Case No: 2304159/2019
& 2304727/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr J Khan

Respondent: P2M Coffee Ltd (1)
Mr R Pandya (2)

REMEDY HEARING

Heard at: Croydon (by cloud video platform)
On: 7 December 2021

Before: Employment Judge Nash
Mr N Aziz
Mr A Peart

Appearances
For the claimant: Ms Forsythe, Caseworker
For the respondents: Ms Omotosho, Solicitor

REMEDY JUDGMENT

1. The first and second respondents are jointly and severally liable to the claimant £10,638.30 as compensation for subjecting him to detriments for making public interest disclosures.

2. The second respondent only is liable to the claimant for an additional £2,000.94 as compensation for subjecting him to detriments for making public interest disclosures.

REASONS

Liability Judgment

1. In a liability judgment on 4 January 2021, the Tribunal made the following liability findings: -

   a. Section 13 of the Employment Rights Act in respect of unauthorised

deduction from wages against the first respondent;

b. Section 8 of the Employment Rights Act against the first respondent in respect of failure to provide itemised payslips;

c. Section 47B of the Employment Rights Act against the first and second respondents in respect of the following detriments:-

i. The claimant was asked to make good a shortfall of £115 on 27 June 2019;

ii. The claimant was invited to a disciplinary hearing to address accusations of financial irregularities and of being late;

iii. Accusing the claimant of abusing his position on 5 July 2019;

iv. Accusing the claimant of falsifying his time sheets;

v. Failing to pay the claimant's wages in full and on time, and

vi. Failing to progress the disciplinary process in a timely fashion.

Remedy Hearing

2. The matter was listed for a remedy hearing. Following two postponements this went ahead on 7 December 2021.

3. The Tribunal heard evidence from the claimant on his own behalf and had sight of his written witness statement.

4. The respondents sought to adduce evidence from Mr Pandya, the second respondent, and from Mr Choudhury. The Tribunal was satisfied that this evidence did not go to remedy and therefore did not hear their evidence. Their evidence, primarily, went to the following:-

    a. Challenging findings in the liability judgments, e.g., the relationship between the two respondents, the respondents' motivations or the wages paid to the claimant.
    b. The effect of COVID and lockdown on the first respondent.
    c. The financial and medical situation of the second respondent.

5. The Tribunal had sight of a remedy bundle and the liability bundle (including a further copy of page 163 of the liability bundle, the respondents' payment schedule).

6. The Tribunal, with the agreement of the parties, considered firstly the claim for remedy in respect of Section 47B of the Employment Rights Act. It would then be decided whether that rendered any remedy in respect of the other two claims otiose.

Submissions

7. The Tribunal heard brief oral submissions from both parties.

The Law

8. In respect of compensation for detriment, Section 49(2)(b) Employment Rights Act 1996 requires Tribunals to have regard to any loss which is attributable to the act or failure to act which infringed the claimant's right. Section 49(3) expressly provides that loss for this purpose will be taken to include

   i. Any expenses reasonably incurred by the claimant in consequence of the act or failure to act which is the subject of his or her complaint; and

   ii. Loss of any benefit which they might reasonably be expected to have had but for the act or failure to act.

9. According to Section 49(4), when ascertaining a loss, a Tribunal should apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law.

Applying the facts to the law.

Compensation – Money Claims

10. The Tribunal firstly considered what money had the claimant lost attributable to the detriments.

11. The Tribunal firstly considered the claimant being asked to make good a shortfall of £115 on 27 June 2019. The Tribunal had found that the claimant was made to pay this money from his own pocket when there was no good reason to do so. This loss was attributable to the respondents' act.

12. The next money detriment was the failure to pay the claimant his wages in full or in time. Any failures to pay in full or on time up to the presentation of the first claim form on 27 September 2021 (against both respondents) lay against both respondents. Any failures to pay in full or on time after this date and up to the date of the second ET1 on 28 October 2019 (against the second respondent only) only lay against the second respondent.

13. The dates of the failures to pay were set out in the liability judgment and these corresponded to page 163, the respondents' payment schedule, which was not in dispute between the parties.

14. The Tribunal considered what losses were attributable up to 27 September 2021.

15. It had found that the claimant was deducted, in effect, £181 from his wages on 4 July 2019. This was attributable to the detriment.

