EMPLOYMENT TRIBUNALS

Claimant: Ms Olga Antonova

Respondent: HF Trust Ltd t/a HFT

Heard at: Birmingham (via CVP)

On: 1 December 2021 and 2 February 2022 (deliberations in chambers)

Before: Employment Judge Meichen, Mr C Greatorex, Mr R White

Appearances:
For the claimant: in person, with the assistance of a Russian interpreter as needed
For the respondents: Mr C Adjei, counsel

JUDGMENT ON REMEDY

1) The respondent is ordered to pay the claimant the following subject to the recoupment provisions:

   a. Notice pay of £1541.54.

      (7 x £220.22).

   b. A basic award of £1115.29.

      (£1593.27 – 30% deduction for contributory conduct).

   c. A compensatory award of £3376.25.

      (27 x 274.91 loss of pay

      + 27 x 6.83 loss of pension

      = £7606.98 before deductions and uplift

      Deduction of the claimant's earnings from temporary employment – £716.68 = £6890.30

      30% deduction for percentage chance that the claimant could have been fairly dismissed = £4823.21

      30% deduction for contributory conduct = £3376.25)

d. £350 for loss of statutory rights.

e. £7618.42 compensation for injury to feelings

(£5500

+ interest at 8% from 16 July 2019 to 2 February 2022

933 days x 0.08 x 1/365 x 5,500 = £1124.71

+ 15% uplift)

2. The grand total to be paid by the respondent to the claimant, subject to the recoupment provisions, is £14001.50.

3. The Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349, apply. In accordance with those Regulations: (a) the total monetary award made to the claimant is £14001.50; (b) the amount of the prescribed element is £3376.25; (c) the dates of the period to which the prescribed element is attributable are 25 November 2019 to 2 February 2022; (d) the amount by which the monetary award exceeds the prescribed element is £10626.25.

REASONS

Introduction

1. This hearing was to consider the remedy issues arising from the Tribunal's liability judgment dated 19 April 2021. By that judgment the Tribunal upheld the claimant's claims of unfair dismissal, wrongful dismissal and detriment on the ground of a protected disclosure when the claimant was mistreated at a meeting on 16 July 2019. All other claims were dismissed.

2. The Tribunal also made the following decisions:

2.1 The claimant contributed to her dismissal by her blameworthy conduct and there shall be a 30% deduction to the basic and compensatory awards to reflect that.

2.2 There was a percentage chance that the claimant could have been fairly dismissed and a further 30% deduction to the claimant's compensatory award will be made to reflect that.

3. There was no appeal or reconsideration of our judgment and therefore our decisions remain.

4. The claimant gave evidence at the remedy hearing and was cross examined. She did not call any other witnesses. The respondent did not call any witnesses.

5. We were provided with a remedy hearing bundle numbering 504 pages to which a few documents were added by consent.

6. As at the liability hearing the claimant called on the assistance of the interpreter as and when required. Mr Adjei did not object to this approach and we agreed to it. The claimant requested the assistance of the interpreter on a few occasions throughout the hearing.

7. The hearing took a full day and we therefore reserved our decision. We were not able to find a day for us to complete our deliberations until 2 February. That explains the delay in producing this judgment.

8. Following directions issued with our liability judgment the parties had helpfully prepared a list of issues for us to determine. We therefore present our findings on each of the issues which we were asked to determine.

Wrongful dismissal

9. We have to decide what sum should be awarded to the claimant for her notice period. It was agreed that the claimant is entitled to 7 weeks' notice.

10. The claimant contends the sum should be £1,975 and the respondent contends the sum should be £1,541.54.

11. The reason for the difference is a disagreement as to what the claimant's net weekly pay is – the claimant contends it is £282.24 and the respondent contends it is £220.22.

