Insurance and Pension Contributions

The Tribunal accepted the Claimant's evidence that these payments had been deducted from him but not paid to the Revenue or to his pension fund. In so far as the Revenue were concerned he was now being held liable for them. In the circumstances the Tribunal awarded the sum sought of £1,118 (Tax), £800 (National Insurance) and £594.36 (pension). This totalled £2,512.36.

Basic Award

The Tribunal make a Basic Award of £9,069.20.

Unfair Dismissal Compensatory Award

The Tribunal award the following:

(i) Loss of earnings (2 June 2019 to 1 January 2020) = £381 x 30 weeks = £11,430.

(ii) Tax, National Insurance and Pension = £2,512.36.

(iii) Loss of Statutory Rights = £500.

(iv) ACAS uplift at 10% = 10% of £14,442.36 = £1,444.24

Total Compensatory Award = £15,886.60.

Recoupment

The Claimant had not been in receipt of recoverable benefits.

5 **Employment Judge: A Strain**
 Date of Judgment: 30 November 2021
 Entered in register: 8 December 2021
 and copied to parties

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