EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr P Marzejan	v	Brown Sugar Bakery Limited (in voluntary liquidation) (1) Mr G Dabliz (2)

Heard at: Reading **On:** 6, 7 and 8 December 2021

Before: Employment Judge Hawksworth
Members: Mr P English
Ms C Whitehouse

Appearances
For the claimant: Mr L Werenski (counsel)
For the respondents: the second respondent in person
Polish interpreters: Ms E Syta (6 December 2021)
Ms M Dzulik (7 December 2021)
Mr R Rozycki (8 December 2021)

JUDGMENT was sent to the parties on 8 January 2022. Written reasons for the judgment were requested by the second respondent on 14 January 2022 in accordance with rule 62(3) of the Employment Tribunal Rules of Procedure 2013. The reasons for the judgment are set out below.

REASONS

Claim and response

1. The claimant brought his claim on 31 October 2019 after early conciliation from 29 October to 30 October 2019. He claimed direct race discrimination and harassment.

2. The respondents submitted their ET3 on 5 December 2019. The respondents defended the claim. At the time of the hearing the first respondent was in creditors' voluntary liquidation, and bankruptcy proceedings had been started against the second respondent but no bankruptcy order made.

Hearing and evidence

3. The hearing took place in person at Reading employment tribunal on 6, 7 and 8 December 2021.

4. There was an agreed bundle with 155 pages (hard copy pagination). Page references in these reasons are references to page numbers in the hard copy bundle.

5. The hearing was interpreted in full for the claimant and his witness. We are very grateful to the three interpreters, they assisted us considerably with the conduct of the hearing.

6. On the first day of the hearing, after reading the witness statements, we heard evidence from Mr Dabliz, the second respondent, and his witness Ms Raszewska. At the judge's suggestion the parties agreed that we would start with the respondent's evidence, firstly because of witness availability and also because Mr Dabliz was not represented, and this order of witnesses would give him the opportunity to be questioned (and get a feel for how questions are put and so on) before having to conduct questioning of other witnesses himself. On the second day of the hearing we heard from the claimant and his witness Ms Klein. We heard closing comments from the claimant's representative and from Mr Dabliz. We then took some time for deliberation.

7. We gave judgment and reasons on 8 December 2021. We decided unanimously that the claims for harassment and direct discrimination succeeded, except for one of the complaints of harassment (issue 4c in the list of issues). The employment judge gave reasons at the hearing. She explained the tribunal's findings of fact and the conclusions reached on each of the issues, including a short summary of the relevant legal principles.

8. We then heard further comments on remedy from the claimant's representative and Mr Dabliz. After time for deliberation, we gave our judgment on remedy and explained our reasons.

9. The judgment was dated 9 December 2021 and sent to the parties on 8 January 2022. The second respondent Mr Dabliz has requested written reasons.

Issues for us to decide

10. The respondents had legal representation at an earlier stage in proceedings, and their counsel prepared a draft list of issues dated 28 September 2020. This list was agreed by the claimant's representative at the hearing before us, subject to two points:

    10.1 The reference to disability discrimination in the heading after paragraph 7 was accepted as being a typing error, and was meant to refer to race discrimination;

10.2 The only allegation of direct race discrimination is the dismissal (issue 8a). Issues 8b to 8e, which relate to the claimant's grievance, are relevant to remedy but are not themselves allegations of direct race discrimination.

11. A copy of the agreed list of issues for us to determine is attached in an appendix.

Findings of facts

12. This section explains our findings of fact, that is our decision about what happened. To make findings of fact we consider the evidence we have heard and the documents we have read, and we decide what we think is most likely to have happened. That is described as deciding what happened 'on the balance of probabilities', and that is the approach we take to fact finding.

Introduction

13. The claimant is Polish. He started working for the first respondent, a bakery owned by the second respondent, on 8 July 2019. His employment ended when he was dismissed with a week's notice on 11 October 2019. The first respondent is now in creditors' voluntary liquidation. Bankruptcy proceedings have been started against the second respondent but no bankruptcy order has been made.

14. Almost everyone who worked for the first respondent was Polish other than the second respondent, his family members, and a few others. Mr Dabliz told us, and we accept, that around 95% of staff were Polish.

