



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs D Philpott

**Respondent:** Cawdor Cars (Newcastle Emlyn) Ltd (R1)  
Mr D.K.L. Davies (R2)  
Mr. D.W. Evans (R3)

**HELD AT/BY:** Wrexham by CVP                      **on:** 30<sup>TH</sup> May 2023

**BEFORE:** Employment Judge T. Vincent Ryan  
Mrs L. Owen  
Mrs Y. Neves

## REPRESENTATION:

**Claimant:** Litigant in Person  
**Respondent:** Ms H. Barney, Counsel

# RESERVED JUDGMENT

This reserved judgment is in respect of remedy where the liability judgment was signed on 2<sup>nd</sup> August 2022 and was sent to the parties on 18<sup>th</sup> August 2022 (“the liability judgment”); the claimant was constructively unfairly dismissed by the first respondent which also victimised her; the first and second respondents discriminated against the claimant because of something arising from disability.

The unanimous remedy judgment of the Tribunal is:

1. In relation to the claimant’s Unfair Dismissal claim, the first respondent shall pay to the claimant £2,150.00, comprising:
  - 1.1. Basic Award – as agreed between the parties £990.00.
  - 1.2. Compensatory Award:
    - 1.2.1. Loss of statutory rights – as agreed by the parties - £500.
    - 1.2.2. Loss of Notice – two week’s pay - £660 subject to statutory deductions.
2. In relation to the discrimination and victimisation claims, the first and second respondents shall pay to the claimant:

- 2.1. Damages for Injury to Feelings: £18,000.
- 2.2. Interest from 17.03.20 – 30.05.23 at 8% pa (for 3 years and 10 weeks) - £4,596.90.
3. The total payable to the claimant, subject to deductions as mentioned above (para 1.2.2) is £24,746.90. The recoupment provisions do not apply.

## **REASONS**

**The Issues:** It was agreed at the outset that the issues to be decided were (in accordance with a list prepared by the first respondent):

### **Remedy for unfair dismissal**

1. Does the Claimant wish to be reinstated to their previous employment?
2. Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?
3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
5. What should the terms of the re-engagement order be?
6. If there is a compensatory award, how much should it be? The Tribunal will decide:
  - 6.1. What financial losses has the dismissal caused the Claimant?
  - 6.2. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - 6.3. If not, for what period of loss should the Claimant be compensated?
  - 6.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 6.5. If so, should the Claimant's compensation be reduced? By how much?
  - 6.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - 6.7. Did the Respondent or the Claimant unreasonably fail to comply with it by?
  - 6.8. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
  - 6.9. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
  - 6.10. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
  - 6.11. Does the statutory cap apply?
7. What basic award is payable to the Claimant, if any?

8. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

**Remedy for discrimination or victimisation**

9. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
10. What financial losses has the discrimination caused the Claimant?
11. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
12. If not, for what period of loss should the Claimant be compensated?
13. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
14. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
15. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
16. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
17. Did the Respondent or the Claimant unreasonably fail to comply with it?
18. If so, is it just and equitable to increase or decrease any award payable to the Claimant?
19. By what proportion, up to 25%?
20. Should interest be awarded? How much?

**The Facts:**

21. The claimant (C) was employed by the first respondent (R1) from 14 December 2017 until 13 June 2020. In its liability judgment the Tribunal held that C had been constructively unfairly dismissed, and victimised, by R1 and that she had been discriminated against because of something arising out of disability by both R1 and R2. All other claims failed and were dismissed.
22. C does not wish to be reinstated to her previous employment, nor does she wish to be re-engaged to comparable employment or other suitable employment with R1. The relationship of trust and confidence has completely broken down such that, nearly 3 years on, C is still convinced that the respondents and their legal representatives are "lying" about her and the circumstances surrounding the ending of her employment, and seek to make her life difficult, including in the preparations for this hearing. The Tribunal makes no findings, at this stage at least, in respect of these allegations that were repeatedly made by C. She seeks payment of compensation and damages totalling £91,975.86. The respondents value the claimant's claim at £18,990.
23. Was there a chance that C's employment would have ended anyway? In its liability judgment the Tribunal found that R1 engineered the claimant's exit from the company. The respondents do not argue that C was, more likely than not, redundant in any event. The Tribunal does not need to make any further findings in this regard.
24. Notice of termination: C's contract of employment required her to give four weeks' notice of termination. The requirement upon R1 was to give statutory notice that

is, after one month's continuous employment to give one week's notice of termination and thereafter, after two years continuous employment, to give one week's notice per completed year of employment. C resigned summarily, that is without notice. She was however constructively dismissed by R1. At the time of her constructive dismissal C was entitled to receive two weeks' notice from R 1. No notice was given, (obviously in view of the circumstances), and no payment was made in lieu of notice by R 1.

