



EMPLOYMENT TRIBUNALS

Claimant: Mr M Bandura

Respondent: Mr M Fernandez

Heard at: London South

On:

Before: Employment Judge McLaren
Members Mr J Gautrey- Jones
Mrs R Bailey

Representation
Claimant Mr. Philips, lay representative
Respondent: Mr. P Edmonds, Solicitor

JUDGMENT

The unanimous decision of the tribunal is the claimant is awarded

REASONS

The unanimous decision of the employment tribunal is that the claimant is awarded £121,462 . This is made up of the following elements.

- 1.Unlawful deduction of wages for being paid below the national living wage £20,635
- 2.Four weeks pay for failure to be provided with a written statement of employment terms calculated as £1658
3. Loss of employment rights £500
- 4.Basic award of £11,816.10
5. Compensatory award of £44,811.68. This is subject to 25% uplift in compensation for failure to follow the ACAS code, being £11,209.92. This is a total compensatory award of £56,014.60
6. An injury to feelings award of £12,000, together with interest on injury to feelings award at 8% for a period of 28 months, £2,240 and interest on the compensatory award calculated at the mid point i.e. a period of 14 months £5,228. This is a total of £19,468
7. The sums paid at paragraph 5 and paragraph 6 need to be grossed up.

When grossing up is applied to these two awards the total is £86,853.

8. The figure awarded is the total of items 1,2,3,4 and 6.

Background

1. Judgment had been sent to the parties on 11 January 2022 and the unanimous decision was as follows

Unlawful deduction from wages

2. How many hours a week did the claimant work? He says 50.5, the respondent says 24 hours a week. We have found he worked 50.5.
3. What was the claimant's hourly rate of pay and was it below the national living wage? We have found that he earned £11,418 in 2016 or £219.57 a week. This is an hourly rate of £4.34 an hour. In 2017 he was paid £ 10,497 or £201.86 a week being £4.17 an hour. In 2019 he was paid £11,008 or £211.69 a week, £4.19 an hour. These figures fall short of the relevant NMW for each period.
4. We conclude the claimant's wages were subject to series of unlawful deductions from wages which amount to an ongoing breach. The underpayment was for each year of his employment although a claim can only be brought for 2 years prior to the date of the claim. The claim succeeds.

Direct Age Discrimination (section 13 of the Equality Act 2010)

5. Was the claimant subjected to less favourable treatment by being dismissed? If so, was the claimant treated less favourably than a hypothetical comparator.
6. We have found that the reason for the dismissal was retirement based on the claimant's age. He was treated less favourably than a younger man. As the respondent had 2 full time butchers employed by August 2019, it chose to keep the newly appointed younger man. The claimant has proved facts from which an inference of discrimination could arise and the respondent has not proved that that the dismissal was 'in no sense whatsoever' on the protected ground
7. The respondent did not seek to rely on a legitimate aim, and we find there was none. The claim succeeds.

Unfair Dismissal: Claim under Section 95(1)(a) of the Employment Rights Act 1996

8. Was the reason for the Claimant's dismissal a fair reason pursuant to section 98(2) of the Employment Rights Act 1996? The respondent contends that the claimant was dismissed for a fair reason, capability. We have found it was for an unfair reason, retirement, a wholly unfair procedure was implemented, and we conclude the dismissal was unfair in all aspects. The ACAS code was wholly ignored. The claim succeeds.
9. It was agreed that no terms of employment had ever been provided. The claim for failure to provide such terms also succeeds.