12. The claimant is entitled to her normal pay based on her normal working hours during her notice period.

13. At the time of her dismissal the claimant was contracted to work 25 hours per week. We agree with the respondent that the claimant's payslips from May to September 2019 clearly show the claimant's monthly gross salary based on her normal working hours was £986.32. The claimant received additional payments based on overtime but these did not form part of her normal pay. Overtime was not guaranteed or compulsory and was not part of the claimant's normal working hours.

14. The claimant's monthly salary equated to gross weekly pay of £227.61 and net weekly pay of £220.22 in the relevant tax year. Damages for wrongful dismissal should be awarded as net pay.

15. We therefore agree with the respondent that the correct figure to award the claimant for her notice pay is £1541.54.

Unfair dismissal

Basic award

16. The claimant contends that the amount of the basic award is £2,469.67 and the respondent contends it is £1,113.00.

17. It is agreed that the basic award should be based on an award of 7 weeks gross pay.

18. The first reason for the difference between the parties is a disagreement about what is a week's pay – the claimant contends it is £282.24 and the respondent contends it is £227.00.

19. The concept of a week's pay for the purpose of the basic award is defined by s. 220 to 229 Employment Rights Act 1996. In short a week's pay is the gross contractual remuneration an employee is to entitled to be paid when working their normal hours each week. As we have already explained the claimant's normal working hours were 25 per week and her gross monthly pay for working those hours was £986.32 (making gross weekly pay of £227.61). The claimant received additional payments based on overtime but these did not form part of her normal pay. Overtime was not guaranteed or compulsory and was not part of the claimant's normal working hours.

20. The basic award should therefore be based on an award of £1593.27 (7 x 227.61).

21. The second reason for the difference between the parties is because the claimant contends that there should be no deduction for contributory fault and the respondent contends that a deduction of 30% for contributory fault should be applied because this is what the Tribunal decided in its liability judgment.

22. The respondent is correct. There has been no appeal or reconsideration. There is no basis for us to go behind the decision we made in our liability judgment. We shall make the deduction for contributory fault because that is what we have already decided.

Compensatory award – period of loss

23. There is a dispute over the period of time for which an award should be made. The claimant contends that the period of loss should be until September 2021 (23 months) and the respondent contends that the period of loss should be until 31st May 2020 (34 weeks).

24. Section 123 Employment Rights Act 1996 provides that the compensatory award shall be: *'…such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer'.*

25. The compensation should be awarded to *'compensate and compensate fully, but not to award a bonus'* according to Sir John Donaldson in Norton Tool Co Ltd v Tewson [1973] All ER 183. This reflects the fundamental point that the object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed - it is not designed to punish the employer for their wrongdoing. Correspondingly, the employer's liability should cease if the employee has (or ought to have) got a new permanent job paying at least as much as the old job as there will no longer be a loss arising from the dismissal.

26. Following a brief period working in retail the claimant obtained a new job as a carer with Spinal Healthcare Services. By June 2020 her payslips show that she was earning more on a monthly basis with Spinal than she had been

earning with the respondent. On a couple of occasions her monthly earnings with Spinal dropped but on the whole she was earning at least as much as she earned with the respondent. We therefore think the respondent's liability should cease from the end of May 2021.

27. The claimant argued that her job with Spinal was less desirable than the work she had been doing with the respondent, essentially because it was a live in role and required travel. This does not affect our analysis under s.123. The claimant had chosen to take the job and the consequence of doing so was that by June 2020 she earned more money than she had been earning with the respondent. She therefore extinguished any ongoing loss and it would not be just and equitable in our judgement to compensate the claimant further. It is our view that to do so would amount to awarding the claimant a bonus.

28. In any event the respondent had shown that the claimant could have applied for jobs in the care sector closer to home. Had she chosen to do so the claimant could have mitigated her loss in this way. We accepted that the claimant should have mitigated her loss by the end of May 2020 by applying for care jobs closer to home. We would not therefore have compensated the claimant past this point even if we disregarded the claimant's job with Spinal.