15. The claimant started on a months' probation at grade 3. On 1 August 2019, at the end of his probation, he was promoted to grade 4 Bakery Assistant. The letter confirming his promotion said that both Monika Raszewska (the bakery assistant manager) and another manager were very impressed. We note that the claimant passed his probation in less than a full month after his start date. Not everyone passes their probation, and even staff who do pass their probation are not automatically promoted. We find that it is clear from these facts that there were no concerns about the claimant's performance at this stage.

16. On 4 September 2019 there was an across the board pay rise for all staff.

17. The claimant said that after this he was told he would be given another promotion. The respondents denied this. The claimant said he was shown a letter that said he was being promoted, but there was a mistake with the paperwork as it said he was being promoted to grade 4. As he was already at grade 4, a promotion would have been to grade 5. He said that the letter offering him promotion was taken away and no other letter given to him. There were no documents before us about this. We find that there may have been some discussion about another promotion but that the claimant was not in fact promoted to grade 5.

Weekend working

18. The respondents expected their employees to work occasional weekends. This was not expressly set out in the claimant's offer of employment or his contract. We find that the claimant told Ms Raszewska at an early stage of his employment that he could not work weekends because of family responsibilities. We reach this finding because the claimant was not asked to work weekends for almost three months after he joined the respondents, and this suggests that they knew from an early stage that they could not put the claimant on the rota to work weekends.

19. In early October 2019 Ms Raszewska asked the claimant to work a Sunday as cover on short notice. He said he could not do this because of his family responsibilities. He sent a text on 3 October 2019 which said, "I am telling you straight I am not going to work on Sunday so take me out of the rota." Ms Raszewska spoke to Mr Dabliz about this and they decided to keep the situation under review.

Safety shoes

20. There was also an issue with the claimant's safety shoes. Another employee wore the claimant's shoes accidentally, and the claimant did not want to wear them after this. The replacement pair that was ordered for the claimant were white and, despite being labelled with the right size, they were too small for the claimant, perhaps because they were women's safety shoes as these are more normally white. A second replacement pair was ordered which were black, the colour which was more normally used for men's safety shoes. The second replacement pair fitted the claimant and he wore them.

21. We find that there were issues with the claimant's safety shoes, but this was because of sizing problems. The claimant was not being awkward about this, and he did not refuse to wear safety shoes.

The claimant's duties

22. The respondent said the claimant worked mainly on ciabatta and was reluctant to train on new bakery products. The claimant said it was the second respondent's decision to keep him mainly on ciabatta.

23. We find that the claimant was not reluctant to train on new bakery products. We reach this finding for the following reasons. First, the claimant had experience of making a large number of different types of bread from his previous work. Secondly, his CV showed that he was an adaptable person who turned his hand to working in different industries. Finally, learning different skills within the respondent's bakery was the way workers progressed up the pay scale. The claimant was the only breadwinner in his family and the money he earned was important for him. With those facts in mind, we think it is much more likely that he would have been keen to develop his skills within the bakery, to increase his chance of promotion and a pay rise, than that he would have been reluctant to train on new products.

The incident on 11 October 2019

24. On 11 October 2019 there was an incident in the bakery. The claimant was working from 6.00am to 2.00pm. There was no ciabatta being baked that day.

25. Mr Dabliz was working near the claimant. Mr Dabliz tapped the claimant on the shoulder and asked him to follow him. They left the production area and went to a small room used for washing baking trays. Another employee, Katarzyna Klein, was already there. She was relatively new, having only joined the bakery on 23 September 2019.

26. Mr Dabliz asked the claimant and Ms Klein to clean the trays, and showed them how to do it in the sink. The claimant and Ms Klein cleaned the trays by taking them outside to scrape the dried dough off, before cleaning them in the sink. While they did so, Mr Dabliz initially stayed with them and asked them to hurry up, by saying, “Push up” or something like that. Mr Dabliz then left the room. He came back later to inspect the work. He was not happy. He did not think that the trays were clean.

27. There was then a heated discussion between the claimant and Mr Dabliz. There was a dispute between the parties about the incident, about what was said during the heated discussion, and about Mr Dabliz’s behaviour. We set out both parties’ accounts of what happened, and then explain our findings.