Preliminary matter

10. The claimant and respondent had both prepared a schedule of loss. We noted that the claimant was limiting his compensatory award to 12 weeks. At the outset of the hearing I raised this with the claimant's representative who said that that was the case. The respondent confirmed they understood this had always been the total amount claimed as compensation.
11. During the claimant's evidence it then appeared to the panel that he was giving evidence of loss of earnings and mitigation which was inconsistent with limiting the compensatory award to a 12 week period.
12. We raised this with the parties and I outlined to the parties the legal principles the tribunal would apply. These are set out in detail in the relevant law section below, but in summary I explained that the compensatory award is such amount the tribunal considers just and equitable in all the circumstances so as to compensate the employee for financial loss that would not have occurred had he not been unfairly dismissed. As this award is for dismissal because of an act of discrimination, it is not subject to the statutory cap.
13. The injury to feelings award is to compensate for non-pecuniary loss and is intended to compensate for the anger, distress and upset caused by the unlawful treatment they have received.
14. The parties asked for an adjournment and following this the claimant's representative presented a revised schedule of loss. The amount of the compensatory award had been increased to include all of the pecuniary element sought and the claimant was seeking compensation for loss of earnings from the date of dismissal to the date of today's hearing. The revised schedule of loss also reduced the injury to feelings award from £20,000-£12,000 to reflect only the nonpecuniary element.
15. We gave the respondent's representative a further opportunity to make any relevant submissions and to further cross-examine the claimant.

Finding of facts (remedy)

16. The claimant gave evidence, and we find as follows. Following his dismissal on 4 October 2019, after 19 years of employment, the claimant was shocked and distressed. This shock and distress arose because of the manner of his dismissal and because he had his job taken away from him in circumstances that he could not comprehend or make sense of. We find that he had intended to work until his 70th birthday and retire only at that point. His dismissal therefore cut short his working life by three years.
17. This was challenged in submissions by the respondent's representative. It was put that the claimant had in fact determined to retire once he lost his job and this is evidenced by the fact he had not done much to look for jobs. We accept the claimant's evidence on this point. He has been consistent there from liability hearing and this remedy hearing that it was his intention to stop at his 70th birthday.

18. This shock had two direct effects. We accept that the claimant was unable to function, which included being unable to look for other work as he could not rid his mind of the thought of what happened, and the job loss and the way in which it happened impacted his self-confidence. This was also why he could not look for a job for six months. He also had difficulty sleeping, for example shouting out in the night. As a result, at the end of the six-month period, which we put as April 2020, he went to his GP and was prescribed sleeping tablets which he still takes.
19. Sometime around April 2020, that is about the same time he was prescribed sleeping tablets, the claimant did start looking for other work. While he did not look on the Internet, his job search took the form of reading the local paper and contacting butchers' shops in his local area. He told us that he contacted two local butcher shops and left a telephone number with both, but there were no vacancies.
20. The claimant has been a butcher for over 50 years, and this is his sole skill set. He did consider looking for work as a butcher outside his local area but cannot drive. He would need to take a bus if he were to find a job outside the village in which he lives. Previously, his wife had been able to drive him, but this is no longer practicable. The claimant therefore can only get to work if he can do so very locally, or on public transport. He was aware that, and it is not disputed, that the local bus network does not start early enough for him to be able to get to a job as a butcher. Butchers start very early, generally around six in the morning and the buses start after eight.
21. The claimant was asked about local supermarkets and explained that they do not have butchers anymore, they sell prepacked food or use cutters to cut the meat. They do not employ skilled butchers. The claimant confirmed that he had not looked for any other type of work other than being a butcher.
22. We note that the global pandemic started in January 2020 but from March 2020 most of the country was in lockdown. It was therefore difficult to find work and, despite the regulations being relaxed at various times to today's date, we find that these restrictions would have an impact on the claimant's ability to seek for and find other work.

Submissions

23. The claimant's representatives asked for compensation of the maximum of four weeks for failure to provide written particulars of employment because the relationship had been 19 years and there was plenty of opportunity to provide these. On behalf of the respondent, it was submitted that this was a very small employer with very little knowledge of employment law.
24. In relation to the ACAS uplift the claimant asked for the maximum 25% on the basis that no procedure was followed at all. The respondent argued that the appropriate percentage should be 10%, again because this is a small employer with limited knowledge of the law.
25. The respondent's representative conceded that £500 is an appropriate amount for the loss of employment rights.

