EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100336/2022

Remedy Hearing held remotely in chambers on Microsoft Teams on 28 October 2022

Employment Judge Ian McPherson
Tribunal Member Julie Ward
Tribunal Member David Calderwood

Ms C	**Claimant** **Written Representations:** **Mr Stuart Swan** **Solicitor**
Thistle Communications Ltd (in liquidation) **c/o Claire Middlebrook** **Middlebrooks Business Recovery & Advice**	**Respondents** **Written Representations** **by Liquidator**

ANONYMISED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The further Judgment of the Employment Tribunal is that it does not order any financial penalty on the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996,** in favour of the Secretary of State, as it would not be in the interests of justice to do so ; and it confirms the monetary awards of compensation payable to the claimant, payable by the respondents, as set forth in the earlier reserved Judgment issued on 28 September 2022, totaling some **£30,468**, inclusive of interest.

REASONS

Introduction

1. This case called again before us, as a full Tribunal, remotely in chambers, on Friday afternoon, 28 October 2022, for an in chambers Remedy

Hearing. It was a members' meeting conducted remotely by the full panel using Microsoft Teams. This was the earliest date mutually convenient for all members of the Tribunal. Parties were not required to attend. Neither party had requested an oral Hearing, and we dealt with matters on the available papers only.

2. This further Hearing follows upon a 3-day Final Hearing, which we heard in person on 1, 2 and 3 August 2022, with the claimant only attending, along with her solicitor, the respondents not appearing or being represented to participate in that Hearing, although they had defended the claim by ET3 response previously lodged, and not withdrawn.

3. After the close of the Final Hearing, we were advised by the respondents' liquidator, on 31 August 2022, that the company had gone into a creditors' voluntary liquidation on 18 August 2022. Our reserved Judgment was issued after a second Members' meeting held on 22 September 2022.

4. Our unanimous written Judgment and Reasons was issued to parties on 28 September 2022, and the anonymised / redacted **Rule 50** version was published on the ET decisions part of the Gov.UK website on 6 October 2022.

5. In that earlier reserved Judgment, we found for the claimant, that she had been unlawfully discriminated against and harassed by the respondents, on grounds of sex and sexual orientation, contrary to **Sections 13 / 26 and 39 / 40 of the Equality Act 2010**, and we made various awards of compensation to be paid to her by the respondents, totalling some **£30,468,** inclusive of interest.

6. We also reserved, for our determination at a later date, and in a further Judgment to follow, whether or not to impose a financial penalty on the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996.**

7. We allowed the respondents' liquidator a period of no more than 14 days from date of issue of that Judgment to make any written representations to the Tribunal, which failing the Tribunal would make a reserved decision without any further delay, and without the need for any attended Hearing, unless the respondents' liquidator requested to be heard.

8. Specifically, within the Written Reasons for our earlier Judgment, at paragraphs 223 to 227, we had stated as follows:

Financial Penalty

223. While, on the claimant's behalf, in his closing submissions to the Tribunal, Mr Swan stated that he was not inviting us to make a financial penalty order against the respondents, in our private deliberation, we have agreed that we should consider doing so, and offer the respondents' liquidator an opportunity to reply.

224. The respondents are still a limited company on the public register, although now in liquidation, and they are still a party to these Tribunal proceedings and, as such, they are entitled, via their liquidator, to a copy of this Judgment and Reasons. It is being issued to the liquidator , along with a copy sent to the claimant via Mr Swan as her solicitor and representative in these Tribunal proceedings.

225. In light of our reserved judgment, we have found that the respondents have breached the rights of the claimant and, in these circumstances, and as it may be that this case has one or more aggravating features, such that a financial penalty might be imposed against the respondents, under ***Section 12A of the Employment Tribunals Act 1996,*** *before we consider whether to issue such a penalty and, if so, in what sum, we have decided to give the respondents' liquidator a period of* ***no more than 14 days from date of issue of this Judgment*** *in which to make written representations as to why we should*

not do so or, if we decide to do so, what amount the penalty ought to be, having regard to all the circumstances of the case, and the respondents' ability to pay such an award, all as provided for in ***Section 12A*** *itself. We have so ordered at paragraph (6) of our Judgment above.*

226. A financial penalty can be one half of the award made by the Tribunal. When replying to the Tribunal, ***within the next fourteen days****, the respondents' liquidator should also confirm whether or not payment of the sums awarded to the claimant in terms of this Judgment have been paid to her, which is another factor that may be taken into account by us.*

227. Following the expiry of that 14 days from date of issue of this Judgment, we wish to make it plain that if the respondents' liquidator does not make any written representations to the Tribunal, we will proceed to make a reserved decision, without any further delay, and without the need for any attended Hearing. In that event, the full panel will meet again, remotely, and we will deal with the matter in chambers, and on the available papers.