28. The claimant said that Mr Dabliz was in a bad mood from the start of the day and that when he first asked the claimant to follow him, Mr Dabliz muttered, ‘Fucking Polish’ under his breath. The claimant said that when Mr Dabliz showed him how to clean the trays, he did so in a patronising voice and with an aggressive manner. The claimant said that when Mr Dabliz came back to inspect the trays, he said they looked like shit. The claimant said that he told Mr Dabliz that the trays were clean and that Mr Dabliz replied, ‘You fucking Polish idiot’ and ‘You fucking Polish moron’, and then continued to spit out the words, ‘Fucking Polish’. The claimant says that Mr Dabliz became angry and, gesturing, told the claimant, ‘Get the fuck out if you won’t do what I say’. Finally, the claimant says that Mr Dabliz began cleaning the remaining trays angrily using the scraper as the claimant had done.

29. Mr Dabliz’s account of this incident is that he did not swear at the claimant either when on the way to the cleaning room or while in the room, and that he was not patronising or aggressive when explaining the cleaning of the trays. Mr Dabliz says that when he returned to the room to check on progress, only a few trays had been cleaned and those had been scraped but not washed. Mr Dabliz says he told the claimant and Ms Klein that this was unacceptable, and the claimant replied that he was a baker not a cleaner. The second respondent denies swearing at the claimant or saying anything about his nationality.

30. We have considered this factual dispute very carefully. It is the heart of the dispute between the parties. We have to decide what we think is most likely

to have happened. We have decided that the claimant's account is most likely, for the following reasons.

31. First, and importantly, the claimant's account was supported by Ms Klein. She was present throughout the incident in the wash-up room. She was not a close friend of the claimant (as the respondents suggested) as she had only met him when she started working in the bakery three weeks before the incident. Ms Klein's evidence to us was clear and was consistent with the claimant's account.

32. Secondly, the claimant set out his account of what had happened in an email grievance and appeal which he sent to the respondent three days after the incident (page 92). That is a near contemporaneous email in which the claimant recorded what he said had happened. It was consistent with the claimant's account to us.

33. Finally, we thought about why the claimant would be saying that the incident happened if it had not. Mr Dabliz suggested that he was doing it for the money (to seek financial compensation). However, the claimant was aware before the hearing that, in light of the financial position of the first and second respondents, he was unlikely to recover any or much financial compensation if he succeeded. He still continued with his complaint, suggesting that pursuing the claim was not about financial compensation for him.

34. We have therefore accepted the claimant's account of the incident on 11 October as we have summarised above.

35. Following the incident Ms Raszewska approached the claimant and asked him to clean the wash-up area. The claimant said he was unhappy and was not going to clean the wash-up area. Ms Raszewska reported this to Mr Dabliz. He said that enough was enough and the claimant's attitude was not right for the bakery. He asked Ms Raszewska to terminate the claimant's employment on grounds of poor attitude. Ms Raszewska agreed with his decision.

36. Ms Raszewska gave the claimant a dismissal letter on the same day, giving him a week's notice. The claimant did not work his notice period as he was signed off sick.

<u>The claimant's grievance and appeal</u>

37. The claimant's grievance and appeal was sent by email on 14 October. In his email he said that he wanted to make a grievance and he complained about Mr Dabliz's conduct on 11 October 2019. He asked whether there was any appeal against dismissal.

38. The first respondent's Workplace Harassment, Discrimination and Bullying Policy said that the bakery would "not tolerate acts that breach this policy, and all such breaches or alleged breaches will be taken seriously, be fully

investigated and may be subject to disciplinary action where appropriate" (page 99).

39. Mr Dabliz responded to the claimant's grievance on 24 October 2019. He said that there was no-one more senior in the company to direct the claimant's appeal to and so he had carefully reviewed his original decision. He said that the claimant's recollection of what was said was 'at odds with the reality of the situation' and that given the claimant's 'blatant misrepresentation of what had occurred [he had] little trouble in upholding the original decision' (page 94).

40. In his evidence to us Mr Dabliz said there was no point investigating the claimant's allegations of discrimination as provided for in the respondent's harassment policy because nothing had happened and so it would have been a waste of time.

The law

Direct discrimination because of race

41. Race is a protected characteristic under sections 4 and 9 of the Equality Act 2010. Race includes nationality.

42. Section 13(1) of the Equality Act provides:

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

Harassment

43. Under section 26 of the Equality Act, 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."*

44. Because of the focus on the effect of the conduct (as an alternative to considering its purpose), lack of intent is not a defence to complaints of harassment.

