



EMPLOYMENT TRIBUNALS

Claimant: Mrs Leigh Best

Respondent: Embark on Raw Ltd.

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 31 January 2022

Before: Employment Judge B Elgot
Members: Mr M Wood
Mr R Blanco

Representation:

For the Claimant: Ms W Miller, Counsel
For the Respondent: Mr D Green , Counsel instructed by Mrs A Fletcher,
Director

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

The Tribunal having reserved its decision now gives judgment as follows:

REMEDY JUDGMENT

The Claimant having succeeded in her claims of unfair dismissal, unlawful detriment on the ground that she made protected disclosures, harassment related to her age and sex and the complaint of victimisation, is awarded compensation calculated as follows:-

Unfair dismissal

1. Basic award based on agreed gross weekly wage £ 293.47. The multiplier is 1.5
£ 440.21
2. Compensatory award

The agreed net weekly wage is £270.26

Immediate loss of wages from 18 May 2020 until the date of the remedy hearing- nil

Future Loss of wages -nil

Loss of statutory employment rights £200

The total of £ 200 is increased under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA) by 20% as a result of the Tribunal's decision that it is just and equitable to award this uplift as a result of the Respondent's unreasonable failure to comply with the ACAS Code of Practice.

The total compensatory award is £240

The total compensation for unfair dismissal is **£ 680.21** (440.21 + 240)

3. The Employment Protection (Recoupment) Regulations 1996 apply to the compensatory award and the relevant information is as follows:-

- i. Amount of total monetary award is £240
- ii. The amount of the prescribed element is £240
- iii. The dates of the period to which the prescribed element is attributable are 18 May 2020 to 31 January 2022
- iv. The amount by which the monetary award exceeds the prescribed element is nil.

4. **Injury to Feelings.**

No additional amounts relating to financial loss are awarded as remedy for the sex and age discrimination or victimisation. However there is an award for injury to feelings as follows:-

- i. The award for injury to feelings in relation to harassment is £2000
- ii. The award for injury to feelings in relation to victimisation is £2000
- iii. The award for injury to feelings in relation to unlawful detriment is £10,000
- iv. The total of £14,000 is increased by 20% under section 207A TULRA=
£16,800

5. **Interest on Injury to Feelings Award.**

The Tribunal awards simple interest at 8% per annum. An award of interest is made in accordance with the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, as amended. The interest on the injury to feelings award relates to the period from the date of the first act of discrimination complained of which is Monday 2 March 2020 (the approximate date in 'early March' when the Respondent made comments amounting to harassment) to the date of calculation which is 31 January 2022.

The total sum of interest is **£2,577.53**

6. The grand total of compensation awarded in this case is **£20,057.74** (£680.21+ £16,800 + interest £2,577.53) which must be paid by the Respondent to the Claimant within 28 days.

REASONS

1. At this remedy hearing conducted via Cloud Video Platform (CVP) facility the Claimant gave evidence on her own behalf and Mrs Andrea Fletcher gave evidence on behalf of the Respondent. There was an agreed electronic bundle of documents relevant to remedy including a schedule of loss produced by the Claimant which only covers the period from the date of termination of her employment until the date of the liability hearing on 27 October 2021. The Schedule of Loss has not been updated. The parties were given additional time during the remedy hearing to ensure that they had each received and read the remedy bundle and had adequate time to prepare cross examination.
2. The Tribunal reserved judgment on remedy but was in fact able to reach a decision in chambers on the afternoon of 31 January 2022 without the necessity of listing a separate hearing.
3. The liability judgment is dated 5 January 2022 and was sent to the parties on 7 January 2022 consisting of 54 paragraphs. It followed a full merits hearing on 27,28,29 October 2021 and a reserved judgment in chambers on 30 November 2021.

Unfair dismissal

4. The Claimant was dismissed on 11 May 2020 for the unfair reason that she made protected disclosures relating to covid safety in the workplace. She received one week's notice pay making the effective date of termination 18 May 2020. At the date of dismissal the Claimant had been employed for 15 months and was aged 52. The multiplier is 1.5 and her agreed gross weekly wage was £ 293.27. The basic award is therefore £293.27 x 1.5 which amounts to £440.21.
5. We find that following her dismissal the Claimant was highly disappointed, discouraged and distressed by the Respondent's unfair termination of her employment. The loss of her job occurred at the height of the first and most severe national lockdown which commenced on 23 March 2020 in response to the covid 19 pandemic. Her prospects of immediately finding similar retail or other employment at the same remuneration were extremely limited and we are satisfied that it was inevitable that she would remain unemployed claiming jobseekers' allowance (JSA) for six weeks until she decided to set up her own business.
6. In all the circumstances we conclude that the Claimant with the support of her husband made the reasonable and rational choice to start her own small business from home selling raw pet food as a way of re-establishing her income. This is an industry in which she has experience and knows the market and the suppliers. She decided, using the business model suitable to the pandemic situation, to focus on on-line orders which would be click and collect or delivered by courier. She did not offer a direct local delivery service as the Respondent does.

7. She began trading from her own home on or around 25 June 2020 initially by incorporating a company named Rawkings Ltd. Her business accounts, a copy of which we have seen, commence on 1 July 2020. She later, no doubt upon further advice, dissolved that company and has operated as a sole trader under the trading name Rawkings. She has a bank account which was her old semi-dormant personal account which she told us she now uses interchangeably for business receipts and expenditure and for some of her personal expenses. Similarly she has a credit card which is used for both business and personal transactions. This is not uncommon for small traders.
8. The Claimant has disclosed two sets of accounts prepared by Rawkings' accountant which consist of Balance Sheets and Trading and Profit and Loss Accounts beginning at page 27 of the remedy bundle. She told us that she has no personal understanding of accounting rules or procedures or of her own business accounts. She simply sends the relevant paperwork including her bank and credit card statements to her accountant and lets him do all the calculations and declarations. She keeps no books of accounts herself not even a record of sales. None of the documents that she has sent to her accountant over the relevant period are disclosed in the remedy bundle and so it is not possible to ascertain how the accounts have been prepared.
9. The business appears from the accounts to have done quite well in terms of income over the relevant period. From 1 April to 30 September 2021 total sales were £59,058. During the initial trading period from July 2020 to March 2021 the sales were £9,276 when the business was just starting up.
10. The Schedule of Loss at page 22 of the remedy bundle claims an immediate loss of income from 11 May 2020 to the date of the Liability Hearing 27 October 2021 (76 weeks). That claim must be adjusted to 75 weeks to take into account that she was paid her weekly wage until 18 May 2020. $75 \text{ weeks} \times \text{the agreed net weekly wage of } £270.26 = £20,269.50$
11. Despite apparently healthy sales the Claimant gives credit in the said Schedule for total earnings of only £5,917 obtained from her business until 30 September 2021. These earnings are stated to be £ 713 for the tax year 20/21 and £5,204 for the period from April 2021 to September 2021. The small reduction to her total claim for immediate losses (£5917) would therefore reduce the claim to £14,352.50. She claims future loss of earnings for a further 28 weeks at the rate of £70.11 per week (£270.26 - £ 200.15) because she contends that for the next 28 weeks she will still only earn £5204 divided by 26 weeks (a six month period equivalent to the period between April- September 2021). In other words she anticipates no increase in earnings beyond that low rate.
12. However Mr Green for the Respondent submitted that we should undertake a closer examination of the accounts submitted by the Claimant. She was asked questions in cross examination in order to elicit further clarification of the accounts. There are two sets of accounts. One shows a trading, profit and loss account for the period 1 April to 30 September 2021 and a balance sheet as at 30 September 2021. There is a similar set of accounts for the period 1 July 2020 to 31 March 2021. In particular counsel drew the attention of the Tribunal and the Claimant to two entries headed '*Drawings*' in the amounts of £ 4373 (July 2020 to March 2021) and £16,845 (April to September 2021). The total is £ 21,218. The ordinary meaning of an entry headed

'Drawings' is to money withdrawn from a business by the owner or owners for personal use and this was put to the Claimant.

13. The Claimant was unable to understand or explain the references to 'drawings' and we heard no expert accountancy evidence. She did tell us that in relation to her credit card she marks with a P for personal all items which she purchases on credit for her own use rather than, for example, buying stock for the business. We find it more likely than not that the accountant records at least this personal spending as drawings for the Claimant's personal use from the business although there is no indication of the sums involved.
14. The total amount of the drawings (£21,218) exceeds the immediate loss of earnings claimed in the Schedule of Loss. We therefore award no sum of compensation for immediate loss of earnings.
15. There is no relevant evidence which suggests, as stated in the Schedule of Loss, that for the 28 weeks from 27 October 2021 i.e. until 4 May 2022 the Claimant will sustain the losses she claims if her business continues to make sales sufficient for her to make the same or similar drawings for her personal use.
16. In addition the Claimant confirmed that although the totality of the expenses in purchasing and running her car are claimed as business expenses in fact she uses her vehicle '*just as a car, for everything, just normally*'. The car is not used for deliveries and she said that, being a convertible with a small boot, the vehicle is not suitable for the task. The vehicle is not for exclusive or even mainly business use. This means that the Claimant is receiving a benefit in kind paid for by her business which she would otherwise be required to pay for out of her personal income. We are unable without accountancy advice to forensically calculate the correct amount. In addition the motor expenses/overheads depress the profit figure shown on the accounts.
17. Mr Green invites us to make further findings that the profit recorded in the accounts is significantly understated, that the true level of profitability supports the level of drawings and that we should conclude that the profit understatement supports his submission that Rawkings can thus sustain personal drawings by the Claimant at the rate which appear in the accounts. It is unnecessary for us to make detailed calculations in view of our conclusions above and in the absence of accountants' evidence. However we have identified some evidential information which indicates that the profits from the Claimant's business are better than she says and this supports our conclusion that she has felt financially comfortable in taking an income (drawings) from it even at an early stage.
18. As an example, page 29 shows direct costs for 'carriage and packing materials' in the sum of £9381 yet the Claimant gave evidence that she re-uses free boxes supplied to her by her husband. She also told us that the top line Sales figure on page 29 is inclusive of the costs of carriage which she charges to customers. If the said costs have been passed to the customer then they cannot also be a direct cost to the business which reduces profit. The same analysis can be applied to the figures at page 33.