16. Further, the claimant was not paid on 29 August and the amount was, according

to the figures in the ET1 and the ET3, £1,424 net. In addition, according to the ET1, and not challenged in the ET3, the claimant was entitled to pension contributions. The Tribunal determined the amount of monthly pension contributions by taking the figure for pension from the August 2019 payslip where the net sum payable was £1,472.84, (extremely close to the £1,424 net sum agreed between the parties). Accordingly, the Tribunal determined that the pension contribution was £48.84 per month. Therefore, the deduction in August was £1,472.84.

17. The same calculation applied in respect of the losses attributable to the second respondent, save that there was a further failure to pay monthly salary on 3 October 2019 (for September 2019). In respect of the failure on 3 October, the Tribunal used the same figures of £1,424 net plus £48.84 for pension contributions, making a sum of £1,472.84 per month x 2, being £2,945.68.

18. Those were the losses attributable to the detriments. However, that was not the end of the story because the first respondent, according to the liability judgment, made a part-payment towards these losses. The first respondent subsequently paid the claimant the sum of £2,848 on 18 December 2019. Thus, the actual loss attributable to the detriments was the original losses less the part-payment.

19. The findings in the liability judgment as to attributable loss were in respect of Section 13 Employment Rights Act. Nevertheless, this was a finding of fact which must apply to the detriment claim. According to the liability judgment, the payment of £2,848 was a global payment going to all the respondents' liabilities for the months of August, September, October and November 2019, and from the 1 to 18 December 2019. There were 140 days in this period making what might be referred to as a daily rate of £20.34.

20. Accordingly, from the first respondent's liability of £1,472.84 was deducted 31 days x £20.34 being £630.54 - making a loss attributable of <u>£842.30.</u>

21. The second respondent was liable for the same sum, with the following addition. There was an original loss attributable of £1472.84 less 30 days x £20.34, making a deduction of £610.20. This resulted in a loss attributable of <u>£862.64.</u>

22. Accordingly, the money losses for both the first and second respondents were £115 plus £181 plus £842.30 - giving a total of <u>£1,138.30.</u>

23. In addition, against the second respondent only, there was a further £862.64 loss. This made the losses attributable to the second respondent £115 plus £181 plus £842.30 plus £862.64, being <u>£2,000.94.</u>

24. The Tribunal found that those were the money losses attributable to the detriments.

<u>Compensation – Injury to Feelings</u>

25. A Tribunal must have regard to 'the infringement to which the complaint relates' according to Section 49(2)(a). In *Virgo Fidelis Senior School v Boyle* 2004

[ICR1210] the Employment Appeal Tribunal stated that detriments suffered by whistle blowers should normally be regarded as a serious breach of employment rights which is the equivalent of or a form of the right not to be the victims of discrimination.

26. However, this did not mean when having regard to the infringement complained of, that a Tribunal should permit the nature of the infringement itself to have an impact on the level of damages awarded, irrespective of any injury to feelings caused by the infringement. To compensate simply for the detriment, rather than the resulting injury would be an offence against the general principle that the Tribunal must not punish but must compensate. So, any reference to infringement is construed simply as a reminder to Tribunals to have some regard to the nature of the complaint when assessing the loss, in that the more serious the offence the more likely, though not certain, it is that feelings would have been injured.

27. In *Virgo Fidelis***,** the EAT held that it was appropriate to adopt the same approach to compensation in whistle blowing detriment claims as has been established in discrimination cases. Further, the Presidential Guidance of 5 September 2017 referred to detriment claims and the annual addendums to that guidance have not resiled from that.

28. The respondent referred the Tribunal to the comments of Lord Justice Singh in *Gomes v Higher Level Care Limited 2018* [EWCA CIV418] which queried the correctness of this approach**.** *Gomes* was a case under the Working Time Regulations, and the comments were obiter. In the view of the Tribunal, it remained bound by the authority of the Employment Appeal Tribunal in *Virgo Fidelis***,** bearing in mind that there has been no alteration to the Presidential Guidance which expressly referred to detriment in respect of Vento bands.

29. Accordingly, the Tribunal was satisfied that it had the power to award compensation for injury to feelings in complaints under Section 47(b) Employment Rights Act.