45. In deciding whether conduct has the effect referred to, the tribunal must take into account:

> "*a) the perception of B;*
> *b) the other circumstances of the case;*
> *c) whether it is reasonable for the conduct to have that effect."*

46. There are therefore subjective and objective elements but overall the criterion is objective. The tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for them to do so (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336).

Overlap between harassment and direct discrimination

47. Section 212(1) of the Equality Act provides that detriment does not include conduct which amounts to harassment. Therefore any conduct which amounts to harassment cannot also amount to a detriment for the purpose of a direct discrimination claim.

48. This means that a finding of direct discrimination cannot be made in respect of conduct which is held to be unlawful harassment.

Burden of proof

49. Sub-sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) This does not apply if A shows that A did not contravene the provision."*

50. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

51. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required to produce “cogent evidence” of this. If there is a prima facie case and the respondent’s explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

Remedy

52. The remedy a tribunal may award for discrimination at work is set out in section 124 of the Equality Act 2010.

53. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.

54. The aim of compensation is that '*as best as money can do it, the [claimant] must be put into the position [they] would have been in but for the unlawful conduct'* (*Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position they would have been in if the discrimination had not occurred. This requires the tribunal to look at what loss has been caused by the discrimination.

Acas Code of Practice on Grievance and Disciplinary Procedures

55. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> *"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%."*

56. Section 207A applies to proceedings listed in Schedule A2, which includes claims for discrimination at work.

Conclusions

57. We have applied these legal principles to our findings of fact, to reach our conclusions on the issues for us to decide.

Harassment

58. We first considered the claimant's allegations of harassment, that is issues 4a to 4g. We review our findings of fact, then apply the relevant legal tests.

59. We have found that the factual allegations at paragraphs 4a to 4g in the list of issues happened as alleged by the claimant with one exception. That exception is that in relation to issue 4a, we have not found that the discussion on the morning of 11 October 2019 was prompted by the claimant, rather we have found that it was prompted by the respondent tapping the claimant on the shoulder. We have found the remainder of allegation 4a to have happened as alleged.

60. We have to consider whether the things that happened meet the legal tests for harassment, the first of which is that the conduct must be unwanted. The treatment that we have found to have occurred was unwanted treatment. The claimant would have preferred it not to have taken place. He made a complaint about it three days later.

61. We then have to consider whether the unwanted treatment had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. If we decide that it did, we go on to consider whether the conduct was related to race. We have considered the allegations in three groups:

    61.1 allegations 4a and 4e, involving swearing and referencing the claimant's Polish nationality;

    61.2 the allegations involving the cleaning of the trays and swearing at the claimant to leave, that is allegations 4b, 4d, 4f and 4g; and

    61.3 allegation 4c about Mr Dabliz saying, 'Push up' or something similar.

62. The acts that we have found to have occurred at 4a and 4e did have the effect of violating the claimant's dignity or creating a hostile environment for him. Taking into account his perception and the other circumstances of the case, it was reasonable for the conduct to have that effect, as the claimant was sworn at and his nationality expressly referred to on a number of occasions during the incident.

63. The acts at 4a and 4e were related to race as they expressly referenced the claimant's nationality. We therefore conclude that acts 4a and 4e amount to unlawful harassment related to race.

64. The second group of acts of unwanted conduct are 4b, 4d, 4f and 4g. They also had the effect of creating a hostile environment for the claimant. The respondent's manner was patronising and aggressive. The conduct at issue 4f also involved swearing.

65. We need to consider whether these acts were related to race. These acts did not expressly include reference to nationality. When asking ourselves this question we have applied the burden of proof in section 136 of the Equality Act. This requires us to consider whether the claimant has proved facts from which we could decide that there has been unlawful harassment. If so, the burden shifts to the respondent to show that the conduct was not related to race.

66. The proximity of these matters to the acts of unlawful race-related harassment we have found to have occurred is evidence from which we could conclude that this other conduct was related to the claimant's race. We find the burden shifts. We have not been provided with any explanation or evidence of that explanation that the other treatment of the claimant on 11 October 2019 was not related to the claimant's nationality. We therefore find harassment in relation to the acts 4b, 4d, 4f and 4g.

