



EMPLOYMENT TRIBUNALS

Claimant: Mr S Jonjo

Respondent: HC-One Oval Limited

Heard at: East London Hearing Centre

On: 30 November 2022 (in chambers) 16 January 2023

Before: Employment Judge S Knight
Members: Mrs G McLaughlin
Mr J Quinlan

Representation
Claimant: Represented himself
Respondent: Victoria Young (Solicitor)

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

1. The Respondent is ordered to pay the Claimant **£15,000** in respect of race discrimination.
2. The Respondent is ordered to pay the Claimant a further **£30,837.90** in respect of unfair dismissal.
3. For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:
 - (1) The total monetary award for unfair dismissal is £30,837.90.
 - (2) The prescribed element is £30,670.32.
 - (3) The prescribed element relates to 22 September 2020 to 30 November 2022.
 - (4) The amount by which the total monetary award for unfair dismissal exceeds

the prescribed element is £167.58.

REASONS

Introduction

1. The background to the claims is set out in the written reasons provided in respect of our judgment on liability dated 30 November 2022. The Claimant succeeded in claims of unfair dismissal due to making a public interest disclosure, and race discrimination in relation to the actions of Nurse B.
2. These are the reasons for our judgment on remedy. They are based on the evidence and submissions we heard during the liability phase of the case, as well as the Claimant's evidence and the submissions of both parties, orally and in writing, at the hearing 30 November 2022.

Findings of fact

Discrimination on the grounds of race

3. The Claimant was offended by the comments of Nurse B. As the Claimant remarked in submissions, "When you hurt a resilient person you hurt them more than someone who is oversensitive." For the Claimant to take offence at Nurse B's remarks means that he really was offended. In relation to the first incident with Nurse B, he was particularly hurt because it was in the context of her not helping him to provide care to a resident that was desperately needed. The Claimant felt that this was inhuman, and that he was failing to help the resident because he could not get help from Nurse B.

Unfair dismissal due to making a public interest disclosure

4. The Claimant's employment began on 30 September 2019 and ended on 22 September 2020.
5. The Claimant's normal gross weekly pay was £792.
6. The Claimant's normal net weekly pay was £577.34.
7. The Claimant was paid in lieu of notice, which means he has already been compensated for the loss of earnings in the period from 22 September 2020 to 20 October 2020.
8. In the period between 21 October 2020 and 31 October 2020 the Claimant would have been able to work.
9. However, on 1 November 2020 the Claimant became so sick from COVID-19 that he would not have been able to work. The Claimant suffered from Long COVID. The effect of this was that he was not able to work between 1 November 2020 and 31 July 2021. From 1 August 2021 the Claimant began to apply for jobs as

he was then feeling well enough to do so.

10. The United Kingdom's Job Retention Scheme ("furlough") ran until 30 September 2021. From 1 July 2021 onwards employers had to make increasingly large contributions to staff furlough pay.
11. The Claimant had the rare trait of being a CQC registered manager. As such, if the Respondent had not dismissed the Claimant, they would have wanted to retain his services. He would have been a valuable asset to the Respondent. The costs of keeping the Claimant employed on furlough would have been financially worthwhile for the Respondent. The costs that the Respondent would have had to pay under the furlough scheme, between 1 November 2020 and 31 July 2021, would have been minimal, particularly when set against the financial and staff-cost time of running a recruitment exercise to find a permanent replacement for the Claimant. As such, despite the fact that the Claimant was unable to work, if he had remained employed by the Respondent then he would have been placed on furlough to allow his employment to continue.
12. The Claimant's past payslips from when he had been furloughed show his monthly net furlough pay was £2,024.50. As such, his weekly net furlough pay was £467.19.
13. The Claimant was successful in finding new employment. That new employment began on 1 December 2021. In his new employment he was paid £40,000 per year. That is £769.23 per week gross, or £562.34 per week net. His net wages in his new job were £15 per week net less than in his old job.
14. The Claimant's new employment ended on 31 August 2022. That was as a result of a series of disagreements he had with his new employer which caused him to decide that he could no longer remain employed, and to resign.

Conclusions

Discrimination on the grounds of race

Injury to feelings

15. The discrimination involved in this case was neither a campaign of discriminatory harassment as seen in the worst sorts of cases, nor a one-off event. It was a single major event, followed by multiple instances of abusive treatment that resulted from a discriminatory motive by Nurse B.
16. The Respondent has been correct in noting that the Claimant was not badly hurt by every discriminatory comment. Nonetheless, the Claimant's feelings were injured. He was a resilient person and even for him Nurse B's initial racially-motivated comment was too much, particularly in the context in which it was made.
17. This case falls within the middle band of awards for injury to feelings ("**the Vento bands**"). It is a serious case which nonetheless does not merit an award in the highest band.

18. In assessing the place that the case falls within the middle band, the Tribunal considered several precedent cases, but was not directed to any case which was of direct relevance to the present case. Rather, they showed the general operation of the Vento bands.
19. We conclude that this case falls towards the middle to lower end of the middle band. The middle band for dismissals between 6 April 2020 and 5 April 2021 is £9,000 to £27,000.
20. We order compensation for the Claimant's **injury to feelings** in the sum of **£15,000**.

