EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Guice	**v**	**24/7 Plumbing & Gas (UK) Limited**

Heard at: Midlands (West) Employment Tribunal (hybrid)

On: 13 March 2023

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: Ms J Guice, parent

For the Respondent: Ms E Afriyie, employment consultant

JUDGMENT having been given orally on 13 March 2023 and written reasons having been requested by the Respondent at the end of the hearing, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

Reasons

Background and Issues

1. This was a remedy hearing to determine compensation to the Claimant for unfair dismissal and for the Respondent's failure to pay the Claimant for overtime work outside his normal hours of work of 40 hours a week.

2. All issues of liability in this case have been determined at the hearing on 21 and 22 December 2022. To understand the reasoning in full these Reasons should be read together with the liability Judgment sent to the parties on 29 December 2022 and written Reasons sent to the parties on 12 January 2023 (together "**the Liability Judgment**").

3. The Liability Judgment also contains the relevant background and factual findings relevant to the compensation issues.

4. As at the liability hearing the Claimant was represented by Ms Guice, and the Respondent by Ms Afriyie. The parties submitted a bundle of documents of 272 pages in evidence. The Respondent sent further three one-page documents at start of the hearing. I accepted those in evidence. Neither party referred to those three additional documents at the hearing.

5. There were three witnesses: the Claimant, and Ms Guice for the Claimant, and Mr R Brown for the Respondent. The Claimant had not prepared a written witness statement in advance of the hearing. I proposed that the Claimant's Schedule of Loss, which contained substantial narrative as well as calculations, would be taken as his evidence in chief to the Tribunal. Both parties agreed to that.

6. There were two main compensation issues I had to decide: (1) compensation to the Claimant for unpaid overtime; (2) compensation to the Claimant for unfair (constructive) dismissal.

The Parties' calculations

7. In support for the calculations in his Schedule of Loss the Claimant presented various supporting documents, including the Payslip Analysis spreadsheet ("**the Payslip Analysis**") and the Data Analysis of Available Pay Data document ("**the Data Analysis**"). These were prepared by Ms Guice, who is a data analysist with 25 years' experience. However, it is important to highlight, that neither Ms Guice evidence, nor the two Analysis documents were taken by me as an expert report or expert evidence.

8. It is regrettable that despite clear directions given at the liability hearing, as confirmed in the Case Management Orders sent to the parties on 29 December 2022, there was a real paucity of clear evidence on the Claimant's financial losses following his dismissal. However, I was satisfied that based on the evidence available to me I could make just and fair determination of all compensation issues.

9. The Respondent produced a counter Schedule of Loss and its analysis in support of its numbers.

10. The Claimant's Schedule of Loss contained the following heads of compensation claim.

10.1.	For Unfair dismissal:	
10.1.1.	Basic award:	£1,500
10.1.2.	Compensatory Award:	
10.1.2.1.	Loss of Statutory Rights:	**£500**
10.1.2.2.	Loss of Earnings between 2/03/2022 and 2/01/2023:	**£18,185.70**
10.1.2.3.	Loss of Employer's Pension Contribution between 2/03/2022 and 2/01/2023:	**£539**

10.1.2.4. Future Loss of Earnings: **£6,000**
10.1.2.5. Future Loss of Employer's Pension Contribution: **£441**
10.1.2.6. Job Seeking Expenses: **£1,579**

10.2. For unlawful deductions (breach of contract):
10.2.1. For overtime worked between 40 and 45 hours a week: **£8,251**
10.2.2. For travel time from last job home: **£2,297**
10.2.3. For overtime worked over 45 hours a week: **£2,085**
10.2.4. For deductions made in the May 2022 payslip: **£243**
10.2.5. Interest on the underpaid sums @8%: **£2,001**