Parties' Written Representations

9. Written representations were made by the respondents' liquidator within that 14-day period. In particular, on 29 September 2022, the liquidator acknowledged receipt of the Tribunal's correspondence, enclosing the Judgment issued on 28 September 2022, and stated that: "***As previously advised the Company are now in liquidation and as such any Judgment will form a claim in the Liquidation."***

10. The respondents had gone into creditors' voluntary liquidation after the close of the Final Hearing, and before our reserved Judgment was issued. As the liquidator's email of 29 September 2022 was brief, the Judge instructed that the liquidator be asked whether they were making any written representations (by 12 October 2022) on whether or not the

Tribunal should make a **Section 12A** financial penalty against the respondents.

11. The Tribunal clerk wrote to the respondents' liquidator on 6 October 2022, and the liquidator's email of 29 September 2022, which had not been copied to the claimant's solicitor, per **Rule 92**, was copied to Mr Swan, and he was asked for his comments within 7 days

12. By email response to Glasgow ET later on 6 October 2022, the liquidator acknowledged receipt of the Tribunal's correspondence of that date, and, in reply stated that: ***"Our position continues to be that the debt was a contingent liability at the time of Liquidation which has now crystallised as such the sums due to*** [Ms C] ***will form an unsecured claim in the Liquidation. The Liquidator wishes to make no further representation."***

13. By response from the claimant's solicitor, that same day, the Tribunal was advised by Mr Swan that **: "*I have been asked for comment regarding the respondent liquidator's correspondence below, by 13 October 2022. I am not sure whether my comment will assist the Employment Tribunal in accordance with the overriding objective, however as I have been asked to comment: While the correspondence from the respondent's liquidator is not entirely clear, the liquidator has written to me separately indicating, amongst other things, that the sum due to the claimant "will form an unsecured claim in the Liquidation" – and the liquidator has provided a claim form. I will be advising the claimant regarding this / her options."***

14. On 7 October 2022, the Tribunal clerk wrote to the respondents' liquidator, acknowledging their reply of 6 October 2022, and also to the claimant's solicitor acknowledging his reply of 6 October, and enclosing, for his information, a copy of the liquidator's email of 6 October 2022, which had not been copied to the claimant's solicitor, per **Rule 92.** The Tribunal did

not request any further comments from either party to assist in our decision. As at the date of this in chambers Remedy Hearing, no further written representations were received from the respondents' liquidator, or from the claimant's solicitor.

15. We note and record here that the respondents' liquidator made no specific written representations upon the respondents' ability to pay, if the Tribunal decided to make a financial payment order, nor did the liquidator say anything expressly about any payment to the claimant being made further to our reserved Judgment. It was implicit to us, from the terms of the liquidator's correspondence of 28 September and 6 October 2022, that the claimant had not been paid anything, and it was expressly stated by the liquidator that she would merely rank as an unsecured creditor in the liquidation.

16. By letter from the Tribunal to both parties, on 12 October 2022, they were advised that a 2-hour Remedy Hearing in chambers had been arranged for this afternoon, and that they did not require to attend.

Issue for the Tribunal

17. The only issue before us at this Remedy Hearing was whether or not or not to impose a financial penalty on the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996**; and, if so, in what sum.

Discussion and Deliberation

18. We have had cause to reflect, in private deliberation, in writing up this further judgment, whether or not this is an appropriate case to consider making a financial penalty order against the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996,** as amended by the **Enterprise and Regulatory Reform Act 2013, Section 16**, in circumstances where, in determining a claim involving an employer and a worker, the Tribunal concludes that the employer has breached any of the

worker's rights, and the Tribunal is of the opinion that the breach has one or more "***aggravating features".***

19. Whilst the legislation itself does not define what "***aggravating features***" are, the UK Government's explanatory notes suggest that some of the factors which a Tribunal may consider in deciding whether to impose a financial penalty could include the size of the employer, the duration of the breach of the employment rights and the behaviour of the employer and the employee.

20. Further, those explanatory notes also suggest that a Tribunal may be more likely to find an employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated HR team, or the employer had repeatedly breached the employment right concerned.