29. We shall therefore compensate the claimant up until 31 May 2020. This would be 34 weeks from the date of dismissal. However the claimant has already been awarded 7 weeks' pay in respect of the wrongful dismissal claim. The compensatory award shall therefore start from 7 weeks post dismissal, otherwise the claimant would be compensated twice for the same loss. Again this would amount to a bonus; it would not be just and equitable or in accordance with s. 123. Accordingly the claimant is entitled to 27 weeks loss.

Compensatory award – net weekly loss of pay

30. There was also a dispute between the parties over the claimant's net weekly loss of pay. For the purpose of the compensatory award our assessment should be based on the actual net value of the claimant's pay and benefits. The claimant contends that it is £445.49 and the respondent contends it is £274.91.

31. The claimant's figure was based on net monthly pay of £1,930.48. One of her payslips from the respondent (July 2019) showed that she earned this figure. However that payslip was very much an outlier. It was not typical or representative. We therefore think it would be wrong to take that as demonstrating the actual net value of the claimant's pay and benefits.

32. The respondent based its figure on the claimant's payslips for May and June 2019 (£1104.66 and £1277.90 net). The respondent submitted these were fair representative examples of the actual net value of the claimant's pay and benefits. After having reviewed all the payslips before us, we agree.

33. Working from those figures gives a yearly net value of the claimant's pay and benefits of £14295.36 and a weekly net value of £274.91.

34. We therefore agree with the respondent that the compensatory award should be based on net weekly loss of pay at £274.91 per week

Pension loss

35. The parties agreed that the claimant's pension was based on 3% employer contribution.

36. We decided that the claimant's pension loss should be determined on the basis of her lost employer contributions. We considered this was a paradigm case where this approach should be used. The period of loss is relatively short, the statutory cap applies and there are significant reductions for Polkey and contributory conduct.

37. The respondent's contribution was based on the claimant's normal pay. Based on the claimant's pay for normal working hours the respondent contributed £6.83 per week to her pension.

Compensatory award – deductions

38. The claimant suggested that "statutory payments" for 3 months should be deducted. However, if the claimant received JSA or income-related ESA any such sums should not be deducted but are subject to recoupment.

39. There was a disagreement over what sums should be deducted in respect of sums earned in alternative employment. The claimant accepted that £305.83 should be deducted representing her earnings from Polyphil (Evesham) Ltd. We agree with the respondent that a further sum of £410.85 should be deducted representing the claimant's earning from Spinal Homecare Services up until 31 May 2020 (this figure is confirmed in the claimant's payslip form Spinal in April 2020).

40. Contrary to the suggestion of the claimant our decision that the compensatory award should be reduced to reflect the chance that the claimant would have been fairly dismissed in any event stands.

41. Similarly, the claimant contends that there should not be a reduction to the compensatory award for contributory conduct and the respondent contends that there should be a reduction of 30% because this is what the Tribunal decided in its liability judgment.

42. The respondent is correct. There has been no appeal or reconsideration. There is no basis for us to go behind the decisions we made in our liability judgment.

Breach of the ACAS code

43. The claimant's contended that it would it be just and equitable to increase her award by reason of an unreasonable failure by the respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

44. An award of compensation may be increased by up to 25%, if the employer has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes. Section 207(A) TULRC(A) 1992 provides as follows:

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
(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%.

45. The relevant code of practice is ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). Al of the claims which we upheld are contained within Schedule A2.

46. The claimant did not rely on a breach of the Code relating to disciplinary procedures. This was the right choice because although we found the dismissal to be unfair the basic steps set out in the Code were complied with. Instead, the claimant relied upon a breach of the Code relating to grievance procedures. In her "short statement" submitted for the remedy hearing the claimant made it clear that she relied on the Tribunal's findings relating to the respondent's failures to deal with her grievance of 25 July 2019.

