



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Hands

**Respondent:** Markham and Smith Motor Engineers Ltd.

**Heard at:** East London Hearing Centre (by CVP)

**On:** 22 September 2022

**Before:** Employment Judge B Elgot

**Representation:**

For the Claimant: Mr J Crosskey, friend  
For the Respondent: Mr C Crow, counsel

The Employment Judge having reserved her decision now gives judgment as follows :-

## JUDGMENT

1. The Respondent having stated that no part of liability for the claim of unfair dismissal is contested the complaint of unfair dismissal SUCCEEDS.
2. The Claimant is entitled to compensation for unfair dismissal calculated as follows:-
3. Basic award     **£2176.00**
4. The basic award is calculated on the agreed gross weekly wage of the Claimant which was £615.38 with his net pay being agreed as £488.91 per week. The statutory cap on weekly pay at the date of dismissal on 12 November 2021 was £544 pw and the multiplier is 4, as agreed between the parties.
5. The compensatory award is calculated as follows:-
6. Immediate loss of wages from 12 November 2021 until 30 April 2022 (24 weeks)  
x £488.91 = **£ 11,733.84**
7. There is no award for future loss of earnings.

8. The Claimant is entitled to **£500** as compensation for his loss of statutory employment rights.
9. The Respondent concedes and it is reasonable to award **£ 68.90** for the direct costs associated with the incident causing the Claimant's resignation. These include prescription charges, travel to hospital etc.
10. The total is **£12,302.74**
11. The uplift to the compensatory award is fixed at 25%. The Claimant was unfairly constructively dismissed on 12 November 2021 in circumstances where the ACAS Code of Practice on Disciplinary and Grievance Procedures applied. I am satisfied that the Respondent acted unreasonably in totally failing to comply with the Code and it is just and equitable to award an uplift of 25% of £12,302.74 which is an additional **£ 3075.69**
12. The claim for accrued and unpaid holiday pay DOES NOT SUCCEED. The Claimant has been paid for the 10.5 days of annual leave which had accrued and not been paid at the effective date of termination of his employment. That sum is included in the final salary paid to him on or around 26 November 2021 as confirmed by an 'annual leave note' on a compliment slip which the Respondent has disclosed, signed by 'Nat'.
13. That note confirms payment of an additional two days' pay which were ex gratia representing holiday pay not due until Christmas 2021. The Respondent is entitled to have credit given for that additional payment which totals £590.68.
14. There is no claim made by the Claimant for damages for breach of contract relating to a failure to pay notice pay and in any event the notice period is included within the time period of immediate losses covered by the compensatory award.
15. The grand total payable by the Respondent to the Claimant within 28 days is **£16,963.75** ( 2176+11,733.84 +500 +68.90+ 3075.69 less credit of £ 590.68)
16. The Recoupment Regulations do not apply. The Claimant has not applied for or received any relevant state benefits.
17. There is no extant application for costs by either party.

## REASONS

1. The Respondent has not resisted liability. For the avoidance of doubt by reference to Rule 21 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 I am satisfied that the Respondent should be permitted to participate in this hearing to the extent that has occurred- including disclosure of documents, production of witnesses, cross examination of the Claimant and provision of written skeleton arguments and closing submissions. The Respondent has always indicated

that it contests the amount of the remedy claimed by the Claimant whose Schedule of Loss is at page 259 of the bundle. A Counter Schedule is at page 266.