25. Loss of Earnings & mitigation:

- 25.1. As at the time of her dismissal C's gross weekly pay received from R 1 was £330. Her net weekly basic pay was £285.92. There had been an agreement in relation to the payment of some expenses during employment and the facts relating to that agreement are set out in the liability judgment.
- 25.2. At the time of her dismissal, and for some time before that, the claimant carried out self-employed work apart from any service provided to the respondents. Prior to her resignation C's average monthly income from this self-employed work was £401.25.
- 25.3. Following her constructive dismissal, C was able, working from home, without incurring expenses in relation to travelling and working in an environment that suited her when she was concerned about shielding (as the claimant was a vulnerable person during the Covid pandemic) to increase the amount of work undertaken in her self-employed business. Her average monthly pay from self-employed work post dismissal was £766.95. She increased her income post dismissal, from self-employed work, by £365.70. The increase in self-employed income exceeded the wages she had been receiving from R 1.
- 25.4. The claimant did not apply for Working Tax Credit. She considered that she may not have been eligible because of her savings although she knew that there was a possibility that she would be entitled to it. She considered the process of application to be too onerous to be worth trying; she was capable of providing the requisite information as her self-employed earnings were based upon invoices raised by her. For the purposes of this litigation C was able to prepare calculations showing her hours worked and income received. It was her choice not to apply for Working Tax Credits to which she may have been eligible.
- 25.5. Given that C had resigned, claiming it was a constructive dismissal, C was not immediately entitled to any other state benefits and has not claimed any.
- 25.6. C has fully mitigated losses which would otherwise have been sustained in consequence of the constructive dismissal, insofar as any such loss would have been attributable to action taken by R 1.
- 25.7. C obtained employment in the period 10 August 2020 to 30 September 2020 working 20 hours per week over four days on a lower rate of pay than that which she enjoyed with R 1. She left this employment of her own volition,

being wary of the conduct of some of her colleagues which she felt was not compliant with guidance and restrictions imposed in relation to the pandemic (bearing in mind at all times that C was a vulnerable person) and for what she considered to be a better job.

25.8. C was employed in this further alternative employment from 1 October 2020 to 31 January 2021, working a 30-hour week on terms that matched those which she enjoyed with R 1. She negotiated her pay on the basis that she wanted the same remuneration as she had received from R 1. C was again unhappy and concerned that certain of her colleagues failed to follow restrictions that were imposed in the light of pandemic related restrictions; she was also unhappy that her new employer did not implement recommendations that she had made. These matters and the claimant's abiding concern for her personal safety during the time of the pandemic may have affected her performance; that is her perception. For all these reasons the employment ended in January 2021. In the early days of this employment R1 contacted the company for which C was working and engaged its services. C considers that this was unfair and detrimental to her; she has not made a claim of post termination victimisation. In any event there were at most two phone calls from R1 to C's employer in the early weeks of October 2020 following which she worked on until 31 January 2021. The Tribunal is unable to make a finding of fact that R1's conduct at this time effected any loss to C.

25.9. Throughout the period of alternative employments, C maintained her self-employed work.

25.10. It was not until 10 June 2021 that C was certified as unfit to work. There was then a protracted period of incapacity from employment where the stated reason was either pain related to her arthritic condition or stress, where stress may be a contributory factor to pain. The Tribunal is unable to make a finding of fact, in the absence of sufficient medical evidence, that at any stage C was incapacitated from work owing to stress related to the circumstances of either her constructive dismissal, victimisation by R 1 and R 2 or any disability discrimination during her employment with R 1.

25.11. C continued to work on a self-employed basis earning the income referred to above throughout the period of medical incapacity from employment that commenced on 10 June 2021.

26. Loss of statutory Rights: C has claimed loss of statutory rights of the sum of £500. That figure is also given for loss of statutory rights in the respondent's counter schedule. In those circumstances the Tribunal considers it appropriate to confirm that C's loss of statutory protection should be compensated that sum.

27. "Expenses": the liability judgment contains findings of fact in relation to expenses that were paid to C at times during her employment by R1. C did not incur continuing expenses post- dismissal that are recoverable from R 1; there were no losses in this respect attributable to R1's action in relation to her.

28. ACAS Code – Grievance: the liability judgment includes findings of fact in relation to C's grievance. C presented a grievance. She resigned before it had been fully

addressed and while it was being addressed. R1 had instructed an independent grievance officer to investigate the grievance. C, for her own reasons, had no confidence that there would be a fair and proper consideration of her grievance. Her resignation pre-empted the completion of the investigation and grievance procedure, such that the Tribunal finds there was no failure on the part of R 1 to comply with the appropriate ACAS code.

29. C's conduct pre-dismissal: the liability judgment includes a finding that R 1 was "easing the claimant out and singling her out because she did not fit any longer in their long-term plans; this was because she complained in the way that she did as set out in her grievance". Furthermore, C could have no confidence that R 1 would have dealt fairly with any redundancy procedure or with her grievance. R 1 had acted in a way that was likely to destroy or seriously damage the relationship of trust and confidence. The Tribunal has not found any facts in relation to C's conduct before dismissal that would justify a reduction in the Basic Award, or that would show that her dismissal was caused or contributed to by her actions such as to affect any Compensatory Award.
30. Basic Award: the effective date of termination was 13 June 2020. C's gross weekly basic pay at that time was £330. Her age at the effective date of termination of employment was 50 years. She had two years completed employment. The parties have agreed that the statutory basic award amounts to £990.
31. Injury to feelings: the claimant was offended, insulted, and very concerned in terms of any health implications by R 2 and his conduct towards her especially on 17 March 2020. It was on that date that he coughed at her, or in her direction, when she was anxious about the health implications of covid. This situation is covered fully in the liability judgment. C reasonably considered that this created an intimidating working environment. She was further offended and distressed that her complaints were not taken seriously and that the circumstances of the event in question were being covered up. C continues to feel a sense of injustice and outrage at the conduct to which she was subjected. It has caused her mental distress for a protracted period of time. She has suffered injury to feelings.
32. Personal Injury: C was certified unfit to work through pain related to her disability almost 12 months to the day following the dismissal. Subsequently part of the reason for incapacity was specifically diagnosed as stress. C has chosen to redact her medical records that were disclosed for use at this hearing; some of those redactions relate to the identity of her children. It is evident from the context of the redactions that they do not all so relate; some of the redactions appear to be significant, possibly in relation to causation. The Tribunal notes that C has had several potential stressors in her life not least bereavement, a difficult relationship with a controlling partner, a child or children leaving home, litigation (with concern over potential liability for costs), financial concerns as the sole "breadwinner" in a household raising children, let alone the circumstances giving rise to this litigation. C maintains that all her stress was caused by the events that arose during her employment by R 1. The Tribunal is not qualified to reach that conclusion. In any event there is insufficient evidence before the Tribunal for it to make any finding of fact that C sustained a personal injury in consequence of the actions of any of the respondents.

33. Interest: The discriminatory act in relation to which damages are being awarded took place on 17 March 2020. There were subsequent acts of victimisation, but the Tribunal finds that the abiding hurt and distress giving rise to injury to feelings damages commenced on 17 March 2020; it is impossible to apportion damages between any later acts that merely failed to recognise the distress caused in March 2020 or which built upon it. The period of time from 17 March 2020 to 30 May 2023 is three years and 10 weeks. The applicable rate of interest is 8% per annum.

**The Law:**

34. Compensation for Unfair Dismissal:

34.1. Basic Award: a claimant who is unfairly dismissed is entitled to a basic award calculated in accordance with a statutory formula reflecting length of employment, age at the date of termination of employment, and gross weekly pay. These factors are subject to statutory caps. If a Tribunal considers it just and equitable, there are circumstances in which it may reduce a basic award to reflect culpable conduct on the part of a claimant pre-dismissal.

34.2. Compensatory Award: a Tribunal shall make an award that it considers just and equitable in all the circumstances having regard to any loss sustained by a claimant in consequence of an unfair dismissal insofar as that loss is attributable to action taken by their respondent. In ascertaining the loss, the Tribunal shall apply general rules concerning a duty on a person to mitigate loss. Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of a claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to finding.

35. Damages for Disability Discrimination and Victimisation:

35.1. The EAT set out the general principles that apply to assessing an appropriate injury to feelings award in *Prison Service v Johnson* [1997] IRLR 162, para 27:

35.2. Injury to feelings awards are compensatory and not punitive; they must be fair to both parties and ought not be influenced by the tribunal's attitude to the detrimental treatment in question;

35.3. Awards should not be so high or so low as to cause disrespect to the process and purpose of making such awards;

35.4. Awards should have some correlation with personal injury awards in general;

35.5. The Tribunal should consider the real-life value, purchasing power, of any award in day to day living;

35.6. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental

distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

36. In *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102) the Court of Appeal identified three broad bands of compensation for injury to feelings (albeit within each band there is flexibility, allowing a tribunals to fix what it considers to be fair, reasonable and just compensation in the circumstances of the case) and gave the following guidance:

36.1. The top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in the most exceptional case should an award of compensation for injury to feelings exceed top of this band;

36.2. The middle band should be used for serious cases, which do not merit an award in the highest band;

36.3. The lower band is 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 the bottom of this band are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

37. The bands have been revised over time and the Presidents of the Employment Tribunals in England & Wales and Scotland issued '[Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction \(UK\) Ltd](#)'. This Guidance updated the bands and there are annual updates.

38. The bands between 6 April 2020 and 5 April 2021 (the material time in this case) were:

38.1. Upper Band: £27,000 - £45,000;

38.2. Middle Band: £9,000 – £27,000; and

38.3. Lower Band: £900 to £9,000.

39. It is necessary for the individual to prove the nature of the injury to feelings and its extent.

40. Such awards attract interest at the rate of 8% from the date of the act of discrimination/detriment to the date of calculation.

#### **Application of law to facts:**

41. C does not wish to be reinstated or re-engaged by R1. That is the end of that issue.

42. Following her dismissal C was able to, and did, provide her self-employed services to a greater extent than she had prior to her dismissal. Naturally, this resulted in an increase in her income. The additional self-employed income



exceeded the wages that she enjoyed whilst working for R 1. C says that this is irrelevant; she says that it is irrelevant because she already had that self-employed work, and it was always likely to increase. She did not produce any evidence to show that there was any planned increase in paid work regardless of her employed status. There is a correlation in the timing of the increased self-employed activity and dismissal. It appears more likely than not that C's dismissal enabled increased self-employed activity and therefore her increased income. By virtue of this additional work and income C has fully mitigated any potential loss of income attributable to the actions of R1. C was under a duty to mitigate her loss and it is to her credit that she has done so fully. It would not be just and equitable to disregard her increased income following dismissal.

43. In any event, C obtained employment which commenced on 10 August 2020, which she voluntarily terminated on 30 September 2020; that income too would have been brought into account. She then commenced further and better employment, in terms of hours and pay and on terms which were commensurate with those enjoyed with R1, on 1 October 2020. These earnings also would have been brought into account; had there been a continuing loss it would have ended no later than 1 October 2020. C, for her own good reasons, was dissatisfied with working conditions in both of these alternative employments, and latterly disappointed that recommendations she had made were not taken on board. The latter placement was not successful but that had nothing to do with the actions of R 1 of the material time.
44. C decided not to apply for Working Tax Credit. That was her choice. It was a failure to mitigate.
45. C's schedule of loss and the respondents' counter-schedule recite the figure of £500 with regard to loss of statutory rights. The Tribunal may otherwise have ordered one week's pay but in the circumstances is prepared to accept the figure put forward by both parties as being the appropriate compensation.
46. It would not be just and equitable to reduce either basic or compensatory awards in the circumstances above.
47. The parties did not propose any recommendation that the Tribunal ought to consider in the light of the discrimination and victimisation judgment. Without such a matter being fully canvassed it would be inappropriate for the Tribunal to take this issue any further. No recommendations are made. The Tribunal hopes that the respondents have learned from this experience and will take appropriate steps to ensure that similar litigation is avoided and that there can be more mutually beneficial and good employer/employee relations.
48. C confirmed that she had been advised to claim damages for injury to feelings in the middle Vento band at £27,000. At the material time that was the top of the band. That advice was before the final hearing and judgment; the claimant did not succeed with all her claims which included claims of sex and race discrimination. Having regard to C's evidence, the liability judgment, and the applicable law, the Tribunal does not consider that the top of the middle band is the appropriate level of damages. That said, the discrimination to which C was subjected was egregious and very distressing for all the reasons previously explained. Similarly, the victimisation on the dates it was found, had a seriously distressing effect. It is

difficult to apportion out effects caused by actual discrimination and victimisation and that which is caused by C's misplaced perception (at least misplaced in terms of the liability judgment where some of her claims failed but she nevertheless felt justified in making them). It appears just and equitable to the Tribunal, taking into account the applicable law, to pitch the damages award somewhere in the middle of the middle band. This is not a precise science; we are required to make an assessment. In all the circumstances and for all the reasons stated above the respondent's valuation at £18,000, being the very middle of the middle band, appears to the Tribunal to be a fair assessment.

49. C is entitled to interest on that award of general damages at 8% over the period of three years and 10 weeks. No doubt if the Tribunal's calculation is mathematically deficient one or both parties will apply for reconsideration with a correct calculation (hopefully agreed between the parties).

50. In the light of the findings with regard to the grievance procedure and the relationship with the ACAS code, the Tribunal does not award an uplift.

Employment Judge T.V. Ryan

Date: 31 May 2023

JUDGMENT SENT TO THE PARTIES ON 6 June 2023

FOR THE TRIBUNAL OFFICE Mr N Roche