26. In relation to the compensatory award, the respondent submitted that it was the claimant's intention to retire before his 70th birthday and this was evidenced by the fact that he had sought only 12 weeks compensatory award throughout the proceedings. The respondent should not be penalised for any award beyond that time.
27. The respondent's representative also submitted that the claimant had not acted reasonably in his attempt to mitigate. He had done nothing for the first six months and had limited his job search after that to butchery only in a very small local area. This was all unreasonable and respondent should not be held responsible for this loss.
28. On injury to feelings, the claimant's representative submitted that the claimant had suffered significant anger and distress which had resulted in a loss of self-confidence and had an ongoing impact on his health and therefore an award within the middle band would be appropriate. He put this at £12,000. The respondent's representative submitted that this was still too high. As the dismissal was not on grounds of competence it was submitted that this would not undermine his self-confidence in the way that the claimant states.

Relevant Law

29. s123 of the ERA 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'.
30. 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. For dismissals occurring on or after 6 April 2019 the statutory cap (where it applies) is calculated as the lower of £86,444- or 52-weeks' gross pay.
31. Compensation under section 124 (6) Equality Act 2010 is assessed on ordinary tortious principles. It aims to put the employee in a position he would have been in. The tribunal must consider whether, without discrimination, the claimant would have been dismissed then or at some future point.
32. There is a duty to mitigate. The burden of proof regarding failure to mitigate is on the wrong doer and it is not for the claimant to show that he acted reasonably. The claimant must be shown to have acted unreasonably. Determination of unreasonableness is a question of fact, taking account of the claimant's views and wishes, but the assessment must be objective.
33. An award for compensation can be reduced by contributory conduct, or the likelihood of an event occurring which would have brought the employment to an end in any event. Our liability findings

concluded that there was no contributory fault and no reason for employment to be likely to have ended.

Injury to feelings

34. Injury to feelings awards compensate for non-pecuniary loss. Injury to feelings awards are available where a tribunal has upheld a complaint of discrimination. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive.

35. The general principles that apply to assessing an appropriate injury to feelings award have been set out by the EAT in *Prison Service v Johnson* [1997] IRLR 162, para 27:

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

- Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

- Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

- Tribunals should bear in mind the need for public respect for the level of awards made.

36. *In Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102 the Court of Appeal identified three broad bands of compensation for injury to feelings. The bands at the date of dismissal(4 October 2019) were

- Upper Band: £26,300 to £44,000 (the most serious cases);

- Middle Band: £8,800 to £26,300 (cases that do not merit an award in the upper band); and

- Lower Band: £900 to £8,800 (less serious cases).

The 'most exceptional cases' are capable of exceeding the maximum of £44,000.

37. The claimant must prove the nature of the injury to feelings and its extent.

Interest

38. A tribunal is able to award interest in discrimination claims to compensate for the fact that compensation has been awarded after the loss compensated for has been suffered. The rate of interest is 8%.
39. The period of calculation of interest on an injury to feelings award is from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Reg 6(1)(a) IT(IADC) Regs 1996).

ACAS uplift

40. An award for compensation can be increased or reduced, by up to 25%, if the employer has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s207(A) TULRC(A) 1992). Our finding was that ACAS was wholly ignored.

Conclusion

41. Applying the relevant law to our findings of fact we conclude as follows.
42. The parties had agreed the basic award at £11,816.10. It had been conceded that the loss of employment rights merits an award of £500. We therefore make awards in the sums.
43. The parties had also agreed the unlawful deduction from wages claim. That related to the failure to pay the appropriate national living wage. That was calculated as a total of £20,635 and we awarded that sum.
44. We considered the appropriate compensation for the failure to provide terms of employment over a 19-year period. While we take into account the fact that the respondent is a small employer, we conclude that all employers have an obligation to understand their basic responsibilities and to act accordingly. We also conclude that information on the nature of these duties, including having to provide written documentation, was readily available. We therefore conclude that four weeks pay is the appropriate sum and award £1658.
45. We have found that this was a case where no procedure was followed whatsoever. The claimant was in effect dismissed by being sent a P 45 after some five weeks of trying to find out what had happened. While we take into account the fact the respondent is a small employer, again we conclude that all employers have an obligation to understand the basic responsibilities and act accordingly. In the circumstance of this case, we conclude that a 25% uplift is appropriate.
46. We have considered the appropriate period for loss of earnings. While we accept that the claimant took no steps to mitigate his loss during the first six months, we find that he was not unreasonable in taking no action before April 2020. We have accepted that he was shocked and unable to function for this period because of the manner of his dismissal and that was the reason he did not apply for other jobs. We

have accepted that the dismissal did damage to his self-confidence as well as impacting on his sleep.