10.3. Injury to Feelings: **£25,000**

10.4. Uplift of 25% for failure to comply with the ACAS Code of Practice: **£17,155**

Total compensation: **£85,776**

11. The Respondent's counter Schedule of Loss contained the following amounts:
11.1. For Unfair Dismissal:
11.1.1. Basic Award: **£1,458**
11.1.2. Compensatory Award:
11.1.2.1. Loss of Statutory Rights: **£250**
11.1.2.2. Past Losses between 02/03/2022 and 02/09/2022: **£2,408.40**
11.1.2.3. Future Losses: **£4,624**
11.1.2.4. Pension contributions: **£294**
Total for unfair dismissal: **£9,034.40**

11.2. For unlawful deductions (breach of contract): **£5,567.41**

Total compensation: **£14,601.81**

Refused heads of loss

12. At the start of the hearing, I explained to the Claimant that the Tribunal did not have the power to award compensation for injury to feelings for unfair dismissal (see *Johnson v Unisys Ltd* 2001 ICR 480, HL and *Dunnachie v Kingston upon Hull City Council* 2004 ICR 1052, HL), or for breach of contract (see Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 ("**the 1994 Order**")), or for unauthorised deduction from wages (see section 24 Employment Rights Act 1996 ("**ERA**")).

13. With respect to pre-judgment interest on compensation for unfair dismissal, breach of contract and unauthorised deduction from wages, unlike claims in the civil courts, where such interest may be awarded pursuant to section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984, in employment tribunals pre-judgment interest is typically awarded only in discrimination cases pursuant the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803.

14. Whilst as part of awarding just and equitable compensation the Tribunal may increase compensatory award for immediate loss to reflect the late receipt of the money this is not an award of interest (see *Bentwood Bros (Manchester) Ltd v Shepherd 2003* ICR 1000, CA). In the present case I do not find that it will be just and equitable to apply such an increase, as no deduction has been applied for the accelerated receipt of future loss.

15. With respect to pre-judgment interest on damages for breach of contract, Article 3 of the 1994 Order does not specifically state that an employment tribunal may award interest on damages (in contrast with S.35A Senior Courts Act 1981 and S.69 County Courts Act 1984). Even if the phrase "*damages and any other sum*" in Article 3 can be read to include interest, in the present case the claim for damages is with respect to wages unlawfully deducted by the Respondent. It is akin to a claim under s.13 ERA, albeit being advanced as a breach of contract claim.

16. As mentioned above, s.24 ERA does not provide for the possibility of awarding interest on wages unlawfully deducted. Therefore, it would be a curious result if a claim for the same unpaid wages would result in an award of interest if pursued as damages for breach of contract and would not attract interest if pursued as a statutory claim under s.13 ERA. Unpaid wages claims are often pursued by employees in the alternative, which makes the matter even more difficult to reconcile, except by concluding that no pre-judgment interest can be awarded on unlawfully deducted wages irrespective on which legal basis these are awarded to the employee by the employment tribunal (as amount of the deduction made under s.24 ERA or as damages for breach of contract).

17. In any event, even if I have the power to award interest on damages for breach of contract, I do not consider it would be proper for me to exercise that power considering the rate of interest (compounded interest at 8%) claimed by the Claimant and the absence of any clear and rational explanation provided by him for that claim. The measure of damages is to put the innocent party in the position he/she would have been if both parties had performed the contract in accordance with its terms, but not to penalise the party in default for breaching the contract. The claimed compounded interest of 8% is akin to penalty.

18. However, post-judgment interest will accrue on any unpaid award pursuant to the Employment Tribunals (Interest) Order (Amendment) Order 2013 SI 2013/1671, from the day after the relevant decision day, provided no interest shall be payable if the full amount of the award is paid within 14 days after the relevant decision day.

19. I also explained to the Claimant that compensation can be awarded only with respect to the claims adjudicated on at the liability hearing and covered by the Liability Judgment. Accordingly, no compensation can be awarded for the alleged deductions in the May 2022 payslip. These deductions were for the Claimant's sick absence on 25 and 28 February 2022 and for a congestion charged incurred by the Claimant. These deductions were not part of the Claimant's claim at the liability hearing, and there is no judgment that these alleged deductions were unlawful.

20. Accordingly, compensation claims in paragraphs 10.2.4, 10.2.5 and 10.3 (items 10, 11 and 13 in the Claimant's Schedule of Loss) stand to be dismissed for these reasons.

