



# EMPLOYMENT TRIBUNALS

## Claimant

**Mr M Barnett**

**Heard at:** London Central

**Before:** Employment Judge A James  
Ms S Campbell  
Mr J Carroll

## Respondent

**Maltwillow Limited**

**On:** 7 February 2022

**v**

## Representation

**For the Claimant:** Mr M Egan, counsel

**For the Respondent:** Mr J Munro, solicitor

# JUDGMENT

- (1) The respondent is to pay to the claimant the sum of £160 free of tax and national insurance to compensate him for the expenses incurred in looking for alternative employment following his dismissal.
- (2) The respondent is to pay to the claimant the agreed sum of £2,274.72 less tax and national insurance, for unauthorised deduction of wages.
- (3) The respondent is to pay to the claimant the sum of £37,883.94 less tax at 20% on the sum of £7,883.94 only (the sum of £30,000 being tax free, since it is classed as a payment made in connection with the termination of the claimant's employment). The said amount is made up as follows:
  - a. £1,050 for failure to provide a written statement of changes to the claimant's particulars of employment (salary);
  - b. £17,000 for injury to feelings;
  - c. £6,000 for aggravated damages;
  - d. £5,792.60 for loss of earnings;
  - e. A total of £1,439.63 for an Acas uplift of 5% on the injury to feelings/aggravated damages award (£1,150) and the loss of earnings award (£289.63);

- f. The sum of £5,024.92 for interest made up of £4,462.92 on the injury to feelings award and £562 on the loss of earnings award;
- g. Tax due to grossing-up in the sum of £1576.79.

(4) The basis for the calculations are set out in the written reasons below.

## REASONS

### The issues

- 1 The issue for the tribunal to decide upon in this case is to determine the amount of compensation due to the claimant, if any, under the following heads of claim:
  - 1.1 Expenses
  - 1.2 Unauthorised deduction of wages
  - 1.3 Wrongful dismissal
  - 1.4 Failure to provide a written statement of changes to the claimant's particulars of employment (salary)
  - 1.5 Injury to feelings
  - 1.6 Aggravated damages
  - 1.7 Loss of earnings following the claimant's dismissal
  - 1.8 Acas Uplift
  - 1.9 Interest
  - 1.10 The grossing up of the award, to the extent that certain elements of it exceed £30,000.

### The remedy hearing

- 2 The liability judgment was finalised on 14 December 2021. Case management orders were made on 20 December 2021 in relation to the remedy hearing. The remedy hearing took place on 7 February 2022, during which the tribunal heard evidence from the claimant, submissions from both representatives, and then retired to make their decision in private. Judgement was reserved.

### Reasonable adjustments

- 3 The same adjustments were applied as at the liability hearing. No further requests were made by the claimant or Mr Egan.

### Relevant legal principles

#### Expenses

- 4 Following a dismissal, a claimant is entitled to reasonable expenses incurred in searching for alternative employment.

Wages

- 5 The amount claimed by the claimant for unauthorised deduction of wages is agreed. Nothing more needs to be said in this section of the judgement.

Wrongful dismissal

- 6 Any compensation payable to the claimant for wrongful dismissal is covered by the award for loss of earnings, dealt with below. Again therefore, nothing more need be said in this section of the judgement.

Failure to provide a written statement of changes

- 7 If the tribunal awards compensation in relation to the Equality Act 2010 or wages claims, the claimant is entitled to a minimum of two and a maximum of four weeks' pay in addition to that other compensation, subject to the statutory cap (S.38(3) Employment Act 2002). Section 38(3) also provides that the minimum amount must be increased, unless there are exceptional circumstances - see section 38(5)).

Injury to feelings

- 8 A claimant who succeed in discrimination claims is entitled to an award for injury to feelings. The well-known Vento v Chief Constable of West Yorkshire Police (No.2) [2002] guidelines (the Vento guidelines) apply to such awards. Those have been updated, on the basis of Presidential Guidance, which confirms that for claims presented on or after 6 April 2019, the Vento bands shall be as follows:

*a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.*

Aggravated damages

- 9 The classic statement as to when aggravated damages are available was made by the Court of Appeal in Alexander v Home Office 1988 ICR 685, where it was held that aggravated damages can be awarded in a discrimination case where the respondents have behaved "in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination".
- 10 Further guidance was provided by Mr Justice Underhill in Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT where he identified three broad categories of case:
- a. Where the manner in which the wrong was committed was particularly upsetting.*
  - b. 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.*
  - c. 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.*

Loss of earnings

- 11 Compensation for discrimination cases is assessed in the same way as any other claim in tort: section 124(6) Equality Act 2010. The aim is to award a sum of money that will put the claimant into the position that he or she would have been in had the wrong not taken place: *Ministry of Defence v Cannock [1994] ICR 918*. In summary, a claimant is entitled to recover loss of earnings compensation arising from a discriminatory dismissal even if the claimant did not have the requisite continuity of service to bring a stand alone unfair dismissal claim. The suggestion to the contrary at paragraph 8 of the skeleton argument submitted on behalf of the respondent to the remedy hearing, is a surprising and incorrect assertion.
- 12 Claimants are under a duty to mitigate their losses following dismissal. Since the respondent does not take any issue about mitigation in this case, nothing more needs to be said in this section of the judgment.

