



EMPLOYMENT TRIBUNALS

Claimant: Mr T Rajtmar

Respondent: Uneek clothing Company Limited

Heard at: Cardiff via CVP **On:** 22 February 2022

Before: Employment Judge R Havard
Members Ms L Owen
Ms K Smith

Representation:
Claimant: Mr G Airey, Solicitor
Respondent: Ms E Sole, Counsel

RESERVED JUDGMENT ON REMEDY

The judgment of the Tribunal is that the Respondent must pay to the Claimant compensation in the total sum of £15,019.46. This amount is made up of the following:

(i)	Basic award	£391.87
(ii)	Loss of statutory rights	£500.00
(iii)	Unpaid wages	£235.11
(iv)	Notice pay	£1,567.48
(v)	Injury to feelings/Aggravated damages	£10,500.00
(vi)	Interest	£1,825.00

REASONS

Introduction

1. By a default judgment dated 3 December 2021, the Tribunal upheld the following claims:
 - Automatic unfair dismissal
 - Claim in respect of loss of statutory rights
 - Unpaid wages
 - Notice pay
 - Detriment having made protected disclosures.
2. The judgment applied to liability only and it was directed that the matter would proceed to a hearing on remedy.
3. At the remedy hearing, the Tribunal heard evidence from the Claimant. In advance of the hearing, the Claimant had submitted an additional witness statement which set out his position with regard to his various claims, particularly relating to his claim for injury to feelings. This statement was dated 18 February 2022. The Respondent objected to the statement being admitted into evidence and this was therefore considered as a preliminary issue.
4. The Tribunal ruled as follows:
 - (i) The Claimant has submitted a second witness statement dated 18 February 2022 for the purposes of this remedy hearing. Ms Sole objects stating that the first witness statement submitted by the Claimant in advance of a hearing in January and November 2021 also covered issues relating to remedy. In the Case Management Order of 17 June 2020 at paragraph 4.2, it states, "no additional witness evidence will be allowed at the final hearing without the Tribunal's permission." Mr Airey states that the second witness statement is designed to respond to the basis on which the counter schedule has been formulated.
 - (ii) The Tribunal has considered the second witness statement. It is only three pages long. It refers to, and clarifies, certain heads of claim. It has been confirmed that the Claimant will be giving oral evidence and Ms Sole will have the opportunity to cross-examine the Claimant. To that extent, it is of some assistance that there is an updated witness statement from the Claimant.

- (iii) Consequently, the Tribunal considers that it is in accordance with the overriding objective to grant permission to the Claimant to submit his second witness statement for the purposes of this hearing.
5. The Claimant initially served a document entitled, "Schedule of Loss" dated 7 January 2021.
 6. Whilst the date of the document was not clear, the Respondent served a counter schedule.
 7. The Claimant served a further schedule entitled, "The Claimant's Final Schedule of Loss" dated 18 February 2022 which was in response to the Respondent's counter schedule but, as described below, was different in material respects to the initial Schedule of Loss.

Findings of Fact

8. The Tribunal took into consideration its findings of fact in its judgment of liability.
9. The Tribunal reminded itself that in reaching its findings of fact at the hearing on liability, it had concluded that the Claimant was a credible witness.
10. The Claimant also gave evidence at this hearing and confirmed the truth of the content of his second statement of 18 February 2022 which, in turn, made reference to various paragraphs within his original statement. They related to the level of upset he had felt at the manner in which he was treated by the Respondent and that he was being punished for raising health and safety concerns. Indeed, in his additional statement, he says "to me being suspended was the same as being dismissed." He found the attitude of the Respondent to be very irresponsible and deeply frustrating and, unlike the first occasion when he was disciplined for using his mobile phone whilst at work, when a disciplinary process was followed, there was no process followed at all and that he was not given any chance to defend his actions.
11. At paragraph 8 of his second statement, the Claimant sets out how he had found the Respondent's behaviour towards him to be frustrating and aggravating. However, in answer to questions from Ms Sole, he very fairly conceded that the conduct he described on the part of the Respondent at paragraphs 8(a) - (e) did not add to the upset that he felt.
12. The Tribunal had listened carefully to the Claimant giving his evidence at the hearings in respect of both liability and remedy. The Tribunal found that the Claimant was genuinely frustrated at the Respondent's failure to take his concerns seriously, and upset at the treatment he received from the Respondent. However, the Tribunal was also struck by the resilience shown by the Claimant not only in the manner in which he gave his evidence but

also the fact that, very shortly after his dismissal, he was able to secure alternative employment.