47. On behalf of the respondent Mr Adjei did not dispute that the claimant had raised a grievance in writing on 25 July 2019. Accordingly, the Code relating to grievance procedures was engaged.

48. We first have to consider whether any of the claims we upheld concern a matter to which the Code relating to grievance procedures applies. The dismissal claims did not concern a matter to which the Code relating to grievance procedures applied. The disciplinary process was initiated before the claimant raised her grievance and the grievance had no connection to the disciplinary. However the detriment claim did concern a matter to which the Code relating to grievance procedures applied. In her grievance the claimant set out a detailed complaint about Mr Parry's mistreatment of her at the meeting on 16 July. As we noted in our liability judgment this was a complaint of genuine substance and it concerned the detriment which we ultimately upheld.

49. In view of the points relied upon by the claimant concerning the respondent's alleged failure to comply and Mr Adjei's response to those points paragraphs 33, 34 and 40 of the Code are relevant. They provide as follows:

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

34. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance

and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.

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."

50. The claimant relied upon the findings we made in the liability judgment covering the respondent's failure to respond adequately to her grievance of 25 July, including not setting up a grievance hearing until after dismissal and the delay in producing a grievance outcome. The claimant requested an uplift of 40%, but the maximum possible uplift is 25%.

51. Mr Adjei relied on the fact that the respondent had attempted to arrange a grievance hearing on 1 November 2019, but the claimant had not attended or responded to attempts made to contact her. He referred to the grievance outcome letter dated 12 March 2020 which contained findings on the grievance and described attempts to contact the claimant after her dismissal in October 2019. As a result, Mr Adjei argued that no increase should be made or it should be less than the maximum 25%.

52. The relevant events are as follows:

48.1 The claimant raised her grievance in writing on 25 July 2019. She complained about the conduct of Mr Parry in the meeting of 16 July, and also raised concerns about potential race discrimination.

48.2 The claimant raised concerns about her complaint not being responded to on 12 August.

48.3 By 22 September the claimant had still not heard anything about her complaint and she indicated that she was formally raising a grievance.

48.4 On 2 October the claimant reiterated that she had not any response to her grievance.

48.5 The claimant was dismissed on 7 October 2019.

48.6 Sarah Cast was appointed to hear the grievance on 10 October 2019.

48.7 The respondent organised a grievance hearing to take place on 1 November 2019 and they wrote to the claimant confirming that the hearing would be heard on that date on 30 October. The respondent also attempted to phone the claimant on 31 October. The claimant did not attend the grievance hearing on that date and it did not take place.

48.8 A grievance outcome was sent to the claimant on 12 March 2020. In the outcome Ms Cast described attempting to contact the claimant between 14 October and 1 November. The outcome letter does not explain why the hearing did not take place in the claimant's absence on 1 November 2019 nor why it had then then taken until 12 March 2020 for an outcome to be sent to the claimant. Ms Cast did not suggest that she had

attempted to contact the claimant at any stage between 1 November 2019 and 12 March 2020. It is unclear if a grievance hearing actually took place in the claimant's absence in March 2020 or exactly what was done to enable Ms Cast to produce an outcome in March 2020.

48.9 The claimant was not given a right of appeal against Ms Cast's decision.

53. In our liability judgment we recorded our view that it was highly unfortunate and unsatisfactory that the respondent did not arrange a grievance hearing prior to the claimant's dismissal. We remain of that view. We were not, and are not, critical of the claimant for not attending the meeting on 1 November when the respondent had failed to arrange a meeting prior to her dismissal. Further, we remain of the view that the sudden and unexplained delivery of the grievance outcome in March 2020 5 months after the claimant's dismissal and 8 months after her grievance does not show the respondent in a favourable light.

54. We agree with the claimant that the respondent has unreasonably failed to comply with the Code. In particular:

51.1 The respondent unreasonably delayed arranging a formal meeting between 25 July and 1 November 2019. This delay was particularly unreasonable given the efforts the claimant had made to progress her grievance and the fact that the respondent waited until after the claimant had been dismissed to start trying to arrange a meeting.