2. The Respondent does not pursue any Polkey deduction to reflect the chance that although the Claimant's constructive dismissal was unfair it would have happened in any case. Similarly the Respondent makes no argument that the Claimant by reason of his own fault or wrongdoing has in any way contributed to his dismissal such that the basic and/or compensatory awards should be reduced. I do not consider it just and equitable to make any reduction of the compensatory or basic award on either of these grounds.
3. The Claimant gave evidence on his own behalf and was cross examined. The Respondent's witness was Mr John Rablin, an ex-colleague of the Claimant who is still employed by the Respondent as a mechanic and MOT tester and has worked for the Respondent for approximately four years. He was on site working close by to the Claimant on 10 November 2021 when the assault upon the Claimant by Mr Jason Tarling, Managing Director of the Respondent, occurred ('the incident'). There is an agreed indexed bundle of remedy documents amounting to 269 pages which the Claimant confirmed contains all the medical evidence upon which he relies. In accordance with the normal practice of the Tribunal and as explained to the parties I read only those documents in the bundle to which my attention was specifically directed by the representatives and/or the witnesses. I had the benefit of an opening skeleton argument dated 21 September 2022 provided by Mr Crow on behalf of the Respondent and written closing submissions from both parties which were delivered on 5 October 2022.
4. The Incident on 10 November 2021. The Claimant was employed as a vehicle technician/workshop manager from 3 January 2017 until 12 November 2021 when he resigned. He was then aged 35. He had also recently (August/September 2021) acquired a licence to carry out MOT testing. On 10 November 2021 around 8.30 am the Claimant was subjected to an un- provoked aggressive verbal and physical assault by Mr Jason Tarling. He also witnessed a similar assault by Mr Tarling against a female colleague Natalie during which he and another colleague felt they had to intervene.
5. On 24 March 2022 over four months later Mr Tarling pleaded guilty to assault and I have seen the Memorandum of Conviction.
6. I am certain that this incident was shocking, frightening and humiliating for the Claimant leaving him '*feeling confused, embarrassed and fearful*' as he states in his final submission at paragraph 2. There is no reason whatsoever that any employee should have to suffer such ill-treatment in the modern workplace and I accept that the result of the attack upon him has caused the Claimant some difficulties in coping with his mental health including emotional trauma, stress related symptoms and depression which are treated by a first line anti-depressant called Sertraline prescribed by his GP. The Claimant describes at paragraph 29 of his witness statement that he '*was subjected to a highly degrading and embarrassing action front of all of my peers*' and I am sure that this has impacted upon his mental wellbeing.

7. The Claimant remained at work until the end of the day on 10 November 2021 and I accept Mr Rablin's credible evidence that, working in close proximity to the Claimant on that day, he did not observe the Claimant suffering any immediate physical injury, pain or ill- effects or any mobility difficulties throughout the rest of the working day. Paragraph 15 of Mr Rablin's witness statement he describes the jobs carried out by the Claimant on that date which he said were all '*reasonably physically demanding*' requiring the vehicle technician to '*get stuck in*'. He makes no comment about the Claimant's mental or emotional state at the time.
8. On 12 November 2021 in a letter on page 168 of the Remedy Bundle the Claimant resigned with immediate effect citing that '*I believe the employment relationship has irrevocably broken down and as a result of the fundamental breach of the implied terms of my employment contract an unsafe and intolerable working environment has been created*'. The Respondent does not deny that the Claimant was unfairly constructively dismissed on 12 November 2021 in the circumstances described by section 95 (1) (c) Employment Rights Act 1996.
9. The resignation letter makes no mention of any mental health problem and particularly of no physical injury suffered by the Claimant as a result of the assault upon him.
10. Medical evidence of mental health impairment. The fit notes in the remedy bundle were issued retrospectively because presumably not needed earlier by the Claimant (he has not claimed state benefits and has not been employed) except for the purposes of these proceedings. At page 161 the fit note covering the Claimant's incapacity for the period 16 November 2021 until 4 January 2022 (8 weeks) does not refer to physical injury or impairment. It says '*stress, anxiety, panic attack, alleged assault at work*'. The fit note for a further six weeks from 4 January 2022 to 18 February 2022 says '*anxiety, stress, panic attack*'. The same is true of the fit note from 18 February 2022 to 31 March 2022 ( page 163) and for the period 31 March 2022 until 24 June 2022 ( page 164)
11. I have stated above that I am satisfied that these mental health difficulties were substantially caused by the incident on 10 November 2021; there is no evidence that the Claimant had any such pre-existing condition
12. Mitigation of Loss. The Claimant has not sought any kind of work since his resignation and made no applications for jobs or registered with any recruitment agency. He has earned no wages since 12 November 2021 until today's date 22 September 2022 (over ten months) and he does not anticipate being able to work and earn for at least a further six months' future loss. He has made no application for state benefits (means or non means tested) including such benefits which specifically address the functional limitations, capability for work and additional expense of disability such as Universal Credit, Disability Living Allowance and Personal Independence Payment.
13. Mr Hands is sure that he has been and will continue to be incapable of work for the period of six months or more after today's date not only because of '*extreme stress anxiety and fear*' but also as a result of '*physical pain to my throat, neck, back and hip... uncertain of when I will fully recover*'. In other words the Claimant asserts 100% incapacity for work by reason of damage caused by the Respondent to his physical and mental health until at least March 2023.