Acas uplift

- 13 Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides the Tribunal with the discretion to make uplifts of awards in relation to certain jurisdictions listed in Schedule A2 by up to 25%, if the tribunal considers that it just and equitable in all of the circumstances to do so. The jurisdictions listed in Schedule A2 includes sections 120 and 127 of the Equality Act 2010 – discrimination at work cases.
- 14 In *Slade v Biggs UKEAT/0296/7 (1.12.21)* the EAT held that the ET was entitled to apply the maximum 25% ACAS uplift to awards of injury to feelings and aggravated damages, because in that case there was no obvious or significant double counting in doing so.
- 15 The EAT went on to state [para 77] that in determining the level of an ACAS uplift the discretion given to Employment Tribunals by statute is very broad, both as to whether there should be an uplift at all and as to the amount of the uplift. The EAT stated that tribunals may choose to apply the following four stage test when considering whether to award an ACAS uplift and, if so, the level of the uplift:
  - a. *Is the case such as to make it just and equitable to award any ACAS uplift?*
  - b. *If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?*
  - c. *Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?*
  - d. *Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made.*

Interest

- 16 Claimants are entitled to interest on discrimination awards and all financial losses arising from discrimination at the rate of 8% per annum pursuant to the

Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803.

- 17 Regulation 6(1)(a) provides that the period of the award of interest on the injury to feelings award starts on the date of the act of discrimination complained of and ends on the day on which the Tribunal calculates the amount of interest – the day of calculation.
- 18 For all other awards, interest is awarded for the period beginning on the ‘mid-point date’ and ending on the day of calculation: Regulation 6(1)(b). The mid-point date is the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the day of calculation: Regulation 4(2).

Taxation

- 19 Injury to feelings and aggravated damages payable in a discriminatory dismissal are now taxable under section 401 Income Tax (Earnings and Pensions) Act 2003 as payments in connection with termination and not excluded from taxation by section 406 following section 406(2) coming into force. In appropriate cases, therefore, tribunals should gross up those awards to take account of the effect of taxation: Slade v Biggs. The same principle applies to an award for loss of earnings.

**Conclusions on remedy**

- 20 Bearing in mind the above legal principles, our conclusions as to the amounts due to the claimant under the various heads of claim set out in the list of issues above are dealt with in turn below. Where it is necessary to do so, we make relevant findings of fact, prior to arriving at our conclusions. In a number of instances, the claimant’s calculations are not disputed, and where that is the case we have said so.

Expenses

- 21 The claimant claims the total figure of £160. That amount is not disputed by the respondent. In the circumstances, **we award the total amount claimed of £160**. Since the amount claimed is for compensation to the claimant for actual expenses incurred, tax is not payable on that sum.

Wages

- 22 The amount claimed by the claimant is **the sum of £2,274.72**, being the amount deducted from his final wage. That is agreed by the respondent. The respondent should deduct tax and national insurance on the amount due.

Wrongful dismissal

- 23 The sums which could potentially have been claimed by the claimant under this head of claim are covered by the award for loss of earnings. No further compensation is therefore payable under this head.

Failure to provide a written statement of changes

- 24 The claimant is entitled as a matter of law to two weeks’ pay, limited to the sum of £525 per week. Since the claimant is also receiving an amount for injury to feelings in relation to this head of claim, the tribunal considers that

this is an exceptional case where no more than two weeks pay should be awarded. **The claimant is therefore entitled to the sum of £1050.**