Overtime underpayments

21. Ms Afriyie for the Respondent argued that the only compensation for overtime work that could properly be awarded to the Claimant was for his work between 4pm and 5pm and not for his work after 5pm, because, she argued, the Claimant never complained about not being paid correct overtime for his hours after 5pm.

22. I rejected that. The Claimant's claim was for unpaid overtime, that is to say for his work outside his normal working hours of 40 hours a week. The Liability Judgment clearly states that the Respondent was in breach of contract "*by failing to pay to the claimant for overtime work outside his normal hours of work of 40 hours a week*". It does not say that the Respondent's liability is limited to unpaid Claimant's work between 40 and 45 hours a week (see also paragraphs 3, 18 and 85-88 of the Liability Judgment's Reasons).

23. I examined the Respondent's calculations of the Claimant's overtime (pp 226-266 of the Remedy bundle). The Respondent provided little evidence to support its calculations. Mr Brown in his witness statement says that his "software people" have calculated the Claimant's overtime by reference to his start and end time every day between January 2019 and February 2023(sic). He goes on to say that he believes that if the Claimant started at 8am and finished at 4.15pm, he is only entitled to 15 minutes overtime pay and not 1 hour. He also says that the Claimant's calculations are wrong because they do not take into account days when the Claimant finished work early, was on annual or on sick leave.

24. In cross-examination Mr Brown said that his "software people" were Commusoft (software used by the Respondent to record jobs attended by its staff with start and end time of each job). Mr Brown also confirmed that the data used by Commusoft to calculate the Claimant's overtime was taken from the Claimant's Commusoft job log entries.

25. Whilst I agree that if the Claimant finished at 4.15pm, he is entitled to 15 minutes overtime pay and not one hour overtime pay, the Claimant's calculations do not show that he claims a minimum of one hour overtime for any time worked in excess of eight hours a day. Also, his calculations are based on days he actually worked and exclude weekends and public holidays (when he did not work) and days when he was on annual leave or on sick leave.

26. To the extent Mr Brown claims that if the Claimant first job was after 8am (e.g., 9am) and he finished at 5pm, he is not entitled to overtime pay, I do not accept that. The Claimant's contract of employment states that his normal working hours are 40 hours per week between 8am and 5pm, Monday to Friday. He was paid a fixed salary for those hours.

27. Therefore, if on some days the Respondent allocated to the Claimant his first job of the day to start later than 8am, this does not mean that the Claimant was not working from 8am on that day. The Claimant was at the Respondent's disposal from 8am. He was carrying out his activities and duties in being ready to attend the first job at the time and location determined by the Respondent. Therefore, that time must count as "working time" within the meaning of Regulation 2(1) of the Working Time Regulations 1998. The same principle applies to the situation when the Claimant finished his last job before 4pm and the Respondent did not allocate him any further job for that day.

28. Furthermore, it was not the Respondent's defence that it was entitled to deduct from the Claimant's overtime pay any pay with respect to the Claimant's "idle time", i.e., when the Claimant started his first job after 8am or finished the last job before 4pm. The Liability Judgment does not say that such deductions were authorised and can be set off against any overtime pay claimed by the Claimant.

29. The Respondent's calculations do not appear to align with the Commusoft log data, which, the Respondent says, it used to calculate the Claimant's overtime pay. For example, the entry for 16/02/2021 shows that the Claimant started his first job at 7:52am (there is also an earlier entry on that day with zero values) and finished his last job at 9:25pm. This is 5.5 hours of overtime. The Respondent's calculations for some reason recognise only 1 hour of overtime.

30. Similarly, the following day, 17/02/21, the Claimant's first job is recorded as 7:47am and the finish time of the last job as 7:15pm. This is 3.5 hours of overtime. Yet, the Respondent's calculations recognise only 1 hour of overtime for that day.

