



# EMPLOYMENT TRIBUNALS

**Claimant:** Mx F Evans

**Respondent:** Thoughtful Supermarket Ltd

**Heard at:** London South via CVP      **On:** 1 November 2022 (with written submissions following the hearing)

**Before:** Employment Judge D Wright (Sitting Alone)

## **Representation**

Claimant: In person, with support from Ms. Eley Assoc CIPD

Respondent: Mr. Amiri, Company Director

# JUDGMENT ON REMEDY

1. The Respondent is to pay the Claimant the sum of £5,197.50 gross of tax in loss of earnings.
2. The Respondent is to pay the Claimant the sum of £250 to compensate for their loss of statutory rights.
3. The Respondent is to pay the Claimant the sum of £7,500 for injury to feelings.
4. The Respondent is to pay the Claimant the sum of £1,620 towards the costs of therapy attributable to the dismissal.
5. The Respondent is to pay the Claimant the sum of £1,092.56 for a failure to follow the ACAS code.

# REASONS

## Preliminary

1. The Respondent was taken ill during the remedy section of the hearing. The parties agreed to provide written submissions on the outstanding points. The Claimant did so but the Respondent did not. The deadline having passed a significant time ago I now proceed on the submissions before me.
2. It was agreed that the Claimant's average weekly pay, before tax, was £74.25

Basic Award

6. The Claimant initially claimed £632.00 for this head of claim. The Claimant worked for the Respondent for a period of around eight weeks. This means that they did not have any complete years of service and therefore the Basic Award calculation would involve a multiplication by zero. As such I make no award for this head of claim.

Past and Future Loss of Earnings

7. The Claimant has claimed £74.25 a week from the date of dismissal until the hearing on 1<sup>st</sup> November 2022 (being 91 weeks), plus a further 26 weeks to allow them to find alternative employment.
8. The Claimant says that they struggled to find alternative employment because they were diagnosed with PTSD following the dismissal which made it hard to search for work. This was further exacerbated by Covid 19 making jobs scarcer. I note that whilst the Claimant has submitted evidence that they have been seeing a counsellor, there is no evidence before the Tribunal to support a diagnosis of PTSD.
9. The Claimant subsequently expanded on this point by saying that they found it hard to apply for jobs in the Brighton area because they were paranoid about what the Respondent may have said to his contacts. They were paranoid that they would be deemed to be a troublemaker.
10. The Claimant says that they started self employed work in early 2022 as a tattooist. They rent a chair in a London venue and are yet to make a profit. They hope that within six months they will be turning a profit.
11. The Claimant is currently in receipt of universal credit and informed me that the job centre is content with the level of their job search and their attempts to get their tattoo career off the ground.
12. The Respondent raises doubts over how long the Claimant would have worked for them in any event. They point out that the weekly pay based on the shifts the Claimant was getting would not be sufficient to cover their living expenses.
13. The Respondent, to their credit, does not seek to challenge the validity of the claimed impact on the Claimant's mental health but does feel that the time out of work is unreasonable. The Respondent highlighted that he has set up a number of companies/self employed ventures and felt the Claimant's suggested timeframe to making a profit was too slow.
14. I find that ordinarily 91 weeks to find alternative employment, in a role which requires no qualifications, is excessive. However, I note the impact of Covid 19 on this case and furthermore find that the Claimant did suffer a degree of mental ill-health as a result of the unfair dismissal. Whilst I am unable to find that this was PTSD, I do find that it had a significant impact on their health and prevented them from conducting as thorough a job search as possible.
15. However, I would have expected the Claimant to have found alternative work by now to supplement their burgeoning tattoo career. Overall, I find

that a period of 70 weeks would be sufficient. I therefore make an order that the Claimant is entitled to past loss of earnings in the sum of £5,197.50 gross of tax.

16. This period ending prior to the hearing I make no award for future loss of earnings.

Loss of Statutory Rights

17. The Claimant claims £300 for this head. I note that the Claimant was very early into their employment with the Respondent and therefore was a long time off earning these rights in the first place. I do note however that the dismissal has caused the clock to restart, and I have also accepted above that it was reasonable to take 70 weeks to find alternative employment, during which time they would have become closer to establishing those rights. Overall, I find that an award of £250 is appropriate.

Expenses incurred in looking for a new job

18. This head of claim was unevidenced and unparticularised. As such I dismiss it.

Injury to feelings, aggravated damages and personal injury

19. The Claimant has suggested that a figure of £10,000 would be appropriate here but leaves it largely to the Tribunal to determine.

20. I repeat the points made above in paragraphs five and six. In addition, the Claimant mentioned that they were troubled by the fact that the Respondent had their information and was concerned as to how he might treat it. In particular information relating to their gender identity.

21. These points were one of the reasons they have set up their tattoo business in London as they were concerned about how businesses in Brighton might treat them. Furthermore, their concerns and anxiety relating to this have led them to move house and start therapy.

22. The Claimant also brings a claim for personal injury relating to their mental health and the toll which the dismissal has had on their health. As mentioned above I find that there was a significant impact on the Claimant's mental health but, due to the lack of evidence, am unable to find that this was a recognized psychological disorder by reference to the DSM categories. As such I dismiss the personal injury element of the claim. The damage to the Claimant's mental health can be adequately dealt with by way of an award for injury to feelings.

23. The Claimant has also raised issues relating to "deadnaming" and misgendering by the Respondent in relation to this head of claim. I note that discrimination on grounds of gender identity has not been pleaded in this claim. Therefore, I find that I am unable to make an award for this under injury to feelings and make no findings as to whether there was any discrimination prior to the dismissal.

24. The Claimant has said that the mental ill-health and need for therapy could be equally split between the unfair dismissal and the alleged issues with gender identity discrimination (both pre and post issue).

25. The Claimant has also raised issues which could be deemed to be an aggravated damages claim. They surround the alleged conduct of the Respondent in defending these proceedings.
26. The Claimant highlights that all letters sent by the Respondent use their previous name. Furthermore, the ET3 uses the same name, and repeats it several times in the Grounds of Resistance. This has upset them and caused them mental distress.
27. The Respondent denies that this was done with the intention to cause the Claimant distress. I accept this. The Claimant used their old name in the ET1 and therefore it is reasonable for the Respondent to use that name in formal correspondence. I note from the evidence bundle that in pre-litigation correspondence the Respondent used the Claimant's chosen name and did not share their legal name with anyone else in the Respondent's employ. During the hearing the Respondent used the Claimant's chosen name and the only misgendering which took place during the hearing was done by me accidentally using the incorrect pronouns, for which I was rightly picked up on and for which I apologised.
28. The Respondent was aghast at the suggestion he caused this pain and distress intentionally. I find that this was not done on purpose and was reasonable in light of the use of the legal name on the claim form. Therefore, I dismiss the claim for aggravated damages.
29. The Claimant has also raised concerns about the Respondent failing to adequately respond to their request for access to their data held by the Respondent. This is largely a matter for the Information Commissioner to determine, but I do not see any obvious refusal which would cause me to increase the award here. By the Claimant's admission most of their concerns here related to their own paranoia (however well founded) as to what, if anything, the Respondent may do with information held.
30. Having dealt with the above I consider that the dismissal on grounds of making a protected disclosure falls within the lower of the Vento bands. The claim form was issued on 11 March 2021. The relevant Vento band at the time gives a range of £900 to £9,000.
31. I note the impact on the Claimant of the incident and remind myself that when considering this award, it is necessary to look at the matter subjectively rather than objectively. Whether or not the "average" person would have suffered in the way that the Claimant did is irrelevant, one must look at all of the characteristics of the Claimant. Noting the significant impact of this dismissal on the Claimant (including the need to engage the services of a therapist), but also taking into account that some of the impact is attributed to alleged misgendering which is outside the bounds of this claim I find that an appropriate award within this bracket is £7,500.

#### Therapy Costs

32. The Claimant seeks £2,400 for 80 past sessions with a further estimated 28 sessions at £30 a session. The total sum claimed therefore is £3,240. Although I note that the Claimant has not provided evidence that they suffered from a recognized psychological disorder as a result of pleaded actions of the Respondent, I accept that there was some psychological

upset, at least, caused. The Claimant accepts that the need for counselling could be split between the unfair dismissal and any unpleaded discrimination. Therefore, I award the sum of £1,620 for this head of claim.

Failure to follow the ACAS code

33. The Claimant seeks an uplift to the compensatory award for the Respondent's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures in that the Respondent failed to provide the Claimant with the true reason for their dismissal and failed to inform the Claimant that they had the right to appeal.
34. I find that the Respondent did not follow the code precisely. When coming to my decision as to the appropriate uplift I note that the Claimant had only been employed for a short period of time and also that the Respondent is a relatively small organisation without a dedicated HR department.
35. Taking everything into account I find that the appropriate figure would be 7.5%

Basic Award	£0.00
Loss of Earnings	£5,197.50
Loss of Statutory Rights	£250.00
Injury to feelings, aggravated damages and personal injury	£7,500
Therapy costs	£1,620.00
Sub-total	£14,567.50
ACAS uplift @ 7.5%	£1,092.56
Grand-total	£15,660.06

Employment Judge **D Wright**

Date 22 March 2023