67. We do not find allegation 4c to be proven. This is Mr Dabliz's instruction to 'Push up'. It was a one-off management instruction to encourage the claimant and Ms Klein to hurry up. It did not have the purpose or effect of violating the claimant's dignity or creating a hostile environment for him. If it

did have that effect, it was not reasonable for it to do so, given the circumstances.

68. Those are our findings on the allegations of harassment.

Direct discrimination

69. The allegation of direct race discrimination relates to the dismissal of the claimant (issue 8a). (The claimant's representative confirmed that issues 8b to 8e are not allegations of direct race discrimination.)

70. We have to consider whether the dismissal was less favourable treatment because of race. For direct discrimination, as for harassment, the burden of proof provisions in section 136 of the Equality Act provide that if the claimant is able to establish facts from which we could decide that there has been discrimination, we then look to the respondents to explain their decision.

71. The claimant was dismissed. Dismissal amounts to less favourable treatment. We have to consider whether the less favourable treatment was because of race.

72. It is for the claimant to prove facts from which we could conclude that there was discrimination. We bear in mind that few employers would be prepared to admit discrimination, even to themselves, and discrimination can be conscious or subconscious. In many cases discrimination may not be intentional. We have decided that there are facts here from which we could conclude that race played a part in dismissal. These are first, the proximity of the dismissal to the acts of race-related harassment which we found to have occurred.

73. Secondly, the second respondent's decision to respond to the claimant's grievance without an investigation is something from which we could infer discrimination. That decision was in breach of the respondents' own policy. We could infer that the second respondent refused an investigation because he did not want someone else to investigate what happened on 11 October 2019, because it had happened as the claimant said.

74. This conclusion means that the burden of proof moves to the respondents. It is for the respondent to prove that the dismissal was not direct race discrimination. To discharge that burden, the respondents have to show, on the balance of probabilities, that the dismissal of the claimant was in no sense whatsoever on the protected ground. The tribunal would normally expect cogent evidence to discharge that burden. We will examine carefully any failure to deal with codes of practice.

75. The respondents say that the dismissal was because of the claimant's poor attitude as evidenced by:

    75.1 The refusal to wear safety shoes;

    75.2 The reluctance to train on new bakery products; and

75.3 The refusal to work at weekends.

76. We have scrutinised these reasons put forward to evidence poor attitude which was the reason for dismissal, starting with the three other factors:

76.1 First, in respect of the refusal to wear safety shoes, we have found that the claimant did not refuse to wear safety shoes and that his requests concerning safety shoes were reasonable.

76.2 Secondly, we have not found that the claimant was reluctant to train on new bakery products.

76.3 Thirdly, we did find that the claimant refused to work on weekends but we found that he had raised this early in his employment and had not been rota'd to work on weekends for three months or so. Further, he had told the respondents again on 3 October 2019 that he would not work weekends and they decided to keep things under review. This factor alone therefore cannot have been the reason for dismissal.

77. Mr Dabliz and Ms Raszewska said that the claimant's refusal to clean the wash-up area on 11 October 2019 prompted the decision to dismiss for poor attitude.

78. We have to consider whether we are satisfied that the dismissal of the claimant for poor attitude was in no sense whatsoever related to race.

79. The Equality and Human Rights Commission's Statutory Code of Practice for employers states at paragraph 17.4 and 19.10 that employers should keep written records of decisions and reasons for dismissal.

80. The respondent had no written record of the reasons for dismissal or of any issues with the claimant's attitude. If there had been a problem with the claimant's attitude we would have expected there to have been some record of this.

81. We do not consider that the two matters relied on by the respondents which we have found to have occurred are sufficient to explain the decision to dismiss. The claimant's refusal to work on Sundays was something which the respondent was aware of and had decided to keep under review. The refusal to clean the wash-up area took place very shortly after the claimant had been subject to race-related harassment. A one-off event in those circumstances, even with the claimant not being able to work on weekends, does not seem to us to be a sufficient explanation for the respondents' decision that the claimant had a poor attitude and should be dismissed.

82. The respondents have not satisfied the burden of proving that race did not play any part in its perception of the claimant's attitude on which it based its decision to dismiss. The complaint of direct race discrimination in relation to dismissal therefore succeeds.