31. There are many more such anomalies in the Respondent's calculations. Mr Brown did not explain them in his evidence, other than saying that the Respondent only looked at the difference between 40 hours and 45 hours. It appears that the Respondent simply assumed that the Claimant was correctly paid for all hours worked after 5pm (or that not compensation can be awarded by the Tribunal for that overtime work) and ignored any such time as overtime and did not check it against the actual overtime pay it had paid to the Claimant. That was a wrong approach to take, considering the scope of the Liability Judgement, as explained above (see paragraphs 21- 22 above).

32. In short, I find the Respondent's calculations are unreliable and must be rejected as the basis for calculating compensation to the Claimant for unpaid overtime work.

33. I then examined the Claimant's calculations. The Respondent chose not to cross-examine Ms Guice on her evidence about how she had done those calculations. Other than the statement in Mr Brown's witness statement that he believes that the Claimant's calculations are wrong, which I rejected for the reasons explained above, the Respondent did not challenge the Claimant's calculations.

34. Ms Guice swore that the everything in her calculation was true and correct to the best of her knowledge and belief. She explained the method she adopted in calculating the Claimant's overtime hours in her witness statement. I asked Ms Guice some further clarifying questions. Based on her answers I was satisfied that

her calculations were correct and represented true and fair computation of the Claimant's unpaid overtime. There was no double counting in her calculations. The hours she had recorded in her calculations corresponded with the Claimant's manual time sheet and Commusoft data entries. I, therefore, decided that the Claimant's calculations should be adopted as the basis to calculate compensation for unpaid overtime.

35. I agreed with the Claimant's figure of **£8,251** of unpaid overtime between 40 and 45 hours a week (paragraph 10.2.1 above and item 7 on the Claimant's Schedule of Loss). I also agreed with the Claimant's calculation of the unpaid hours after 5pm (paragraph 10.2.3 and item 9 on the Claimant's Schedule of Loss). However, the Claimant's calculations contained an arithmetical error and also used a wrong overtime rate for Saturday work (x1.5 hourly rate instead of x1.25 hourly rate as stated in his contract of employment). I calculated the correct amount to be **£2,095.50**.

36. With respect to the overtime claim for travel times from the Claimant's last job home, I was satisfied that on the facts such time falls within the definition of "working time" under Reg 2(1) Working Time Regulations 1998, to be interpreted in light of the ECJ's decision in *Federación de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL and anor* 2015 ICR 1159, ECJ.

37. That judgment held that if a worker did not have a fixed or habitual place of work, time spent travelling between their homes and the premises of the first and last customers designated by their employer constitutes working time under Article 2(1) of the Working Time Directive. That situation clearly applied to the Claimant. He did not have a fixed or habitual place of work and travelled to the jobs as directed by the Respondent. Although, on occasions he might have visited the Respondent's office for a meeting or to pick up or drop off some tools, etc., it was not his place of work. His place of work was where he was directed by the Respondent to attend on a Respondent's client, and his van when he travelled between the jobs.

38. There is nothing in the Claimant's contract of employment to say that the Claimant will not be paid for travelling from his last job back home. The Respondent paid the Claimant for travel time when he travelled from home to his first job or from his last job home before 4pm (as his normal salary). The Respondent also paid the Claimant overtime pay when he travelled home after 5pm from his last job if that job was located at a considerable distance from the Respondent (see paragraph 18 of the Liability Judgment's Reasons).

39. Mr Brown in his witness statement states:

"*It has never been our policy to pay employees for traveling home after work done within the West Midlands. He is therefore not entitled to any such payment. Tony was paid for traveling home from all jobs done outside the West Midlands.*"

40. That, however, is insufficient to disapply the operation of Reg 2(1) WTR, so to make such travel time not to be working time. That requires a "relevant

agreement", which the Respondent did not have (or at any rate did not present any evidence that it did).

41. Therefore, if travel time is working time, as I found, and the Claimant's contract of employment states that he is entitled to overtime pay for hours worked in excess of his normal hours of work of 40 hours a week, I see no legal basis why he should not be entitled to be paid for overtime when travelling from his last job home.