21. Also, again as per those explanatory notes, it is suggested that a Tribunal may be less likely to find an employer's behaviour in breaching the law had aggravating features where the organisation has only been in operation for a short period of time, it is a micro-business, it has only a limited HR function, or the breach was a genuine mistake.

22. While the power to make financial penalty orders has been in place since 6 April 2014, it would seem that few, if any, have been made, and as such, so far as we can ascertain, there has been only one appellate judgment from the Employment Appeal Tribunal on such orders.

23. The Judge has identified the EAT judgment by Mr Justice Kerr in **First Greater Western Ltd & Anor v Waiyego [2018] UKEAT 0056/18; [2019] WLR(D) 290.** On the facts and circumstances of that case, the EAT held that the ET had rightly rejected the claimant's invitation to impose a financial penalty on the first respondent for deliberate and repeated breaches of employment law.

24. The relevant law is fairly straightforward, and contained within the bounds of **Section 12A**. Further, we have reminded ourselves that the UK Government's explanatory notes are guidance, they are not the law, but an interpretation of the law. The absence of a statutory definition of "***aggravating features***" is peculiar, but Parliament has so made the law, and we have to do our best to interpret its meaning, and the extent of its application.

25. As such, we have referred to the clear words of the statute, and there is no gloss, whether by appellate case law authority, or otherwise, upon the wording of **Section 12A**. As Mr Justice Kerr identified in **Waiyego,** there is a power to make such an order, but not a duty.

26. In the absence of any statutory definition of those two words, "***aggravating features***" , it seems to us that we need to have regard to the ordinary and natural meaning of those two words as they are used in the English language.

27. In that regard, we accept, as falling within the proper meaning and effect of those two words, the various examples cited by the UK Government's explanatory notes. However, we equally well recognise that, as in all cases before the Employment Tribunal, cases are all fact-sensitive, and everything depends on the particular circumstances of the specific case before the Tribunal.

28. In such circumstances, we turn to the facts and circumstances of the present case. While, at the Final Hearing, we heard and accepted compelling evidence from the claimant, we have not heard any evidence from the respondents, nor received any written representations, or submissions from them, other than what was in their ET3 response, their director, Mr Michael McDade's email of 27 May 2022 (commenting upon the claimant's Schedule of Loss), and his subsequent email of 25 July 2022, stating that he would no longer represent the respondents and he would

not be attending any further in the proceedings, that there were no funds in the respondents' bank account and, therefore, no funds to defend the claim or any potential award, and that the respondents were going through a formal process of insolvency.

29. Whatever that formal insolvency process was, it was not transparent to the claimant, nor the Tribunal, until after close of the Final Hearing. The fact that the respondents went into liquidation, on 18 August 2022, only came within the Tribunal's knowledge, and that of Mr Swan, the claimant's solicitor, when the liquidator communicated with both on 31 August 2022.

30. It seems to us that the respondents, though their director, Mr McDade, chose not to participate in the Final Hearing, which proceeded in their absence, and what is equally clear from our original Judgment, issued on 28 September 2022, against which the respondents have made no application for reconsideration, within the 14 days allowed, is that they infringed the claimant's employment rights, in several ways, and we so found in our earlier reserved Judgment. Further, we are of the opinion that the breach of those rights had one or more aggravating features.

31. Specifically, we find, from the facts and circumstances of this case, as established in evidence at the Final Hearing, and as set forth in our findings in fact in the earlier reserved Judgment, that the acts and omissions of the respondents, through their staff, managers, and director, Mr McDade, were deliberate, although we do not go as far as to state that it is established that they were done with malice towards the claimant.

32. It is not evident to us, on the limited information available to the Tribunal, whether at the material time, the respondents had a dedicated HR team, or indeed any access to any legal or HR advice.

33. We do know, as per our findings in fact in the earlier Judgment, that the respondents engaged Best HR (an external HR consultancy) for the grievance and grievance appeals, but we heard no evidence from the respondents, or Ms Parsons and Mr Bailey from Best HR.

34. We are satisfied, from the evidence before us at the Final Hearing, that the respondents are a micro-employer, even although their business as a Vodafone store was operating under the trading style of a larger franchise.

35. Finally, from the extent of their breaches of the claimant's employment rights, we cannot regard the respondents' established breaches of employment law as having occurred due to a genuine mistake – their acts and omissions are indicative of failures by deliberate design, rather than by inadvertent default of their obligations, or some pretended ignorance of their statutory and contractual responsibilities as an employer.