Aggravated damages

21. We considered whether an award of aggravated damages should be made. We concluded that the criteria for making an award of aggravated damages did not apply. Our reasons in particular are as follows.
22. Firstly, the discriminatory acts were not done in an exceptionally upsetting way. The extent to which they were upsetting, and in particular the context of not assisting to toilet a resident, has already been accounted for in our award of basic damages.
23. Secondly, the motive for the discriminatory act was no more spiteful and vindictive than necessary for the detriment because of race to have occurred. As such no additional distress was caused to the Claimant/
24. Thirdly, the Respondent's actions subsequent to the discriminatory conduct did not rub salt in the wound. The Claimant is not happy with how the Respondent has acted, but the Respondent's subsequent actions did not increase his distress. It was the racially motivated detriment alone which caused the injury to his feelings.

Unfair dismissal due to making a public interest disclosure

ACAS uplift

25. The Claimant seeks an ACAS uplift. He says that the Respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("**the ACAS Code**"). The Claimant in particular claims that there was no fair investigation, and that he was prevented from being able to be accompanied by a trade union representative.
26. In contrast, the Respondent says that the ACAS Code does not apply.
27. Paragraph 1 of the ACAS Code sets out its scope of application. It applies to "disciplinary and grievance situations in the workplace". As it notes, "Disciplinary situations include misconduct and/ or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted".

28. However, this leaves a grey area regarding other reasons for dismissal, including capability where under-performance or absence occurs as a result of long-term ill health or disability. If the reason for dismissal, as found by the tribunal, does not involve a disciplinary offence, then the ACAS Code has no relevance and it must follow that there can be no basis for awarding an uplift for failure to comply with it. In *Holmes v Qinetiq Ltd* [2016] I.C.R. 1016 (26 April 2016), the EAT held that a disciplinary situation was one in which an employee faces a complaint or allegation that might lead to disciplinary action, and such action ought only to be invoked where there was culpable conduct or performance alleged against the employee.
29. We conclude that this is the sort of case which falls outside the scope of the ACAS Code. In particular, there was no suggestion of a disciplinary offence by the Claimant, given that there was no culpable conduct alleged against him.
30. As such, we make no adjustment for failure to comply with the ACAS Code.
31. If we were wrong in our interpretation of when the ACAS Code applies, and it should have applied in this case, then we would have awarded an uplift of 25%. This is because the Respondent conducted such a poor investigation of the Claimant's training records that it got matters factually wrong, with Ms King failing to realise what training the Claimant had in fact completed. It is further because, as set out in our written reasons on liability, Ms King prevented the Claimant from relying on a trade union representative by requiring a meeting to go ahead at short notice and when the trade union representative was not available.

Basic Award

32. The Claimant was employed for less than a year. As such, the calculation of his **Basic Award** would be $£792 \times 1.5 \times 0 = \text{£}0$.

Compensatory Award: Prescribed Element

33. Between **21 October 2020 and 31 October 2020** the Claimant was able to work normally. He is to be compensated for this period at his weekly normal net pay x 11 days. $£577.34 \times 1\frac{4}{7}$ weeks = **£907.25**.
34. Between **1 November 2020 and 31 July 2021** the Claimant was off sick and would have been furloughed if he had not been dismissed. He is to be compensated for this period at his weekly furlough net pay x 39 weeks. $£467.19 \times 39$ weeks = **£18,220.41**.
35. Between **1 August 2021 and 30 November 2021** the Claimant was looking for work. He took reasonable steps in that period to find work, against the background of recovering from Long COVID. He is to be compensated for this period at his weekly normal pay x $17\frac{3}{7}$ weeks. $£577.34 \times 17\frac{3}{7}$ weeks = **£10,062.21**.
36. Between **1 December 2021 and 31 August 2022** the Claimant was earning £15 net per week less than in his old job. He is to be compensated for this period at £15 per week x $39\frac{1}{7}$ = **£587.14**.

37. Between **1 September 2022 and 30 November 2022** the Claimant was unemployed. It is not the Respondent's fault that the Claimant lost his new job. However, it is their fault that he had that job to begin with. Nonetheless, it is an intervening event. He could have got a better job in that time. As such, for this period there is **no compensation** due.
38. This gives a total **loss of earnings of £29,777.01**.
39. On all of these sums the Respondent's **employer's pension contributions** were 3%. 3% of £29,777.01 = **£893.31**.
40. This gives a total **Prescribed Element of £30,670.32**.

Compensatory Award: Non-Prescribed Element

41. The Claimant had been employed for less than a year when he was dismissed. He had no right to claim for ordinary unfair dismissal. He had no right to long notice. As such, we make no award for loss of statutory rights or right to long notice.
42. Happily, on the day after the hearing in this case the Claimant was due to begin a new job. As such, there was no suggestion of future loss.
43. The Prescribed Element figure exceeds £30,000 by £670.32. We estimate tax at 20% of £670.32. The additional compensation to account for tax is therefore $(£670.32 / 0.8) - £670.32 = £837.90 - £670.32 =$ **£167.58**.
44. This gives a total **Non-Prescribed Element of £167.58**.

Summary of conclusions on remedy

45. We order the Respondent to pay **£15,000 in respect of injury to feelings** for discrimination, and **£30,837.90 in respect of unfair dismissal**, this being the Prescribed Element.
46. We make no other award.

Employment Judge Knight
Dated: 17 January 2023