42. I accepted the Claimant's calculations on that head of loss, as detailed in Ms Guice's witness statement. Therefore, I decided that the Claimant was due compensation in the amount of **£2,297** for unpaid overtime when he travelled from his last job home outside his normal hours of work (paragraph 10.2.2 above and item 8 on the Claimant's Schedule of Loss).

43. Accordingly, I awarded to the Claimant the total compensation for unpaid overtime is the amount **£12,643.50** (gross) = £8,251 + £2,095.50 + £2,297.

44. The overtime claim was advanced by the Claimant as a claim for breach of contract. Under Article 3 of the 1994 Order, an employment tribunal has jurisdiction to determine a contract claim (subject to the exclusions set out in Article 5 of the Order, none of which apply here) if it arises or is outstanding on the termination of the employee's employment, it is a claim that a civil court in England or Wales would have jurisdiction to hear and determine, and the employee seeks one of the following:
    - damages for breach of a contract of employment or any other contract connected with employment,
    - the recovery of a sum due under such a contract, or
    - the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

45. The above conditions are met with respect to the Claimant's overtime pay claim. Therefore, his entitled to recover for the unpaid overtime as damages, and beyond the two-year time limit under s.24(4A) ERA. However, all the Claimant's calculations were in gross sums without taking into account deductions for tax and national insurance contribution the Respondent would have had to make on such sums.

46. Damages payable for breach of contract must be assessed on the principle in so far as money can do to put the innocent party (i.e., the Claimant) into the position he would have been in had both parties to the contract performed their obligations according to that contract (see *Robinson v Harman* 1848 1 Exch 850, Court of Exchequer). This means that the Claimant's damages award must reflect the Claimant's net loss. Unfortunately, both the Claimant and the Respondent prepared their respective calculations in gross sums, and there was no time at the hearing to covert those into net figures, after tax and national insurance deductions.

47. Therefore, although awarded as damages for breach of contract, the award is calculated in gross sums and subject to deductions for tax and national insurance contributions the Respondent will have to calculate and make.

Compensation for Unfair Dismissal

The Law

48. Section 118 of the Employment Rights Act 1996 ("ERA") provides that where a "*tribunal makes an award of compensation for unfair dismissal […] the award shall consist of:*

(a) a basic award (calculated in accordance with section 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123,124, 124A and 126)."

49. The basic award is calculated in accordance with a statutory formula by reference to the employee's age, length of continuous service and the relevant amount of a week's pay. Any redundancy payment received by an employee must be deducted from the basic award (S.122(4) ERA).

50. Section 123 of ("ERA") provides that a compensatory award shall be: "*such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer*".

51. The objective of the award is "*to compensate, and compensate fully, but not to award a bonus*": (see *Norton Tool v Tewson* [1972] ICR 501, per Sir John Donaldson at 504).

52. As part of a compensatory award under section 123 ERA, the Tribunal may award expenses reasonably incurred by the employee in consequence of his dismissal, including a contribution towards costs incurred in setting up a new business following the dismissal (see *Gardiner-Hill v Roland Berger Technics Ltd* [1982] IRLR 498).

53. "*In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland*." (S. 123(4) ERA)

54. "*In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence*." (see *Software 2000 Ltd v Andrews and ors* 2007 ICR 825, EAT per Mr Justice Elias, the then President of the EAT)

55. To calculate a compensatory award, it is first necessary to ascertain the employee's total loss in consequence of the dismissal, in so far as that loss is attributable to the employer's actions and from that amount make the deductions and adjustments in the following order:
    (i) deduction of any payment already made by the employer as compensation for the dismissal.
    (ii) deduction of sums earned by way of mitigation, or to reflect the employee's failure to take reasonable steps in mitigation — S.123(4) ERA.
    (iii) 'just and equitable' reductions based on S.123(1) ERA, including reductions in accordance with the principle in *Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL.
    (iv) increase or reduction (adjustment) of up to 25 per cent where the employer or employee unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).
    (v) adjustment of up to four weeks' pay in respect of the employer's failure to provide full and accurate written particulars (S.38 Employment Act 2002).
    (vi) percentage reduction for the employee's contributory fault (S.123(6) ERA).
    (vii) deduction of any enhanced redundancy payment to the extent that it exceeds the basic award (if applicable).
    (viii) application of the statutory cap, if applicable (S.124 ERA).