13. Indeed, it was confirmed by the Claimant that he no longer pursued a claim for loss of earnings arising out of his automatic unfair dismissal due to the income he had earned since his dismissal.
14. The Tribunal noted that the Claimant believed that, "My award should be very significant as I have been put through a lot of distress, and, frustration and upset for doing the right thing."
15. The Tribunal did not doubt that the Claimant had experienced distress, anger and frustration at the time he was suspended up to the point of his dismissal. However, having listened to the Claimant and also considering the robust way in which he responded to the circumstances which took place at the time of his suspension and dismissal, and his ability to resume full-time employment almost immediately, the Tribunal had not found that the effect of the Respondent's treatment was severe or long-term.

The Law

16. The substantive issue to be resolved between the parties related to the Claimant's claim for injury to feelings.
17. Injury to feelings awards are available where a tribunal has upheld a complaint of unlawful detriment but are not available for unfair dismissal (*Dunnachie v Kingston upon Hull City Council* [2002] UKHL36). The award of injury to feelings is intended to compensate the claimant, and for the upset caused by the unlawful treatment they have received. It is compensatory, not punitive. Tribunals have a broad discretion about what level of award to make. The focus is on the actual injuries suffered by the claimant and not the gravity of the acts of the respondent (*Komeng v Creative Support Limited* UKEAT/0275/18/JOJ).
18. The Tribunal reminded itself of paragraph 53 of **Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102** where it stated:

"In *HM Prison Service v Johnson*, Smith J reviewed the authorities on compensation for non-pecuniary loss and made a valuable summary of the general principles gathered from them. We would gratefully adopt that summary. Employment Tribunals should have it in mind when carrying out this challenging exercise. In her judgment on behalf of the Appeal Tribunal, Smith J said at p.165:

- "(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award;

- (ii) Awards should not be too low, as that would diminish respect for the policy of the ante-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, to use the phrase of Sir Thomas Bingham MR, be seen as the way to "untaxed riches".
- (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards;
- (iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of a value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings;
- (v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made".

19. Paragraph 65 sets out guidance to tribunals and provides:

"Employment tribunals and those who practice in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

- (i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race ... only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000;
- (ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band;
- (iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

20. At paragraph 66 the court added:

"There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

21. Presidential Guidance on the Vento bands has been issued by the Presidents of the Employment Tribunals. There was an addendum to the Presidential Guidance with a further uprating of the Vento bands for claims presented on or after April 2020, which apply to this case.
22. The bands were as follows:
 - "(i) Upper band: £27,400 to £45,600;
 - (ii) Middle band: £9,100 to £27,400;
 - (iii) Lower band: £900 to £9,100.
23. We are obliged to consider whether to award interest on any awards for injury to feelings. For injury to feelings, interest is for the period beginning on the date of the detriment and ending on the day the amount of interest is calculated; the rate is currently 8%.
24. In relation to taxation, the Court of Appeal in *Moorthy v HMRC* 2018 EWCA Civ 847 held that awards for injury to feelings were to be treated as tax free, whether or not related to the termination of employment. This position changed from 6 April 2018 by an amendment to section 406 of the Income Tax (Earnings and Pensions) Act 2003 so that although "injury" in sub-section (1) includes psychiatric injury, it does not include injured feelings. This amendment has effect for the tax year 2018–19 and subsequent tax years. Section 406 which deals with tax exemption provides:
 - (1) This Chapter does not apply to a payment or other benefit provided—*
 - (a) in connection with the termination of employment by the death of an employee, or*
 - (b) on account of injury to, or disability of, an employee.*
 - (2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings*
25. An award for injury to feelings is taxable to the extent that it exceeds £30,000.
26. Grossing up: To avoid any disadvantage to the claimant, if any award to him is over £30,000, the amount over £30,000 should be grossed up. It requires us to estimate the tax he will have to pay on receipt of the award and add that sum back into the award, to cancel out the tax burden on the claimant. The

purpose is to place in the claimant's hands the amount he would have received had he not been subjected to a detriment.

27. In relation to the ACAS Code, section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that for the jurisdictions listed in Schedule A2 of the Act, which includes detriment in employment claims, where an employer has failed to comply with a relevant Code of Practice, and that failure was unreasonable, the tribunal may, if it considers it just and equitable to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

28. The following heads of claim were agreed:

Unpaid wages - £235.11

Breach of contract/Notice Pay - £1,567.48.