Injury to feelings

- 25 Before considering the appropriate figure for injury to feelings, the tribunal has reminded itself of the discrimination claims that were upheld by the tribunal. They are, first, the section 15 Equality Act 2010 claim, in relation to the dismissal. Second, five acts of victimisation (although we note that two of those overlap, regarding the deduction from wages). The acts of victimisation are in summary, the first set of disciplinary proceedings, the removal of clients from the claimant's workload, the reneging on an oral contract regarding pay and then deducting his wages, and dismissing the claimant.
- 26 Third, in relation to the reasonable adjustments claims, the tribunal upheld the claimant's claims in relation to the failure to provide a buddy system; the failure to provide screen-reading software; the failure to provide written notification of the meeting on 28 September 2019; the failure to allow additional time to arrange union representation on 10 October 2019; and the failure to allow the claimant to use Siri reading software at the disciplinary investigation and disciplinary hearings on 10 October 2019. Again, we note that the conclusions in relation to the use of Siri/screen reading software are related.
- 27 We have taken into account the contents of the claimant's witness statement to the remedy hearing, setting out the impact of the discriminatory behaviour on him, together with the relevant paragraphs in his witness statement to the liability hearing. We are satisfied that the discrimination had a considerable impact on the claimant, and that he is still affected by the treatment he was subjected to.
- 28 We also note however that the claimant was able to obtain further employment relatively quickly, and has continued in employment since his dismissal. No medical evidence was put before us to suggest that the claimant's health has suffered as a result. Further, the discrimination occurred over a relatively brief period of time (about three months) although that ongoing treatment did end in the claimant's dismissal. We are also confident that the conclusion of these proceedings will provide a sense of closure to the claimant and allow him to move on.
- 29 In these circumstances, **we consider that the appropriate injury to feelings award is the sum of £17,000** i.e. towards the middle of the middle Vento bracket.

Aggravated damages

- 30 Bearing in mind the factors set out in the Shaw case above, the tribunal comes to the following conclusions.
- 31 *Where the manner in which a wrong was committed, was particularly upsetting.* The tribunal concluded, following the liability hearing, that the first set of disciplinary proceedings that were taken against the claimant amounted to an act of victimisation. The respondent singled the claimant out in relation to some of the disciplinary allegations, and set out to build a case against him. An informal meeting took place with the claimant to discuss a number of issues, which the respondent then relied on as a formal investigation hearing,

without having informed the claimant of the investigation meeting beforehand, or provided information to him about the matters that were to be discussed.

- 32 In relation to the second set of disciplinary proceedings, the tribunal concludes that the way that the investigation hearing and disciplinary hearing were conducted by Mr Jukes was high-handed and oppressive. The way Mr Jukes proceeded was unacceptable. Mr Jukes breached the Acas Code of Practice in a number of respects (see below) and the respondent's decision to dismiss, based on those hearings, was in all the circumstances unfounded.
- 33 *Where there was a discriminatory motive.* In relation to the first set of disciplinary proceedings, and the dismissal itself, as well as in relation to the other matters that were found to be acts of victimisation, we conclude that there was indeed a discriminatory motive. That follows from the fact that we have concluded that the claimant was victimised because he had requested reasonable adjustments.
- 34 *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.* The tribunal has found the way that the respondent, via its representatives, have conducted their defence of the claim indicates that it has not taken the claimant's claims seriously. For example:
- 34.1 the suggestion that the claimant is a serial litigant;
  - 34.2 the suggestion that the claimant was exaggerating his disability, a perception which appears to have been shared by some of the claimant's colleagues, and which appears to have been encouraged by senior management.

See the liability judgment for example, at paragraphs 15, 270, 271 and 272.

- 35 The suggestion by the respondent's representative that the injury to feelings award should be limited to £900 in total, further suggests that the respondent still does not take the claim seriously. Such an amount is the minimum amount to be awarded for injury to feelings in a successful discrimination case. The tribunal has upheld the claimant's claims in a number of respects, as outlined above. The minimum award is clearly not appropriate in such a case.
- 36 Taking the above into account, **the tribunal considers that an aggravated damages award should be made, in the sum of £6,000.** That brings the total for injury to feelings, including aggravated damages, to £23,000. We consider that to be a proportionate sum in all of the circumstances. The tribunal is satisfied that that bearing in mind the overall figure, it is not appropriate or necessary to reduce the proposed aggravated damages sum of £6,000.

#### Loss of earnings following the claimant's dismissal

- 37 As noted above, the respondent is not arguing that the claimant has failed to mitigate his loss. The respondent does suggest that the chain of causation was broken, as a result of the claimant finding new employment from 19 November 2019 and then again from 7 September 2020. The tribunal disagrees. Finding a new job, and subsequently, finding better paid employment, were steps taken by the claimant to mitigate his losses, as he

was duty-bound to do. Both steps reduced the potential compensation payable to him by the respondent. Reasonable steps taken to mitigate loss do not break the chain of causation. The tribunal is satisfied that the claimant has taken reasonable steps to mitigate his losses, and is entitled to the compensation claimed in his schedule of loss, which were not challenged. The loss can be broken down as follows.

*17 October to 18 November 2019 inclusive*

- 38 23 days to find new employment 1, £1,882.42 net for continuing loss of wages plus commission £163.44, plus tips £87.40, plus employer pension £99.07 = £2232.43 net.