(see *Digital Equipment Co Ltd v Clements (No.2)* 1998 ICR 258, CA)

56. When an employee obtains new employment before the remedy hearing, as the general rule, the employee's earnings from the new employment should be offset against his losses to determine the overall loss for the relevant period (see *Ging v Ellward Lancs Ltd* 1991 ICR 222, EAT).

57. New employment does not necessarily break the chain of causation with respect to the employee's losses flowing from unfair dismissal, because this could lead to an award that is not just and equitable, especially where the new employment comes to an end after a short period of time through no fault of the employee. (see *Dench v Flynn and Partners* 1998 IRLR 653, CA).

58. With respect to mitigation of loss, the burden of proof is on the respondent to show that the claimant acted unreasonably in failing to mitigate. What is reasonable or unreasonable is a matter of fact for the Tribunal to determine objectively taking all relevant circumstances of the case into account (see *Cooper Contracting Ltd. v Lindsay* UKEAT/0184/15 at paragraph 16)

59. It is not enough for the respondent to show that it would have been reasonable for the claimant to take a particular mitigation step. It must show that it was unreasonable for the claimant not to take it. (see *Wilding v British Telecommunications plc* [2002] ICR 1079, at paragraph 55).

ACAS Code of Practice

60. Under section 207A TULR(C)A 1992 , in the case of proceedings relating to a claim by an employee under any of the jurisdictions in Schedule A2 to that Act, if it appears to the Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies and the employer has unreasonably failed to comply with the Code in relation to that matter, the Tribunal may, if it considers it just and equitable in all the circumstances of the case to do so, increase any award it makes to the employee by no more than 25%. Schedule A2 of TULR(C)A 1992 includes claims under s 111 ERA for unfair dismissal, s.23 ERA for unauthorised deductions, and under the 1994 Order for breach of contract.

61. When considering uplifts, the relevant circumstances to be taken into account may vary from case to case but should always include the following:
    (i) whether the procedures were applied to some extent or were ignored altogether,
    (ii) whether the failure to comply with the procedures was deliberate or inadvertent, and
    (iii) whether there were circumstances that mitigated the blameworthiness of the failure to comply. (per Mr Justice Underhill, then President of the EAT in *Lawless v Print Plus* EAT 0333/09)

62. Furthermore, the size and resources of the employer were capable of amounting to a relevant factor in the tribunal's consideration of whether an uplift was appropriate and, if so, by how much.

63. The ACAS Code states: "…,*whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*

- *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act consistently.*
- *Employers should carry out any necessary investigations, to establish the facts of the case.*
- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to appeal against any formal decision made*.

64. The Code goes on to give further guidance on key aspects of handling disciplinary and grievance issues in the workplace.

Submissions and Conclusions

Basic Award

65. The Respondent calculated the Claimant's basic award as £1,458, based on gross weekly pay of £416.67. However, the Claimant's gross weekly pay at the time of his dismissal was £500 and not £416.67. Ms Afriyie was not able to explain why the Respondent used £416.67 in its Counter Schedule of Loss.

66. The Claimant's calculations used £500 as gross weekly pay. His calculations are correct. I accordingly made the basic award in the sum of **£1,500**.

Compensatory Award

Loss of statutory rights

67. The Claimant sought £500 for loss of statutory rights. The Respondent contended that the award for this head of loss should not exceed £250. Considering that the Claimant had a relatively short tenure with the Respondent (3 years) and the fact that following his departure from the Respondent he decided not to seek an alternative employment but to open his own business, and as such, at least for now, is not accruing the lost statutory rights, I decided that **£300** would be just and equitable compensation for this head of loss.

Immediate Loss between EDT and the remedy hearing

68. The Respondent calculated the Claimant's immediate loss between 2 March 2022 (the effective date of termination ("**the EDT**") until 2 September 2022 (24 weeks) and using weekly net pay of £385.35. The Respondent, however, did not explain on what basis it used those parameters. I did not accept the Respondent's calculations, because these were based on the incorrect weekly pay and incorrect period.