29. The Tribunal made the following awards in respect of those heads of claim which were not agreed.

Basic award

30. Taking account of the Claimant's age, period of employment and salary, it was not disputed that the full entitlement to a basic award amounted to £391.87.
31. However, the Respondent argued that, due to the Claimant's conduct in allegedly misusing his phone during work prior to his dismissal, it would be just inequitable to reduce that amount by 50%.
32. The Tribunal rejected this submission. The documentary evidence which suggested that the Claimant was using his mobile phone when not authorised to do so was only produced in the course of these proceedings. Furthermore, the Tribunal had accepted the evidence of the Claimant and Mr Minas that other members of staff would use their mobile phone during working hours. Finally, the Respondent had provided no oral evidence to support the documentary evidence it had provided. Dr Tshibangu had also made submissions, as opposed to giving evidence, that other members of the workforce had been summarily dismissed for using their mobile phones whilst at work. Again, in the absence of any evidence, either oral or documentary, this was rejected by the Tribunal.
33. Therefore the Tribunal concluded that the Claimant was entitled to his full basic award of £391.87.

Loss of statutory rights

34. The Claimant submitted his claim of loss of statutory rights of £783.74 on the basis of a sum equivalent to two weeks' gross pay. The Respondent suggests that this claim is absorbed by the amount the Claimant has earned since his dismissal.
35. The Tribunal concluded that the Claimant was entitled to an award in respect of his loss of statutory rights but, in exercising its discretion, considered that the sum awarded should be £500.

Injury to feelings

36. In the course of the hearing to determine liability, it was submitted on behalf of the Claimant that the detriment to which the Claimant was subjected related to his suspension from employment on 17 January 2020. Indeed, this is consistent with the Tribunal's conclusion that the act of the Respondent in suspending the Claimant amounted to a detriment. It is also consistent with the Claimant's first schedule of loss dated 7 January 2021 which stipulates that the claim is for "injury to feelings due to suspension".
37. In the second final schedule of loss dated 18 February 2022 the description of the claim changes to "Injury to feelings/Aggravated damages". In his oral submissions, Mr Airey maintained that the act of suspending the claimant could not realistically be distinguished from the act of dismissal. Ms Sole maintained that the claim for injury to feelings must be restricted to the period of suspension as this represented the detriment and that an award for injury to feelings was not available in respect of a claim for unfair dismissal.
38. The Tribunal agreed with the submission of Ms Sole. There was no doubt that, based on its findings that the Claimant had been unfairly dismissed, he was entitled to be compensated for his loss of earnings. It was commendable that the Claimant was able to rebound from his setback so promptly and secure alternative employment which meant that he had not suffered any loss of income for which he would have been entitled to be compensated.
39. The Tribunal concluded that the detriment for which the Claimant was entitled to be compensated for an award in respect of injury to feelings related to the suspension but up to the point at which he was dismissed. To that extent, the dismissal was not wholly irrelevant to the basis on which the Tribunal approached its assessment of an appropriate level of award.
40. In the first schedule of loss dated 7 January 2021, the claim for injury to feelings was based on the middle band of £9,000 - £27,000. In reaching the final figure contained within the schedule of 7 January 2021, the amount claimed was at the maximum of the middle band.

41. In the final schedule of 18 February 2022, the amount claimed was now based on the top band and the final figure represented the maximum that can be awarded of £45,600.
42. In support of this claim, the claimant had provided examples of first instance decisions of which the Tribunal had taken careful note, all of which fell within the top band.
43. The Tribunal had not been provided with the full narratives of the first instance decisions.
44. In respect of the case of Local Government Yorkshire and Humber v Ms N Shah UKEAT/0587/11/ZT on which the Claimant relied, the Tribunal accepted the submissions of Ms Sole who stated that the Shah case could be distinguished from that of the Claimant. The case of Shah was not comparable because that related to the case of a worker as opposed to an employee and, in that capacity, a worker can claim dismissal as a detriment. Ms Sole submitted that where an employee claimed automatic unfair dismissal, the principles regarding compensation for ordinary unfair dismissal apply and therefore would not include a claim of injury to feelings.
45. The Tribunal reminded itself that it had a wide discretion with regard to the award it can make in respect of the Claimant's claim for injury to feelings. It is also compensatory and should be assessed in that way, rather than in a punitive way to reflect the conduct of a respondent towards a claimant. By contrast, two other first instance decisions illustrate circumstances in which lower awards were made in respect of Claimants who had suffered a detriment as a result of raising health and safety concerns.
46. The first was that of Hunt v Cotswold Architectural Products Limited ET case number 1401467/10 where the claimant was given a disciplinary warning after raising health and safety concerns which were disregarded. The tribunal stated "We understand and take notice of the fact that it would be hurtful and upsetting to bring matters to your employer's attention relating to health and safety only to be told that you are wasting company time, that you are being frivolous and vexatious and in effect a liar, without first being given the opportunity of a fair hearing." The Tribunal deemed an award for injury to feelings to be appropriate but given that the Claimant had displayed strength of character in bringing the claim and the fact that she was still employed by CAP Limited, it determined an award in the lower of the Vento bands would be appropriate and settled on a figure of £3,000.
47. In Luparia v Bluewood Recruitment Limited ET case number 2600802/2016, the tribunal found that the claimant, who was a care assistant working at the respondent's care homes, had made several protected disclosures regarding the wellbeing of residents. She was held to have suffered a number of detriments including forced reduction of her hours, being called a "silly bitch"

by a member of staff and being made the subject of a reference to safeguarding authority and received an unjustifiably poor job reference. The tribunal took into account the respondent's treatment of the claimant had caused her considerable distress as a result of which she suffered depression. However, she had been employed for a short time and her job was her first employment in ten years and concluded that the award should be at the lower end of the middle band in the sum of £7,500.