30. The Tribunal reminded itself that the focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent, for instance *Komeng v Creative Support Limited [UKEAT 0275/2018].*

31. The Tribunal reminded itself of the general principles of injury to feelings compensation. These were set out in 1997 by the Employment Appeal Tribunal in *The Prison Service v Johnson [IRLR 162]* at para 27. The following is a brief summary: -

    a. Injury of feelings awards should be compensatory and should be just to both parties.
    b. They should compensate fully without punishing the discriminator.
    c. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award.
    d. Awards should not be too low to diminish respect for the policy of the legislation. On the other hand, they should be restrained and not excessive.

e. Awards should bear some broad general similarity to the range of awards in PI cases.
f. Tribunals should take into account the value in everyday life for the sum they have in mind.
g. Tribunals should bear in mind the need for public respect level for the level of awards made.

32. These principles apply equally to detriment claims. According to *Vento v The Chief Constable of West Yorkshire Police No 2 2003 [IRLR 102],* the matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

33. *Vento* established that there are three bands into which the great majority of awards will fall. Firstly, a top band for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment and it is only in exceptional cases that compensation would exceed this sum. At the material time in this case the figures were £26,300 to £44,000

34. There is a second band, a middle band for cases which do not merit an award in the highest band. At the material time in this case the figures were £8,800 and £26,300

35. There is a third, lower band which is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence. At the material time in this case this was between £900 and £8,800

36. In general, awards of less than £900 (at the material time in this case) are to be avoided altogether as they risk being regarded as too low as being a proper recognition of injury to feelings.

37. As stated, the amounts in the bands have been updated since *Vento*, including in the 2019 addendum to the Presidential Guidance, in respect of claims presented on or after 6 April 2019. The figures in the addendum include adjustments under *Simmons v Castle* [2012] EWCA Civ 1288.

38. The claimant's submission was that the award should fall in the lower middle band. The respondent contended that it should fall at the bottom of the lower band.

39. The Tribunal considered that this was not a case appropriate to the lower band. This was not a one-off occurrence. The detriments had gone on for more than a month. The effects on the claimant were not that of a one-off occurrence.

40. The tribunal concluded that this was a case appropriate to the lower end of the middle band for the following reasons.

41. The Tribunal accepted the false allegations by the respondent were upsetting and unnerving to the claimant. However, in the view of the tribunal, the weightiest detriments when it came to injury to his feelings was the failure to pay. The

claimant's evidence was that the respondent's failings put him in financial difficulties. The Tribunal found the claimant's evidence as to his financial difficulties to be credible. He provided detailed evidence, for instance, of having to travel to a food bank. He said that he had to make a journey from Thornton Heath to Purley Oaks, and he explained that he had had to walk.

42. The claimant gave what the Tribunal found to be compelling evidence, in his witness statement and before the Tribunal, of his feelings of distress and shame at being unable to provide, as a single parent, for his child, including an inability to pay for a new school uniform. The Tribunal was influenced by the considerable contemporary evidence of the claimant raising these matters in very clear terms in a number of emails to the respondent. He expressly referred to the difficulties that he was experiencing in providing for his family because he was not being paid. The Tribunal found the claimant's evidence on this point was persuasive and broadly consistent.

43. The Tribunal reminded itself that it had not found that the respondent had subjected the claimant to an unlawful detriment by its communications with HMRC. The tribunal, therefore, did not take into account any injury relating to his inability to obtain benefits and therefore, to obtain free school meals for his child.

44. In respect of the claimant's financial circumstances as a result of the respondent's failure to pay wages, his evidence was consistent with the bank statements disclosed. These bank statements were not complete. It appeared that only every other page had been provided, rather than a complete set. However, the Tribunal did not see any room for suspicion that the claimant had done this to deliberately hide anything, or that the statements, incomplete as they were, did not provide a reliable, reasonable picture of his true financial circumstances. The tribunal had found the claimant to be a generally honest witness.

45. The Tribunal made an award at the bottom of the middle band being £9,500.

46. In respect of injury to feelings, the Tribunal was satisfied that there were no material new events after the end of September which would mean that the liability of the two respondents might differ. For instance, by the time of the first claim form on the 27 September, the school year had begun, the claimant had already been to a food bank and so on.

<u>Adjustments</u>

47. No adjustment was sought in respect of the ACAS Code in the up-to-date schedule of loss or submissions. There was no submission that the claimant had made any contribution to his losses and accordingly, there was adjustment to this award.

Summary

48. The first and second respondent are liable jointly and severally for the sums of £1,138.30 plus £9,500 making a total of £10,638.30.

49. In addition, the second respondent is liable for an additional £2,000.94.

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Employment Judge Nash

Dated: 10 January 2022

Judgment and Reasons sent to the parties on: 3 February 2022