69. The Claimant's calculations were based on the period between the EDT and 2 January 2023 (the date when the Claimant has prepared his Schedule of Loss) and using his gross salary of £25,025 over 11 months with 5% inflation uplift. The Claimant then deducted from that sum his business' operating profit (before tax) to show his immediate loss. The Claimant separately claimed for loss of the employer's pension contributions at £49 per month (item 4 on the Claimant's Schedule of Loss) and £1,579 compensation for "job seeking expenses" (item 12 on the Claimant's Schedule of Loss).

70. I did not accept the Claimant's calculations, because the Claimant was essentially comparing his gross income at the Respondent's before his dismissal with the gross operating profit of his current business. It was not comparing like with like, and it was not showing the Claimant's financial loss flowing from the unfairness of his dismissal by the Respondent.

71. Furthermore, the Claimant's contract of employment did not contain any obligation on the Respondent to increase the Claimant's salary in line with inflation.

Therefore, the 5% "inflation uplift" used by the Claimant in his calculations had no legal basis.

72. As mentioned above (see paragraph 8 above), in my task I was constrained by a paucity and poor quality of supporting evidence provided by the parties. However, the Claimant gave oral evidence, which I accepted, that he started working as an independent business within 2 weeks of leaving the Respondent, and since the start of his business has been drawing a salary of £1,000 a month on average.

73. Based on the Claimant's payslips contained in the liability hearing bundle (p.257) I calculated using thesalarycalculator.co.uk the Claimant's average monthly take home pay over the last 12 months at the Respondent as £1,751.96 (using the Claimant's the then tax code of 1269L).

Gross Income	**Taxable Income**	**Tax**	**National Insurance**	**Take Home Pay 2022**
Yearly				
£ 25,001.71	£ 12,431.71	£ 2,486.34	£ 1,491.81	£ 21,023.56
Monthly				
£ 2,083.48	£ 1,035.98	£ 207.20	£ 124.32	**£ 1,751.96**

74. The period between the EDT and the date of the calculation of the immediate loss (13 March 2023) is 12 months and 11 days = 12.37 months.

75. Accordingly, I calculated the Claimant's net loss over that period as (£1,751.96 x 12.37) – (£1,000 x 12.37) = **£9,301.78**. I calculated his loss of employer's pension contributions as £49 x 12.37 = **£606.13**

76. I accepted that it was reasonable mitigation for the Claimant to open his own business rather than seeking an alternative employment. The Claimant's evidence, which was not challenged by the Respondent, was that due to the acrimonious nature of his departure from the Respondent he had no confidence that the Respondent would give him a fair reference if he were to apply for a job elsewhere.

77. More importantly, the Respondent did not adduce any evidence to show that if the Claimant had sought alternative employment elsewhere, he would have gained it sooner or that his income would have been greater, or indeed any other evidence that the Claimant had failed to take reasonable steps to mitigate his loss. The burden is on the Respondent (see paragraphs 58, 59 above) and it has failed to discharge it.

78. The Claimant's claim for all of his capital and operating costs to be deducted in calculating his income was wrong for the reasons explained above (see paragraph 70). I did not allow those deductions.

79. However, I accepted that the Claimant had incurred certain expenses in setting up his business, including in setting up his website and advertising his services (what the Claimant described as "Job Seeking Expenses – item 12 in his Schedule of Loss). I decided that in the circumstances it would be just and equitable to award

that the Respondent must pay a contribution of **£1,000** towards the Claimant's costs of setting up his business.

Future Loss

80. The Claimant sought £6,000 in compensation of his future loss, plus £441 for future loss of the employer's pension contributions. These figures were based on the Claimant's estimate that it would take him a further nine months to develop his business to the situation where he is "*not worse off than when [he] was employer by [the Respondent]*".