14. The Claimant has child care responsibilities which mean he cannot work evenings and weekends. He is, he says, only able to travel a maximum of 15 miles to work and 15 miles back. He has explored no possibilities of any type of work full time or part time other than as a highly trained vehicle mechanic and MOT tester and even in that field he has not applied for any specific vacancy.
15. An employee in the Claimant's position no matter how unpleasant the circumstances of the incident and the resulting constructive dismissal is required to reasonably mitigate the financial losses flowing from his dismissal. The burden of proof to demonstrate a failure to mitigate lies with the Respondent.
16. However Mr Crow correctly identifies in his skeleton argument and in closing submissions on behalf of the Respondent that the Claimant himself must prove that his alleged incapacity and the financial losses flowing from it have been caused wholly or in part by the dismissal. The Respondent contends that the assault by Mr Tarling which precipitated the Claimant's resignation did not cause physical injury which has prevented the Claimant from applying for jobs and working. I agree for the reasons set out below that the Claimant has failed to produce the necessary evidence that there was physical injury and pain caused to his throat, neck, back and hip on 10 November 2021 which was enough to stop him earning any wages or seeking any employment following his resignation.
17. First, Mr Rablin observed no physical injury on the day of the incident and heard of no such complaint from the Claimant. Secondly, the Claimant's resignation letter dated 12 November 2021 makes no reference to any such injury. Thirdly, the four fit notes on pages 161-164 covering the immediate period after the assault refer to mental health difficulties but do not record physical injury of any kind.
18. The Claimant attended the Emergency Department in Colchester at 7 30 pm on the day of the incident. The diagnosis was *bruise/contusion/abrasion: neck*. The bruising is recorded as mild with no obvious bruising to the right hip. No treatment was given save for '*may benefit from physiotherapy referral*'[by GP]. Observation is recommended but there is no specific note of hip or back injury.
19. The Claimant went to see his GP on 7 December 2021 and 11 January 2022 but there is no record of his general practitioner writing down the Claimant's reported Musculo-skeletal pain and debility. Only at page 165 on 27 May 2022 does the fit note first record '*right hip pain. Refer to MSK team for review*'. This is more than six months after the incident.
20. In general the Claimant's GP 'patient access' records at pages 45-71 contain little or no useful narrative because they do not record any detail of what was discussed between the Claimant and his doctors at the relevant times. The Claimant told me that this is all he has been given by his GP surgery. He is obliged to agree that in the absence of any detailed information there is only the content of the fit notes upon which I can safely rely.
21. One of the very few pages in the Remedy Bundle which actually gives detail of discussion between the Claimant and his GP is at page 159. This is the first written record in the bundle of '*Hip Pain (new) Right*' with a reference '*ongoing issues since the assault*' and some physiotherapy treatment. I repeat that these matters are un-

recorded anywhere in the patient access notes before this entry on 27 May 2022 by which time the Claimant had lodged his ET1 claim in the employment tribunal. The Claimant agreed in response to cross examination that despite this consultation in May 2022 recording the first conversation between him and his GP which refers to hip pain when walking and '*sitting too much*' the main issue for him was still his anxiety state, as the fit notes for the previous six months record.