*19 November 2019 to 5 September 2020*

- 39 Further losses following increase in pay - £2512.56 net for continuing loss of wages plus pension £132.24 = £2644.80.
- 40 The claimant was on furlough and therefore received 20% less pay during the period 23 March to 6 June 2020, say 2.5 months of a total period of 9.5 months, or 26% of the period.
- 41  $26\% \times 80\%$  of 2644.80 = £549.97.  $74\%$  of 100% of 2644.80 = 1,957.15. Total for the period, taking into account the time spent on furlough = £2,507.12.

*7 September 2020 to 31 April 2021*

- 42 The ongoing loss of wages claimed is £1,108.03 net plus pension of £54.28 - = £1162.31
- 43 The claimant was on furlough and therefore received 20% less pay during the period, 19 December to 11 April 2021. The total period is 7.8 months, during which the claimant was on furlough for 3.7 months, 47% of the time.
- 44  $47\%$  of £1162.31  $\times 80\%$  = £437.03;  $53\%$  of £1162.31 = £616.02. Total for the period, taking into account the time spent on furlough = £1053.05.
- 45 **Total amount due to the claimant for loss of wages until 4 April 2021 when his wage exceeded that payable in his previous job = £5,792.60.**

Acas Uplift

- 46 The specific breaches of the Acas Code relied on by the claimant are as follows:
- 46.1 Paragraph 6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing
  - 46.2 Paragraph 12. 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.
  - 46.3 Paragraph 16. When the companion will not be available at the time proposed for the hearing by the employer the employer must postpone the hearing.
- 47 The tribunal notes that these specific breaches relate mainly to the dismissal process. The tribunal considers that it is just and equitable to award an uplift,



but is conscious of the fact that there will be some overlap with the injury to feelings award. Bearing all of that in mind, the Tribunal concludes that the appropriate uplift in this case is 5%. The tribunal is satisfied, applying a final sense check, that the sum of money represented by the application of a percentage uplift of 5% is proportionate in absolute terms.

- 48 The tribunal concludes that the uplift should be applied to the injury to feelings and aggravated damages award; 5% of £23,000 = £1150.
- 49 The tribunal also concludes that the 5% uplift should be applied to the compensation for loss of earnings; 5% of £5792.6 = £289.63.
- 50 **The total Acas uplift therefore amounts to £1439.63.**

#### Interest

- 51 The tribunal concludes that interest should be awarded on the injury to feelings and aggravated damages award, and the loss of earnings award, in both cases, including the uplift.
- 52 Taking a broad brush approach, the tribunal considers that interest should run from the date of the dismissal. Whilst there were some acts of discrimination before then, they were over a relatively short period beforehand, compared to the period since then.
- 53 The injury to feelings/aggravated damages award plus the uplift = £24,150. Interest is payable from 16 October 2019 to 7 February 2022. That is a period of 2.31 years (2 years plus 15 days, 30 days, 31 days, 31 days and 7 days = 114 days or 0.31 years).
- 54  $8\% \text{ interest} \times 24,150 \times 2.31 = £4,462.92$  interest on the injury to feelings etc award.
- 55 For loss of wages, the tribunal applies interest of half of 8% for the period of 2.31 years. The total loss of wages including the uplift = £6,082.23.
- 56  $£6,082.23 \times 4\% \times 2.31 = £562$
- 57 **The total interest due therefore amounts to £4,462.92 plus £562 = £5,024.92**

#### Grossing-up

- 58 Certain elements of the award need to be grossed up, to the extent that they exceed £30,000. The tribunal has concluded that no deduction should be made in relation to the amount awarded for expenses, and the amount awarded for unauthorised deduction of wages is a gross amount, subject to tax and national insurance deductions in any event. They are therefore excluded from the total amount to be used for calculating the amount of grossing up due to the claimant, if any. The rest of the award totals £36,307.15. That exceeds the tax free sum by £6,307.15.
- 59 This sum falls to be taxed in the tax year 2021/2022. The claimant provided during the hearing a payslip for February 2022 showing that his gross pay in the year to date is £31,380. To the end of the year, it is assumed that the claimant will receive another two months' pay at 3138 per calendar month, which equals £6,276. That gives a total of £37,656, during the year. Adding the sum of £6307.15 to that amount, (plus if necessary sum due for

unauthorised deduction of wages) is still under the threshold at which higher rate tax is to be paid, of £50,270.

- 60 The sum of £6,307.15 therefore needs to be grossed up, so that the claimant receives that amount as a net sum after tax being deducted at 20%. £6,307.15 divided by 80% = £7883.94.
- 61 **The amount to be added in relation to the grossing up calculation therefore amounts to £1576.79.**

### **Costs**

- 62 At the conclusion of the hearing, Mr Egan indicated the claimant's intention to make an application for costs. A provisional date has been set for a hearing to determine that issue, and separate case management orders have been made in relation to it.

Employment Judge A James  
London Central Region

Dated 18 February 2022

Sent to the parties on:

21/02/2022.

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For the Tribunals Office

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