36. In these circumstances, in terms of **Section 12A (1),** we are satisfied that the first part of the statutory test is met, which takes us on next to the ability of the respondents to pay, under **Section 12A (2).** It is provided that the Tribunal "***shall have regard to the employer's ability to pay***." That is a mandatory requirement, as evidenced by the use of the word "***shall***", but it is then provided that ability to pay is to be had regard to in deciding whether to make such an order, and in deciding the amount of a penalty.

37. We also bear in mind that the power under **Section 12A(1)** is discretionary, as evidenced by use of the words "***the Tribunal may order the employer to pay a penalty to the Secretary of State,"*** and in the exercise of our judicial powers, we bear in mind the Tribunal's overriding objective under **Rule 2 of the Employment Tribunal Rules of Procedure 2013** to deal with cases fairly and justly.

38. We must take into account the interests of all parties affected by these Tribunal proceedings, and not just the interests of the respondent former employer as the potential paying party, where, if ordered, the ultimate recipient of any penalty to be paid by the respondents to the Secretary of State is HM Exchequer, and not the claimant.

39. As the respondents' liquidator's written representations to this Tribunal were relatively brief, and sparse of detail, as they did not reply to the Tribunal's wider invitation to them to comment, we have not heard from them directly on the respondents' ability to pay, if we were to decide to make a financial penalty order against them.

40. We do not know the extent of their financial affairs, only that the respondents are insolvent, and that the monies we have awarded to the claimant in our earlier reserved Judgment will rank only as an unsecured creditor in the company's liquidation.

41. Having decided that the respondents acted in a way that a financial penalty order might be made by the Tribunal, we have also asked ourselves whether we should exercise our judicial discretion by granting such an order against the respondents.

42. As far as we are aware, for the Tribunal has not been advised otherwise, by the liquidator, or by the claimant's solicitor, the claimant has not received any payments from the respondents as awarded to her in our earlier reserved Judgment. This Tribunal has no power to enforce that earlier Judgment issued in her favour, but in the event of non-payment, as seems to be the case here, the sums awarded to the claimant are subject to interest payable by the respondents.

43. Further, the claimant's solicitor can apply to the Tribunal for an Extract of that earlier Judgment to allow her to take steps to instruct Sheriff Officers to execute diligence against the respondents, if so advised to do so, given

the respondents are in liquidation. Any such application should be made by her solicitor, in writing, to the Tribunal.

44. After careful and anxious reflection, we have decided that it is not appropriate for us to make a financial penalty order against the respondents, not because of any aspect of the respondents' entirely unacceptable conduct, and their failure to pay the sums already awarded to the claimant, but because, to do so, we genuinely believe, would place in jeopardy the chances (if any) of the claimant receiving from the respondents' liquidator the various amounts that we have already ordered the respondents to pay to the claimant.

45. If we were to make such an order now, the respondents might well decide to give priority of payment to the Secretary of State, rather than the claimant. In these circumstances, we have decided not to make any order under **Section 12A** against the respondents.

46. Accordingly, it is not required that we go on and decide upon an appropriate sum to award against the respondents. What we will say, at this point, is that under **Section 12A(2),** the Tribunal is obliged (rather than permitted) to take into account the respondents' ability to pay, when considering whether or not to make an order or how much that order should be for.

47. We have no meaningful information before us from the respondents' liquidator for us to consider the respondents' ability to pay, and we did not consider it appropriate to again seek further information from the respondents' liquidator by further correspondence, when there was no guarantee that they would reply, and that would simply have further delayed issue of this our further Remedy Judgment.

48. Put simply, this Tribunal has no information as to the respondents' current trading and financial status, other than it is in liquidation, nor any

documented, or vouched information, about their current financial circumstances, and so their ability to pay, or not. All we know, from the liquidator, is that the claimant ranks only as an unsecured creditor in that liquidation, and so it seems that the prospects of her receiving anything (if at all) like the compensation sum awarded by the Tribunal seems remote, and a forlorn hope.

Disposal

49. Having carefully considered the matter, we have decided not to make any financial penalty order in favour of the Secretary of State, considering it to be in the interests of justice to make only the monetary awards of compensation payable to the claimant, payable by the respondents, as set forth in our earlier reserved Judgment issued on 28 September 2022.

Employment Judge: **G. Ian McPherson**
Date of Judgment: **31 October 2022**
Entered in register: **01 November 2022**
and copied to parties