19. There is no evidence that sales and profit from Rawkings is likely to significantly decline after the date of this Remedy Hearing despite a rather quiet start to 2022 and the Claimant will, on the balance of probabilities, be able to maintain her level of drawings and benefits in kind so that she suffers no future loss of personal income as a result of her dismissal. No amount for future loss of earnings is awarded.
20. The Claimant is awarded £200 to represent the fact that, although she acquired none of the usual statutory employment rights during an employment which lasted less than the requisite two years she has nonetheless lost the time which she did accumulate (15 months) and will, in any future employment, need to 'start from scratch' to build up her rights.
21. Injury to Feelings

We have split the award for injury to feelings into three parts by reference to the findings in our liability judgment:-

- 21.1 Harassment: The Claimant was upset by Mr Fletcher's unwanted, obtrusive and inappropriate questioning in early March 2020 about whether or not she was menopausal. It was a subject which she found distressing and wished to avoid talking about; she indicated that it was an intensely private matter for her. Nonetheless it was a one-off remark which was not pursued further. Mr Fletcher made the mistake of persevering with a tactless and humiliating conversation which the Claimant was clearly fearful of. We have recorded this incident in the liability judgment at paragraph 48 as a 'relatively minor' act of harassment. Certainly the Claimant did not complain about it for several weeks until 24 April 2020 during her telephone conversation with Mrs Fletcher.
- 21.2 Equally the harassment on 31 March 2020 related to the Claimant's protected characteristic of age was upsetting for her as we have described in paragraph 47 of the liability judgment because Mr Fletcher knew that she was very anxious about the rapid spread of the covid 19 virus at a time when there were many medical unknowns and no available vaccines or specialised treatments. Again, he persevered in unwanted conduct on that one occasion by pursuing a conversation discussing the availability of treatments for older versus younger patients which caused the Claimant anxiety and stress.
- 21.3 An award in relation to the two instances of harassment at the lower band of the Vento guidelines is appropriate in the sum of £2000.
- 21.4 Victimisation. The less favourable treatment which we have identified as caused by the relevant protected act is described in paragraphs 49-53 of the liability judgment. In summary, as a result of the Claimant's complaint on 24 April 2020 and the alarm which this caused the Respondent Mrs Best was given a verbal warning and her subsequent dismissal on 11 May 2020 was pre-determined and rapidly progressed with little or no respect for a fair process or the rules of natural justice.
- 21.5 By reference to paragraph 16 of the List of Issues to which we referred at the liability hearing the Claimant was not provided with a copy of her verbal or any written prior warning, she was not notified that the meeting of 11 May 2020 was a disciplinary meeting with dismissal as a potential outcome, she was

given insufficient time to prepare for that meeting and sent no evidence of the allegations against her.

- 21.6 Those are the same matters which we also find to be unlawful detriments under section 47B of the 1996 Act imposed upon the Claimant because she made protected disclosures. The award for injury to feelings in relation to unlawful detriment (see below) encompasses much of the same injury, distress and personal disruption caused to the Claimant by the manner in which she was subjected to an alleged misconduct process. We need not duplicate that award. However the final act of victimisation was to dismiss the Claimant from her job as a result of the seriously flawed process and she is awarded a further £2000 for injury to feelings in this respect.

22 Unlawful Detriment

We award £10,000 at the lower end of the Vento middle band for the injury to feelings caused to the Claimant by the acts and omissions of the Respondent done on the ground that she made protected disclosures. The nature and extent of the unlawful detriments to which she was subjected is described in paragraphs 37-41 of the liability judgment. In summary we are certain that over the period 24 April to 11 May 2020 the Respondent failed to properly investigate both the Claimant's disclosures about covid safety at work and her colleagues' complaints that they were unable to work with her. As a result no informed and balanced view of these matters was formulated or implemented. Instead the Respondent instigated a flawed disciplinary process including a telephone meeting on 24 April 2020 when a verbal warning was issued and it then pre-determined the outcome of the termination meeting on 11 May 2020 with the result that her dismissal was inevitable. The Claimant was misinformed, humiliated and mortified by this treatment.

The specific detriments to which she was subjected are set out in paragraph 9 b,c,d and f of the List of Issues.

23. The total award for injury to feelings which is £14,000 is also uplifted by 20% amounting to a total of £16,800 to which we have applied interest at 8% as calculated above.
24. The grand total payable by the Respondent to the Claimant within 28 days is £20,057.74.

Employment Judge B Elgot
Dated: 16 February 2022