Remedy

83. At the hearing, we gave our remedy judgment as set out in the judgment sent to the parties on 8 January 2022. We also explained our reasons for reaching that decision, by outlining the additional findings of fact which we had made which are relevant to remedy, an outline of the legal principles which apply to compensation for discrimination and the conclusions we reached. We explained the calculations we had made to arrive at the sums awarded.

84. In complaints of discrimination, we have to make an award which aims to put the claimant back in the position he would have been in if there had not been any discrimination. That requires us to consider a hypothetical or notional timeline in which the claimant was not dismissed. We then compare that hypothetical timeline with the real timeline and work the financial losses arising from difference between the two timelines.

85. We also make an award for non-pecuniary losses, which means non-financial losses such as injury to feelings. We will deal with these two elements of compensation separately.

Financial losses

86. The financial losses arise from the loss of salary following dismissal. The claimant was unemployed for one month after his dismissal. He suffered loss of salary for that month. We make an award for that loss of one month's salary which is £1,568.

87. After one month the claimant found work but at a lower rate of pay. He was paid around £106 a week less than he was earning for the respondent. The claimant claimed losses for a period of 52 weeks but we think that losses representing a period of six months overall is a more likely period in which the claimant could have replaced his losses fully, had he been continuing to look for work.

88. We have in mind that the end of that six month period would be 18 April 2020, by which time the first national lockdown for covid had started. However, we are aware that there were still jobs during the lockdown, certainly in construction in which the claimant had worked and also in retail, during the lockdown. Also, the lockdown was only an issue at the end of the six month period, and so the claimant could have found better paid work before the lockdown.

89. Calculating a six month period from the termination date, and taking into account the month of unemployment for which we have already compensated, we have arrived at the figure of a further 22 weeks for which we award compensation: 22 weeks at £106 a week gives losses for this period of £2,332. That gives a total financial loss of £3,900 for the period from dismissal to 18 April 2020.

90. We next consider whether there should be any uplift for failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures. An uplift can be applied where there has been a breach of the Acas Code

which the tribunal considers to be unreasonable, and where the tribunal considers it to be just and equitable to make an uplift.

91. We have made findings in our liability reasons about the claimant's grievance and how it was dealt with. The respondents failed to comply with the requirements under the Acas Code to hold a meeting with the claimant and to offer an appeal. That failure was unreasonable. We have concluded the way that the grievance was dealt with was such that there ought to be an uplift, not the maximum uplift of 25%, but an uplift of 20%.

92. The reason we have not made the maximum uplift is twofold. First of all, this was not a situation where it would have been obvious who ought to be considering the grievance. Given the size of the first respondent and the nature of the complaint, there was an issue about who could possibly hear it. Secondly, the grievance was not totally ignored, there was a letter in response. Taking those factors into account, we have concluded that 20% is the appropriate uplift.

93. Applying that uplift to the financial losses gives a figure of £4,680.

94. The claimant should be awarded interest on the compensation for financial losses. Interest runs from the mid-point of the period starting with the date of discrimination and ending with the date of the hearing.

95. The number of days between the discrimination on 11 October 2019 to 8 December 2021 is 790 days, and so the mid-point of that period is 395 days. The rate of interest is 8%. The calculation is 8% x £4,680/365 x 395 days. That means interest on financial losses is £405.17.

Injury to feelings

96. We then looked at injury to feelings.

97. The claimant's representative said that a separate injury to feelings award should be made for each separate act of discrimination. He relied on the decision of the EAT in *Al Jumardi v Clywd Leisure Ltd and others* EAT 2008 IRLR. In that case, there were two acts of discrimination which were factually different, and two protected characteristics (one act of race discrimination and one of disability discrimination). In this case we decided that we should make one overall injury to feelings award. This is because although we have found acts of harassment and direct discrimination, all are based on the protected characteristic of race. In addition, the factual matrices around the 11 October incident and the dismissal are very closely connected. So, for those reasons, we have decided to make one award for injury to feelings.

98. We took into account the information in claimant's witness statement on injury to feelings which we accept. We took into account the upset, shame, worry and anxiety that was caused to him and for which he went to see his GP and was prescribed medication.