48. In reaching its decision, the Tribunal had taken full account of the examples provided by Mr Airey and also the dates of the awards specified above. The Tribunal also reminded itself that it was not bound by the first instance examples provided by Mr Airey or those mentioned above. The Tribunal had reached its decisions by exercising its judgement on the facts as presented and found by it in the current case and on the circumstances that related to this Claimant.
49. The Tribunal took a serious view of the Respondent's reaction to the Claimant seeking to bring to its attention his concerns with regard to health and safety. The Tribunal is satisfied that the manner in which the Claimant was subsequently treated by the Respondent would have caused him considerable distress.
50. However, the Tribunal also took into consideration its finding that the Claimant had shown considerable resilience and, despite the Respondent's conduct, had reacted positively by securing very quickly alternative employment which showed a strength of character and the fact that, whilst he would have experienced distress and frustration caused by the Respondent's treatment of him, he was able to respond positively and constructively. The detriment also occurred over a short period of time.
51. The Respondent's submission stated that any injury to feelings were effectively minimal and that it was more annoying and hurtful for the Claimant as opposed to causing real distress.
52. It was suggested by the Respondent that any award of injury to feelings should be £1,500.
53. The Tribunal concluded that the Claimant's approach to this head of claim, which was initially to place it in the middle band but more recently elevated to the top band, was inappropriate and not justified based on the Tribunal's assessment of the Claimant himself and the effect of the Respondent's conduct on him.

54. At the same time, the Tribunal considered that the Respondent's assessment was similarly incorrect and misjudged.
55. The Tribunal concluded that the appropriate award in respect of injury to feelings fell at the higher end of the lower band and the award for injury to feelings would be £7,500.

Aggravated damages

56. The Claimant had included in his final schedule of 18 February 2022 a claim for an award of aggravated damages.
57. Ms Sole stated that this was not a suitable case for such an award. The Tribunal did not agree. The Tribunal had reflected carefully on the manner in which the Claimant was treated from 20 January 2020 through to the time at which he was to discover that he had been dismissed. Indeed, it was only because he made contact with the Respondent that he discovered that he was dismissed without any disciplinary process having taken place. Further, the decision to suspend the Claimant and then to dismiss him was taken by Dr Tshibangu but was communicated to the Claimant by Mr Jelaj.
58. In approaching its decision whether an award for aggravated damages should be made and if so, the amount, the Tribunal had regarded it as an aspect of injury to feelings awards and considered this as a subheading under the same head of loss. It was the Tribunal's view that the Respondent had behaved towards the Claimant in what could be described as an insulting manner and therefore had decided to award aggravated damages in the sum of £3,000.
59. The Tribunal had decided that the overall award of injury to feelings, to include its award for aggravated damages, i.e. £10,500, was proportionate to the totality of the distress caused to the Claimant.

Uplift

60. The Respondent did not follow a formal procedure at all. The Tribunal considered in the circumstances that there should be an uplift. The Tribunal had to consider what was just and equitable in terms of the amount of that uplift. In the absence of any formal process, unlike on the previous occasion which led to the Claimant receiving a warning, and to reflect the Tribunal's view of the seriousness of the failure to comply with the Code, the Tribunal awarded an uplift of 25%.
61. However, in order to avoid compensating the Claimant twice for the same conduct, the Tribunal had to reduce the amount of the uplift by the amount awarded in respect of aggravated damages. As the amount of the uplift would have been £2,625, the award of aggravated damages effectively cancelled the amount of the uplift.

Summary

62. The Tribunal awarded the Claimant the following:
63. Basic Award - £391.87;
64. Loss of statutory rights - £500.00;
65. Unpaid wages - £235.11;
66. Notice Pay - £1,567.48;
67. Injury to feelings - £10,500, to include aggravated damages of £3,000.
68. Interest calculated from 23 January 2020 – 28 March 2022 at 8% in the sum of £1,825.00.
69. The amount of the award is less than £30,000 and therefore the Tribunal did not need to consider the tax position.

Employment Judge M R Havard
Dated: 28 March 2022

JUDGMENT SENT TO THE PARTIES ON 29 March 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche