EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Healey	**v**	Silo Services Limited

Heard at: Norwich (by CVP) **On:** 25 May 2023

Before: Employment Judge M Warren

Members: Miss A Telfer and Mr N Ramgolam

Appearances
For the Claimants: Mr Gray-Jones, Counsel
For the Respondent: Mr Scott, Counsel

RESERVED JUDGMENT on REMEDY

The Claimant's claims for unfair dismissal and disability discrimination having succeeded by a Judgment given orally to the parties on 25 May 2023, the compensation payable to the Claimant shall be: **£42,334.00**

REASONS

Background

1. Mr Healey succeeded before us as to liability in his claims of unfair dismissal and disability discrimination. Having given an oral Judgment as to liability on day four, 25 May 2023, we proceeded to conduct a hearing as to remedy. Unfortunately, we were left with insufficient time to deliberate and give a reasoned oral Judgment on remedy. We therefore had to reserve our decision.

2. We allowed the parties a one and a half hour adjournment to prepare for the Remedy Hearing. After that adjournment, the representatives were able to confirm to us that the basic award was agreed at £12,512.00 and it was agreed that the appropriate figure to compensate for loss of statutory rights should be £500.00.

3. By way of evidence for the Remedy Hearing, we were referred to Schedule D of the Trial Bundle which contained bank statements for Mr Healey's new business and a Schedule of Loss which began at page 109.

4. The concluding two paragraphs of Mr Healey's Witness Statement, paragraphs 61 and 62, dealt (somewhat briefly) with the issue of remedy. Mr Healey gave further evidence, having been reminded that he was under oath. He was asked questions in cross examination by Mr Scott and by the Tribunal.

The Law

5. Where a claim has succeeded before an Employment Tribunal under the Equality Act 2010, section 124 provides that the Tribunal may order the Respondent to pay to the Claimant compensation of an amount corresponding to the damages the Respondent might have been ordered to pay by a county court. Section 119(1) sets out what a County Court may order, which is to grant any remedy which could be granted in the High Court in proceedings for tort or judicial review, which includes compensation for financial loss and personal injury. Such compensation can include damages for injury to feelings, (s119 (4)). Those damages would be payable by reason of a statutory tort on the part of the Respondent, the measure of damages in respect of which is to place the Claimant, so far as is possible, in the position that he would have been in but for the discrimination, (see Ministry of Defence v Channock [1994] IRLR 509 EAT).

6. Placing a Claimant in the position he would have been in, but for the discrimination, will entail an assessment of what might have happened, but for the discrimination, (see for example Chagger v Abbey National Plc [2009] EWCA Civ 1202 CA, [2010] IRLR 47).

7. Damages are assessed under two headings; General Damages for pain, suffering, loss of amenity or injury to feelings and Special Damages in respect of the financial losses flowing directly from the discrimination.

8. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

    8.1. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

    8.2. Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

8.3. Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

8.4. In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

8.5. Tribunals should bear in mind the need for public respect for the level of awards made.

9. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands were described as follows:

9.1. The top band is for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

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

9.3. Awards in the lower band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

10. The thresholds of the bands are amended to reflect inflation each year, by Practice Direction issues each year by the Presidents of the Employment Tribunals for England and Wales and for Scotland. The new thresholds apply in respect of proceedings issued on or after 6 April in the year in question. For the year commencing 6 April 2021 the band thresholds are:

- *lower band: £900 to £9,100*
- *middle band: £9,100 to £27,400*
- *upper band: £27,400 to £45,600*

11. Where a Claimant has succeeded on grounds of discrimination and unfair dismissal, the elements of compensation inevitably overlap, although unfair dismissal compensation is subject to a statutory cap on the level of award. In such cases, the Tribunal should award compensation under the discrimination legislation, (see D'Souza v London Borough of Lambeth [1997] IRLR 677).

12. An award of compensation can include an element of what is known as Aggravated Damages. In Alexander v The Home Office [1988] IRLR 190 CA the Court of Appeal said that this may be appropriate where the

respondent has behaved in a high handed, malicious, insulting or oppressive manner in committing the act of discrimination.

13. In Metropolitan Police v Shaw [2012] IRLR 291 the EAT reiterated that Aggravated Damages should be compensatory, not punitive and are an aspect of injury to feelings, not a separate head of claim.

14. In Shaw the EAT identified 3 broad examples of circumstances in which aggravated damages might be appropriate:

    14.1. Where the manner in which the discrimination was done was particularly upsetting, referred to in Alexander as, “high handed, malicious, insulting or oppressive”;

    14.2. Where there was a discriminatory motive, known to the Claimant;

    14.3. Where subsequent conduct adds to the injury, for example in the conduct of tribunal proceedings.

15. Special Damages is the name given to the award that is to compensate for financial losses that flow from the discrimination. They fall into 2 elements; losses to the date of the hearing, (which can usually be calculated with some precision) and future financial losses, (which invariably involve speculation as to what the future may hold for the claimant).

16. In respect of financial losses, the Claimant is under a duty to mitigate his loss. The burden of proof though lies with the Respondent if it wishes to assert that the Claimant has failed in that duty. The question is not whether the Claimant has behaved reasonably, but whether he has taken reasonable steps to mitigate. He is expected to behave as He would have behaved had he no prospect of receiving compensation. However, Sedley LJ commented in Wilding v British Telecommunications plc said:

> *“… a restatement of the principle set out by Lord Macmillan in* Banco de Portugal v Waterlow and Sons Ltd *[1932] AC 452, 506:*
>
> *'The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.'*
>
> *In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where,*

and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed."

17. More recently and in the employment law context, Langstaff J reviewed the law on mitigation in Cooper Contracting Limited v Lindsey UKEAT/0184/15 which might be summarised as follows:

17.1. The burden proof is on the wrongdoer.

17.2. The burden of proof is not neutral – if no evidence is offered, the employment tribunal does not have to find a failure to mitigate.

17.3. What has to be proved is that the claimant acted unreasonably.

17.4. There is a difference between acting reasonably and not acting unreasonably

17.5. What is reasonable and unreasonable is a question of fact

17.6. The views and wishes of the claimant is one factor to be taken into account, but it is the tribunal's assessment of reasonableness that counts, not the claimant's.

17.7. The tribunal should not apply too exacting a standard on the claimant, he or she is the victim.

17.8. In summary, it is for the respondent to show that the claimant acted unreasonably.

17.9. It may have been perfectly reasonable for the claimant to have taken a better paid job, that is important evidence, but not itself sufficient.

18. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provide that interest is payable on awards of compensation in cases of discrimination. It is to be awarded regardless of whether an application is made. The rate of interest payable stands at 8% for proceedings issued after 28 July 2013. Interest should be calculated from the 'day of calculation' which in a case of injury to feelings, is the period beginning on the date of the contravention or act of discrimination complained of, through to the date of calculation. In respect of other damages, interest is calculated from the mid-point, half way through the period in question, to the date of calculation.

19. When a Claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that in the case of an ex-employee aged more than 21 and less than 41, the Basic Award shall be a multiple of the number of

years' complete service and the individual's gross pay, (subject to a statutory maximum which has no bearing in this case).

20. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. In this case, those losses are covered by the compensation for discrimination and should not be duplicated.

21. Tribunals have the power to uplift or reduce any award by up to 25% where a party has unreasonably failed to comply with an ACAS Code of Practice. This is provided for in the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A which reads

> *"(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
>
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
>
> *(c) that failure was unreasonable,*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

22. In applying such an uplift to awards for injury to feelings or aggravated damages, one must avoid double accounting, but it is not necessarily impermissible to do so. In Slade and others v Briggs and Stewart EA 2019 000687 VP Mr Justice Griffiths suggested a 4 step approach:

    22.1. Is the case such as to make it just and equitable to award any ACAS uplift?

    22.2. If so, what is the just and equitable percentage?

    22.3. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings and if so, what is the appropriate adjustment, if any, to those awards to avoid double-counting?

    22.4. Applying a final sense check, is the amount of the uplift disproportionate in absolute terms and if so, what further adjustment needs to be made?

Findings of Fact

23. Mr Healey's gross weekly pay with the Respondent was £865.38 and his net weekly pay was £658.88.

24. The period of loss begins on 1 July 2021. This hearing commenced on 22 May 2023.

25. The Respondent paid 8% of gross earnings by way of pension contributions.

26. On 1 July 2021, Mr Healey telephoned a business he knew of based in Oundle that needed, or he thought might need, a welder. He visited the premises, met with the proprietor and was offered a job without any requirement for a reference. The hours of work were Monday to Friday 7am to 6pm. Voluntary overtime was available on Saturdays. The rate of pay was such that he would not be any worse off in that prospective new employment. The mileage from Mr Healey's home at Exton to the Respondent's business premises at Wansford is approximately 15 miles. The mileage between Exton and Oundle is approximately 23 miles. The additional journey time represented by those additional, approximately 7 miles, we estimate represent 15 minutes at the times of day that Mr Healey would be travelling.

27. Mr Healey decided not to take up the offer of new employment.

28. Mr Healey decided to set himself up in business as a self-employed welder. He started working in his new self-employed capacity on 2 September 2021. He opened a business bank account, statements for which were in the bundle. All earnings were paid into that account. His average income per month from September 2021 to the end of March 2023 is £2,343.32 (a figure calculated by Mr Gray-Jones which Mr Scott was prepared to accept). Mr Healey estimates that he is working 30 – 40 hours a week. He confirmed that he would do any work that he could find and that he would do anything to, *"earn a bit of money"*.

Conclusions

29. Mr Healey told us that the problem with the alternative employment procured the day after he left the Respondent's employment, was the additional hours and travel. His evidence was clear that he was keen to get back up to working the same number of hours as he had worked for the Respondent and he acknowledged that if he had taken the new employment, his loss would have ceased, he would have been no worse off. There would have been no obligation to work on Saturdays, (there was no obligation with the Respondent, but there was an expectation). The additional travel time and hours in our judgement is minimal.

30. The question for us is whether it was unreasonable of Mr Healey not to have taken up that employment, nor obtain any other employment and two months later, to have set himself up in self-employment.

31. Using our own personal knowledge and experience, we find that there is a labour shortage in the job market and welders are very much in demand.

That is corroborated by the fact that Mr Healey had found equally well paid employment immediately.

32. Mr Gray-Jones submitted that it was not unreasonable for Mr Healey to have turned down this new employment, given his health condition. That was not the evidence of Mr Healey. It is very surprising indeed that so little attention is paid to this in his Witness Statement which appears to be misleading. At paragraph 61 he told us that he had applied for other welding jobs. He gave as his reason for not persisting, that he was worried about the lack of a reference from Mr Wright. He gave what was, frankly, an unexpected answer to a question from me. He revealed that he had secured a job offer without a need for a reference the day after his employment with the Respondents ended. To his credit, he gave an honest answer to my question without hesitation. Whether it be his fault or that of his Solicitors, we do not know, but this is information which should have been in his Witness Statement.

33. One would have thought in the ordinary course of litigation, with obligations for disclosure and the sort of information one would expect lawyers acting for a respondent to request, that this is information which would have come out sooner. It did not. Thus it is that Mr Scott's cross examination focused on Mr Healey's new business, in respect of which we noted that it had not been suggested to Mr Healey that he had failed to mitigate his loss by setting himself up in business.

34. We found ourselves in a surprising situation in deciding what compensation for financial loss Mr Healey should be awarded.

35. The additional travel seems to us not to be onerous. There is no evidence before us which suggests that Mr Healey would not be able to manage that additional travel or the additional half hour to the working day. There is no evidence before us that suggested in the new employment Mr Healey would not have been able to take the regular breaks he would need. There was no suggestion that there would be any particular problem with the job or with the person that he would be working for; the evidence was Mr Healey had taken the initiative and telephoned the proprietor and so presumably, he would have been happy to work for him or her.

36. In the circumstances, we are driven to the conclusion that it was unreasonable of Mr Healey to have turned the job offer down. We find he has failed to mitigate his loss. We find that had he accepted the new employment, he would probably have started in the new role within two weeks and so we calculate his financial losses resulting from the discrimination and unfair dismissal at two weeks' pay.

37. In respect of the injury to feelings award, Mr Healey was put at a disadvantage for a period of two and a half years due to the Respondent's failure to make reasonable adjustments in his working arrangements so that he could take micro breaks.

38. The comments about Mr Healey's weight, albeit that we have only found that three were made, were hurtful; Mr Healey was self-conscious about his weight.

39. The discrimination to which Mr Healey was subjected led him to resign his employment after 20 years service. That he had remained in the Respondent's employment for 20 years indicates that it was employment with which he was happy, (indeed, he had told us that he'd had a very good relationship with Mr Wright hitherto) until after his heart attack, when the discrimination commenced.

40. During the period after his heart attack, Mr Healey was working in a very unpleasant environment, by reason of the discrimination.

41. We accept Mr Healey's evidence in his Witness Statement that he had lost some confidence and was of low mood after he lost his employment, (but we note this is not offered as a reason for not taking up the employment offer immediately afterwards).

42. Mr Gray-Jones argues for an award of aggravated damages. He does so by refence to the fact that Mr Wright still does not accept or believe that Mr Healey was a disabled person and on the Tribunal's findings, it should have been obvious to him that he was. This is not, in our judgement, a case that calls for a separate award of aggravated damages, or even for identification of a separate figure in the injury to feelings award. However, Mr Wright's attitude to Mr Healey and his disability as manifested during his employment, is reflected in our injury to feelings award.

43. Both parties agreed that the award for injury to feelings should be somewhere in the middle Vento band. Mr Scott argued the figure should be £11,000. Mr Gray-Jones argued that it should be somewhere towards the top end of the middle band.

44. Having regard to the value of the figure that we have in mind in every day terms and having regard to the level of awards that might be made for personal injury in Civil Court proceedings, we arrived at a figure of £18,000.00 for injury to feelings.

45. Mr Gray-Jones argues that there should be a 25% uplift award because of the Respondent's failure to follow the ACAS Code.

46. We agreed that there was a significant failure to follow the ACAS Code. There was undue delay in taking disciplinary proceedings, if disciplinary proceedings were to be taken at all, following Mr Healey's two accidents. There was no investigation of any kind prior to the disciplinary hearing. No proper notice was given of the allegations so as to enable Mr Healey to understand what the charges were that he faced. He may have understood that part of the disciplinary action related to the two accidents, but he would not have understood why. He would have thought that the accidents were incidents that the Respondents had been prepared to let

go and he would not have understood why the Respondent had suddenly decided that they warranted disciplinary action. More significantly, he would not have understood what was meant by, *"your overall attitude towards work and duties"* other than his surmising that Mr Wright was unhappy with him because he had spotted him leaning against the side. No evidence in relation to any of these matters was provided to him in advance of the Disciplinary Hearing.

47. A further point made by Mr Gray-Jones was that Mr Healey had not had an opportunity to make his representations. That is correct, in that at the point of the disciplinary hearing, he did not know what exactly the disciplinary charges were and so he could not make full representations. On the other hand, the disciplinary hearing was adjourned and the Respondent had not yet reached the point where it was going to provide an outcome.

48. In submissions, Mr Scott accepted that any uplift would be in the upper end of the range open to us. Mr Gray-Jones argued of course, as Claimant's always do, that the uplift should be 25%.

49. This is not a case where the Respondent had done absolutely nothing at all; at least Mr Healey was called a hearing. At least he was able to say something. We have regard to the amount of money that would be involved in giving a percentage uplift and concluded that 20% would be appropriate. We have considered the impact of that on the injury to feelings award and are happy that it is appropriate.

50. There is no claim for interest in the Schedule of Loss, which is surprising. Nonetheless, the Tribunal is obliged to award interest, whether it is claimed or not. 8% is awarded, calculated from 31 June 2021 in respect of the injury to feelings award, (694 days) and from the mid-point in respect of the financial award (347 days). No interest is payable in respect of that part of the award which relates to unfair dismissal only, namely the basic award and compensation for loss of statutory rights.

51.

AWARD	CALCULATION	TOTAL
Basic award agreed		£ 12,512.00
Compensatory Award: Loss of statutory rights agreed		£ 500.00
Financial Compensation in respect of the discrimination	2 weeks' pay at £658.88 + 8% pension contributions	£ 1,318.00 £ 105.00

Injury to Feelings		£ 18,000.00
Sub-total		**£ 32,435.00**
Uplift on sub-total	of 20%	£ 6,487.00
Interest on Injury to Feelings award	£18,000 + 20% mark-up of £3,600 = £21,600 x 8% = £1,728 per annum, or £4.73 per day 1 July 2021 to 23 May 2023 is one year (£1,728.00) and 329 days x £4.73 is £556.00	£ 2,284.00
Interest on financial losses from discrimination	Total financial losses were (£1,318 + £105) £1,423.00 + 20% markup of £285 = £1,708.00 at 8% per annum = £137 per year or £0.37 per day, 347 x £0.37	£ 128.00
TOTAL		**£42,334.00**

Employment Judge M Warren

Date: 21 July 2023

Sent to the parties on: ...3 August 2023.

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For the Tribunal Office.