51.2 The respondent unreasonably delayed the grievance outcome until 12 March 2020 and failed to provide a right of appeal.

55. These were serious failures. Against that however we took into account that the respondent had made attempts to contact the claimant and comply with the code, albeit belatedly. Further it had in the end produced a reasoned grievance outcome which suggested there had been some investigation into the claimant's grievance. Although we were not critical of the claimant for not attending the meeting on 1 November it was still a fact that she did not attend and this is likely to have contributed to the delay in resolving matters. In all the circumstances we decided that it was just and equitable to increase the claimant's award by 15%. In light of our finding as to the claim to which the Code relating to grievance procedures applies this uplift shall apply to the injury to feelings award only.

Loss of statutory rights

56. The parties disagreed over what sum should be awarded for loss of statutory rights. The claimant contends that she should be awarded £350 and the respondent contends the sum should be £300. Mr Adjei left the matter to our discretion rather than making submissions. We agree with the claimant.

Detriment because of protected disclosure

Injury to feelings

57. It was agreed between the parties that the claimant should be awarded a sum for injury to feelings in respect of the upheld detriment claim. We agree. The claimant contends that a sum of £44,000 should be awarded and the respondent contends that a sum of £3,950 should be awarded.

58. Given the difference between the parties' positions we remind ourselves of the principles to be applied. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment she has received. It is compensatory, not punitive. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (see Komeng v Creative Support Ltd UKEAT/0275/18/JOJ).

59. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102).

60. In Vento the Court of Appeal identified three broad bands of compensation for injury to feelings. The claimant's proposed figure was at the very top of the top band. We do not agree that this is the correct band. The guidance in Vento makes clear that the top band applies in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. We do not consider that this case can be said to fall into that category.

61. The reality of this case was that we upheld only one allegation of detriment. The allegation related to the conduct of one meeting only. It was a one off incident limited to events at that meeting. We therefore consider that the appropriate band is the lower band. This does not mean that we consider the detriment to be insignificant. On the contrary as Mr Adjei rightly acknowledged we made trenchant findings about the conduct of Mr Parry. However when we reviewed our findings we considered there was an absence of factors which might justify an award in the middle category of Vento. We noted in particular that there was nothing wrong in principle with Mr Parry meeting with the claimant for the purpose which he did and Mr Parry had initially acted appropriately by arranging a note taker at the meeting. Our impression remained that this was a meeting which had spiralled out of control – mainly following Mr Parry making the significant mistake of continuing the meeting after the departure of the notetaker - rather than Mr Parry acting out of malice on a premeditated basis.

62. We have already made clear that we remain of the view that the claimant has not substantiated her allegation that she suffered ill health as a result of her treatment, which required hospitalisation and ongoing specialist treatment. We did not, and do not, find that she suffered ill health to that extent. We have accepted however that the claimant was upset by Mr Parry's conduct of the meeting to the point of becoming stressed and anxious. Taking this into account we concluded that the respondent's suggestion for injury to feelings was too low and the figure should be higher in the lower band. In light of the above we decided that the figure should be £5500.

63. We noted that in her schedule of loss the claimant claimed for a separate award for "emotional distress". There is no basis for us to make a separate award for this on top of an injury to feelings award. In our judgement the claimant will be properly compensated for the distress she experienced through the injury to feelings award.

64. We should also mention that we took into account the case reports which Mr Adjei referred to. Although these were broadly relevant we think the assessment of injury to feelings is quintessentially a question which turns on the individual facts of a case and so we have focused on those.

65. The respondent accepted that 8% interest should be awarded from the date of the incident (16 July 2019). We agree. The respondent had suggested that interest should be awarded to the date of the remedy hearing (2 December 2021). This would have been correct had we had time to calculate figures on the day of the remedy hearing. In the event we did not do so until the deliberations day on 2 February 2022. We shall therefore award interest to that date. We do not think this award of interest causes any injustice.