47. We are also satisfied that he acted reasonably in limiting his search to butchery for at least the first 12 months of his period of unemployment. We find that he took reasonable steps by asking locally and leaving his telephone number. It was not possible for him to pursue butchery further afield because of the limitation of public transport and the early start required. We are satisfied that he took all reasonable steps to look for work as a butcher in as wide an area as was practicably and geographically possible.
48. We then considered whether or not after the end of the first 12 months, that is on or around October 2020, it would be unreasonable if the claimant did not consider roles other than butchery, particularly given the difficulty in obtaining a butcher's role.
49. We have concluded that because he lives in an area which there are few job opportunities, and because his job search coincided with a global pandemic in which jobs were difficult to find, given his age and 50 years he had been a butcher, it was reasonable not to consider looking for jobs other than as a butcher. For these reasons we conclude that the appropriate period of compensation is 118 weeks, that is from 4 October 2019 to 3020 22. We therefore make an award of £48,922.80.
50. We have considered injury to feelings and apply the general principles that any award should be compensatory and should be just to both parties. We have accepted that the claimant was distressed and shocked by the treatment he received and that this did in fact impact to self-confidence and sleeping patterns leading him to have to take medication which he remains on today. We conclude that an award within the middle band is appropriate and we therefore award £12,000.
51. The parties agreed that the compensatory award had been calculated on the basis of the national living wage at the date of dismissal. Both parties agreed they were happy with this approach and wanted to use a figure of £414.60. The identified that this was a gross figure. The claimant accepted the figure of £379.76 as the appropriate weekly net figure. The respondent's representative confirmed that he accepted the calculations done on this figure.

Schedule

Employment termination date : 4/10/19
Complete years of service: 19
Hours worked per week 50.5
NLW in 2019: £8.21 ph
Age at dismissal: 67

1) Unfair dismissal

a) Basic award : 19 x 1.5 x £414.60 :	£11,816.10
b) Compensatory award :	
Loss of employment rights	£500
118 weeks x £ 379.76	£ 44, 811.68
c) Compensation uplift of 25% due to not following ACAS guidelines	£11,209.92
	Total £56, 014.6

2) **Age Discrimination - Injury to feelings**

Mid level Vento band	£12,000
Interest on Injury to feelings claim at 8% from 4/10/19 to 3/2/21	£2, 240
Interest on discriminatory unfair dismissal compensation, mid point £	£5,228
Total	£19, 468

3) **Unlawful deduction of wages – pay below NLW**

From April 2019 to July 2019.

NLW £8.21ph. Actual wage to 10/19 was £4.20 ph.

Shortfall £3.99 x 50.5 x 17 weeks = £3425

April 2018 to March 2019

NLW £7.83. Actual wage 1/4/18/to 31/3/18 was £4.20 ph

Shortfall £ 3.63 x 50.5 x 52 weeks = £ 9532

October 2017 to March 2018

NLW £7.50ph. Actual wage 4/10/17 to 31/3/18 was £4.20ph

Shortfall £ 3.30 x 50.5 x 26weeks = £4332

Total £ 17,289

4) **Unlawful Deduction of pay from 1/8/19 to 4/10/19**

9 weeks pay at NLW less the SSP actually paid.

9 x 50.5 x 8.21 = £3731 less £ 385

Total £ 3,346

5) 4 weeks pay at £414.60 due to non provision of
claimant's terms of employment

£1,658

Grossing up

(British Transport Commission v Gourley)

Compensation and injury to feelings award above £30,000 tax cap is £ 45,482.60

grossed up figure is £86, 853

52. The total compensation payable is therefore under £121,462.

Employment Judge McLaren
Date: 21 March 2022