99. We agree with the claimant's representative that the appropriate Vento band is the middle band. At the time the claim was submitted, the Vento band ran from £8,800 to £26,300. The mid-point was £17,550. We have decided that the appropriate point is halfway between the bottom of the middle band and the mid-point, that is an injury to feelings award of £13,175.

100. We applied the same 20% Acas uplift to that injury to feelings figure which gives an overall injury to feelings figure of £15,810.

101. We award interest on the injury to feelings award. Interest on injury to feelings applies for the whole period from 11 October 2019 to 8 December 2021, the date of the hearing, that is a period of 790 days. The rate of interest is 8%. The calculation is 8% x £15,810/365 x 790 days. That means interest on the injury to feelings award is £2,737.51.[1]

102. We did not make any award for aggravated damages. The conduct complained of did not meet the threshold required for such an award.

103. The total award is therefore The respondents are ordered to pay the claimant the sum of £23,632.68 which comprises:

    103.1 Financial losses of £4,680 and interest of £405.17;

    103.2 Injury to feelings of £15,810 and interest of £2,737.51.

104. We make this award jointly and separately against both respondents, as the second respondent Mr Dabliz was the owner of the first respondent and was responsible for all acts of discrimination as found by us.

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Employment Judge Hawksworth

Date: 28 February 2022

Sent to the parties on: ..13.3.2022.
THY
.....
For the Tribunal Office

[1] There was an arithmetical error in the figure given at the hearing for interest on injury to feelings. There was a consequential error in the figure given at the hearing for the total award. These arithmetical errors were corrected in the written judgment. The figures in these reasons are the corrected figures, not the figures given at the hearing.

Appendix – List of Issues

1. This list of issues adopts the following abbreviations: the Claimant, Piotr Marzejan, is 'C', Brown Sugar Bakery Ltd, the First Respondent, is 'Rl', and Ghaleb Dabliz, the Second Respondent, is 'R2'.

2. C's protected characteristic is race: he is Polish.

3. R1 does not run the statutory defence and will indemnify R2 to any extent necessary.

Harassment. Section 26 Equality Act 2010

4. Did the following acts take place on 11 October 2019:

a. Did C say he was happy to try other work than making ciabatta? If so, did this irritate R2 such that he said "fucking Polish" under his breath in an angry voice in C's hearing?
b. Did R2 demonstrate to C how to clean baking trays in a patronising voice and manner intended to treat C like a child and demean him?
c. Did R2 keep saying "push up" to C to encourage him to work harder and faster?
d. Did R2 say the trays "looked like shit"?
e. Did C challenge this comment? If so, did RZ then say to C: "You fucking Polish idiot", "You fucking Polish moron" and "Fucking Polish"?
f. Did C then ask R2 to calm down? If so, did R2 then say: "Get the fuck out if you won't do what I say"?
g. Did R2 then angrily clean more trays himself, hypocritically copying C's method of tray cleaning and doing so in front of C?

5. If so, were the acts above unwanted conduct related to the Claimant's protected characteristic of race?

6. If so, did the acts above have the purpose or effect of:

a. Violating the Claimant's dignity, or
b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7. In deciding whether the alleged conduct has the effect referred to in paragraph 6 above, the Tribunal must take into account the perception of C, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, pursuant to section 26(4) Equality Act 2010.

Direct discrimination, section 13 Equality Act 2010

8. Did the following acts occur?

a. C was dismissed;
b. C was not given the right to appeal his dismissal;
c. R2 failed to investigate C's grievance;
d. R2 failed to appoint another director to investigate C's grievance;

e R2 rejected C's grievance.

9. If so, were these acts of less favourable treatment?

10. If so, was the less favourable treatment because of C's protected characteristic of race? Or does Rl/R2 have a non—discriminatory reason for any less favourable treatment? R1/R2 say that the dismissal was because of C's poor attitude, as exemplified by:

a. His refusal to wear safety shoes;
b. His reluctance to train on new bakery products;
c. His refusal to work on Sundays.

11. Who is/are C's comparator(s)?

Issues of remedy

12. If any of C's claims succeed, to what remedy is he entitled?

13. Has either party unreasonably failed to comply with a relevant Code of Practice? If so, should any award be uplifted or reduced by up to 25%?

14. Is C entitled to aggravated damages?