Aggravated damages

66. The claimant contends that a sum of £44,000 should be awarded for aggravated damages and the respondent contends that no award for aggravated damages should be made.

67. Aggravated damages are an aspect of injury to feelings, and are awarded only on the basis, and to the extent that aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury to feelings. They are compensatory, not punitive.

68. The leading case on aggravated damages is Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT. There are three recognised category of case where aggravated damages may be awarded:

    63.1 Where the act is done in an exceptionally upsetting way. In Shaw the phrase cited was 'high-handed, malicious, insulting or oppressive' behaviour.

    63.2 Motive: discriminatory conduct that is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is likely to cause more distress than if done without such a motive – for example as a result of ignorance or insensitivity. The claimant has to be aware of the motive in question

    63.3 Subsequent conduct: for example, conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness.

69. We do not consider that there is any basis to award aggravated damages in this case. In our judgement this case does not fall within any of the recognised categories where aggravated damages may be awarded:

64.1 The act was not done in an exceptionally upsetting way and could not be described using the phrase cited in Shaw.

64.2 The act was not done for a motive based on prejudice or animosity. It was not spiteful or vindictive or intended to wound.

64.3 In our view there was nothing in the subsequent conduct of the respondent which could justify an award of aggravated damages.

70. We were satisfied that an award of injury to feelings at the level we have identified is sufficient to compensate the claimant for the totality of the suffering caused. Any further award would in our view be disproportionate.

71. We will therefore make no award for aggravated damages.

Personal injury

72. The claimant contends that an award of £250,000 for personal injury should be awarded and the respondent contends that no award should be made because the Tribunal decided in its liability judgment that the claimant had not sustained any personal injury as a result of the detrimental treatment she suffered because of her protected disclosure.

73. The respondent is correct, and in any event it remains our view that the claimant has not substantiated the assertion that she suffered personal injury because of the detriment we upheld. There is a complete lack of medical or other cogent evidence to that effect. We do not accept the claimant's assertion.

74. We will therefore make no award for personal injury.

Further compensation claimed by the claimant

75. The claimant claimed compensation in the total sum of £22,789.79 for losses in respect of the following items:

73.1 Court preparation

73.2 University fee

73.3 Glasses, eye check up

73.4 Bank fee

73.5 NHS prescription

73.6 NHS future prescription

73.7 Travel to hospital

76. The respondent contended that no compensation should be awarded for these items.

77. We agree with the respondent. There is no basis for us to award compensation for these items in accordance with s.123 Employment Rights Act 1996. They could not be said to be losses in consequence of the dismissal or attributable to action taken by the respondent. Further:

75.1 The Tribunal only has the power to make a costs or preparation time order where it considers that the circumstances identified in Rule 76 of the Tribunal's rules of procedure apply. We did not consider that any of the circumstances in Rule 76 apply here.

75.2 We consider that the award of compensation we make for the claimant's loss of earnings is just and equitable and it would not be just and equitable to award compensation any further because the claimant has been fully compensated for the loss caused by her unfair dismissal.

75.3 We have already found (paragraph 236 of the liability judgment) that the claimant has not substantiated her assertion that she suffered ill health requiring hospitalisation and specialist treatment because of her treatment at the meeting on 16 March. We stand by that finding.

75.4 In our judgement through the awards we have made the claimant has been put in the position she would have been in had the detriment not occurred. We were not satisfied that any of the further losses claimed by the claimant could be said to have flowed directly from the detriment we upheld.

78. Finally, we noted that the claimant's schedule of loss attempted to claim 187.5 hours of holiday pay however the claimant's claim for holiday pay has been dismissed following a withdrawal of that claim by the claimant. There is therefore no basis on which we could make an award for holiday pay.

Employment Judge Meichen

25 February 2022