22. The Claimant has a history of hip pain and debility and in November 2018 he underwent a hip arthroscopy operation which was successful resulting in him regaining full movement, experiencing no further pain and maintaining a full attendance record at work as he states in paragraphs 17 and 18 of his witness statement. He says that the assault by Mr Tarling on 10 November 2021 damaged his hip and back again and has prevented him from working in his trade thus causing the immediate and future losses he claims. I cannot agree that the medical evidence provided by the Claimant in this case supports this contention; he has not discharged his burden of proof in this regard and has not put forward any additional expert medical evidence to support his position that he is incapable of work on physical health grounds. I repeat that his GP records simply do not demonstrate this until, at earliest, 27 May 2022 and instead I rely on the clear content of the fit notes which do not mention physical hip, back or throat pain or debility but do record mental health problems for the period from November 2021 until late May 2022.
23. The orthopaedic referrals initiated on 27 May 2022 which are on pages 158 -160 of the bundle do set out the complaint made to the GP by the Claimant that he has had '*ongoing issues since the alleged assault*' and '*started after an alleged assault*'. In contrast page 160 states '*worsened after 10 November after was being assaulted*' (sic) suggesting that the Claimant had ongoing symptoms of hip and back pain before the incident. I am not convinced that this evidence of what the Claimant reported to his GP six months after the incident and in circumstances where '*still going through tribunals...criminal one ended...awaiting employment tribunal*' is sufficient to discharge the Claimant's obligation to show causation when balanced against the paucity of any such evidence in any other part of his medical records.
24. At pages 178-9 there is a report from the East Suffolk and North Essex Musculo-skeletal and Pain Service dated 24 August 2022 which whilst recording some pain and weakness in the groin and right hip and leg (which the Claimant has experienced intermittently since his mid-20s) treated by mild painkillers and physiotherapy there is '*nothing to be concerned of according to the scan results*'. The two long paragraphs typed in italics in that report confirm that in relation to his right hip and his lumbar spine there are no degenerative changes, structural abnormalities or neural compressions. Only continuing physiotherapy is recommended.
25. In addition, Mr Hands has been fit enough and physically capable of carrying out four MOT tests over the period from 29 January 2022 until 9 July 2022. With the exception of the MOT test in July 2022 he says that he had to do this work in order to maintain his MOT licensed status. The activity shows that he was capable of carrying out some limited yet responsible testing work albeit that, as Mr Rablin agrees, MOT testing is less physically demanding than the job of a general vehicle technician. As I have found below I am satisfied that there are jobs available which consist only of the less physically arduous MOT testing work without any subsequent

responsibility to carry out any repairs which are identified as necessary. The Claimant has applied for no such vacancies.

26. I have decided that the incident did however cause mental health injury which has prevented the Claimant from applying for jobs and working over a limited period of time but that thereafter he did not reasonably mitigate his losses and the compensatory award must be limited accordingly.
27. The Claimant's own oral and written evidence taken together with the content of the fit notes on pages 160-164 is proof that he experienced moderate mental health problems involving stress related symptoms, anxiety, depression and panic attacks (which he calls 'terror') following a shocking and un-provoked attack on him at work where he had built a career and working relationships for over four years. I am satisfied that it was reasonable for him to take time to recover from this distress and that he was initially unable to contemplate the search for alternative work without panic.
28. However by 24 March 2022 Mr Tarling had admitted his guilt over the assaults and been convicted. The Claimant was thereby reassured of his safety and vindicated in relation to his account of the incident; he was not required as a witness and did not have to suffer the further difficulties of going to court and recounting the incident. I am satisfied that thereafter and by no later than 30 April 2022 the Claimant was able to begin looking for a new job and could and should have secured within five weeks suitable employment at a wage equivalent to the amount he earned with the Respondent. I find that his period of immediate loss of earnings is therefore restricted to the time between 12 November 2021 and 30 April 2022 which is 24 weeks x net weekly wage of £ 488.91=£11,733.84.
29. The period of immediate financial loss is not extended beyond 30 April because I am satisfied that after that date the Claimant's mental health was likely to stabilise and improve thus enabling him to mitigate his losses. There is no expert medical advice that his mental and emotional state was deteriorating. He remains on the same mild to moderate dose of Sertraline. He has not been referred to any kind of counselling or talking therapy and does not interact even with early intervention psychiatric services. He described to me how much he has benefitted from and values the help and support of his family with whom he can talk through his difficulties and worries. I am certain that after 30 April 2022 he was not incapacitated by mental health impairment from seeking and carrying out work in his chosen trade or even in some other field.
30. The Claimant is awarded £500 for loss of his statutory employment rights = c/f £12,233.84
31. He is also awarded the incidental costs of attending the emergency department after the incident, prescription costs etc. These costs are set out in his Schedule of Loss at Part C(3) and total £ 68.90 (37.40+11.70+3.60+16.20) = c/f £12,302.74.
32. There is no existing claim under the Employment Tribunal Rules 2013 for legal costs of either party or for preparation time by the Claimant and I have no jurisdiction to award these amounts in the absence of a costs or preparation time order.

33. The Claimant asks for the costs of job seeking, travel and attending interviews (10) in the future. No such interviews have been arranged or attended in the period for which immediate losses have been awarded. There is no award for future loss. Therefore these amounts are not payable by the Respondent.
34. Availability of work which would reasonably mitigate losses The Respondent has disclosed at pages 195 to 221 of the bundle written evidence of a range of vacancies either as a general mechanic/vehicle technician or as an MOT tester which are at the same rate of pay or higher than the Claimant earned before. In his written closing submission Mr Crow has helpfully divided those vacancies into three categories where there is no Saturday working, limited Saturday working and 'the possibility of no Saturday working'. Each of those categories suggest some flexibility which would dovetail with the Claimant's child care responsibilities. There are jobs available in Colchester. There are jobs available slightly further afield where the higher salary may offset the additional cost of fuel and/or child care.
35. It is unnecessary and repetitive for me to reproduce the analysis set out in paragraphs 5.7 to 5.10 of the Respondent's closing submissions. Suffice to say that I accept it as proof that there is a wide and varied availability of work which would suit the Claimant's qualification and experience whilst maintaining his income and his work/life balance. I have also noted the comments made by recruiters Prime Appointments which advertise '*jobs across Essex and Suffolk*' at page 180 in an email dated 10 August 2022 which states that '*the market is extremely busy ...there are numerous jobs available for MOT Testers/Technicians and by looking at their experience and qualifications we would quickly be able to find them employment within a period of one month*'
36. The Claimant's failure to explore these options after 30 April 2022 is a failure in all the circumstances to reasonably mitigate his losses after that date.
37. State benefits I am unable to agree with Mr Crow's submission that the 'rate' of the Claimant's immediate losses should be reduced to '*reflect the likelihood of some [state] benefits*' ( at his estimate of £75 per week). Each of the relevant benefits (means and non means tested) has a specific test of entitlement based on statutory criteria. It would be unwise of me to 'second guess' the decision on entitlement which might be made, following a medical assessment by a 'health care professional', by the Department for Work and Pensions or indeed on appeal. I decline to conclude that the award of some kind of benefits is 'likely'.
38. Holiday Pay. It is now apparent from a compliments slip signed by 'Nat' and apparently sent to the Claimant in conjunction with his final pay slip that the amount paid to the Claimant on 26 November 2021 (two weeks after his immediate resignation) in his final pay slip at page 142 of the bundle is inclusive of 10.5 days holiday pay accrued and owing to him. Page 142 does not record this fact but I accept the evidence of the compliments slip. The slip also notes that two additional days of holiday pay for 'Christmas 2021' have been included in the total of £2157.88 net. Those two days are in effect an ex gratia amount. The Claimant was owed 12 days' pay in November 2021 until he resigned (£835.84) He was paid £2157.88 from which deduct 12 days' wages (£835.84) plus 10.5 days' holiday pay (£488.91x52/365 =£731.36) which totals £1567.20. Credit must be given for the extra payment of £590.68.



39. Grand total payable. In all the circumstances of this case and after careful consideration of the evidence I award the Claimant the grand total of £ 16,963.75 which is calculated as set out above and as explained in these Reasons. The grand total must be paid by the Respondent to the Claimant within 28 days.

**Employment Judge B Elgot**  
**Dated: 24 October 2022**