81. The Respondent argued that no future loss should be awarded to the Claimant because it was his decision to open his own business rather than to seek an alternative employment. I rejected that submission. As stated above, in the circumstances, I accepted that it was a reasonable mitigation step for the Claimant to set up his own business instead of seeking an alternative employment.

82. Furthermore, the Respondent did not submit any evidence to show that if the Claimant had sought an alternative employment his income would have been greater than what he was taking from his own business. The Respondent did not present any evidence or made any coherent submissions as to why it was otherwise unreasonable for the Claimant not to seek an alternative employment.

83. However, the Claimant's claim that he will need a further 9 months before he could afford to pay himself a salary (or take income from his business as dividend) to match his average take home monthly pay at the Respondent was not supported by any proper calculations or other evidence. It was simply his "belief".

84. Ms Guice, who helps the Claimant with his business accounts, said that the Claimant's latest accounts showed the revenue as of the end of February 2023 of £23,006 and expenses of £14,566. This is a substantial (over 40%) increase to the revenue figure of £16,465, generated by the Claimant as of 13 January 2023 (item 3 in the Claimant's Schedule of Loss). This also suggests that the Claimant's capital and operating costs increased by about £5,000, as against the 13 January 2023 figures.

85. Looking at the Claimant's figures in the Schedule of Loss and what Ms Guice told me, it appears that his operating profit as of 13 January 2023 (excluding capital expenditure and the business set up costs) stood at **£8,971** = £16,465 (generated income) - £1,980 (business running costs) - £5,514 (consumable supplies). His revenue increased in just over six weeks between 13/01 and 28/02 by **£6,541** = £23,006 - £16,465.

86. Ms Guice said that the total expenses stood at £14,566 as at 28/02/23, however no breakdown was provided. This is an increase of £4,941 against the total business costs at 13/01/2023 (£9,625), which is unusual considering that by 28/02/2023 the Claimant had been running his business for almost a year, and on his own calculations only incurred £9,625 in costs by 13/01/2023. In any event,

even taking that total costs figure at its face value, it still leaves the Claimant with a disposal income.

87. I, therefore, estimated that at this rate of revenue growth, and considering that the Claimant's initial capital expenditure of setting up his business had been absorbed and the Claimant's business was already turning a modest profit, after a further period of two months the Claimant should be in a position to increase his take home pay (either as a salary or dividend) so to match the average take home pay he enjoyed in the last 12 months of his employment with the Respondent.

88. Accordingly, I decided that his future loss was limited to 2 months of the difference between his last average salary and £1,000 he was taking from his business and two months' worth of the employer's pension contributions – ((£1,751.96 - £1,000) + £49) x 2 months = **£1,601.92**.

89. I made the total Compensatory award to the Claimant of **£12,809.80** (net).

ACAS uplift/reduction

90. The Claimant claimed 25% uplift for failure to follow the ACAS Code of Practice. I asked Ms Guice what part of the ACAS Code the Claimant alleges had been breached by the Respondent. She was unable to give a clear answer. It appears that his complaint is that the Respondent did not deal with his grievance in good faith.

91. Whilst I found in the Liability Judgment (paragraph 101) that the way the Respondent approached and handled the grievance "*did not demonstrate that it was genuinely trying to resolve the matter*" and that was the "last straw" for the Claimant, this does not automatically mean that the Respondent was in breach of the ACAS Code. There is no such finding in the Liability Judgement.

92. Furthermore, this was not put to Mr Brown in cross-examination at the liability or this hearing, nor was it part of the Claimant's pleaded case or evidence to the Tribunal.

93. As recorded in the Liability Judgment (see paragraphs 37 – 41, 45) the Respondent did hold a grievance meeting reasonably promptly after the Claimant had submitted his grievance, the Claimant was allowed to and was accompanied at the grievance by a colleague of his choice, he was allowed to and did put his case to the Respondent. The Respondent communicated the outcome to the grievance to the Claimant. Accordingly, I declined to make any uplift.

94. The Respondent sought to a reduction of 25% for the Claimant's failure to appeal the outcome of the grievance. I declined to make any reduction. Firstly, it was not part of the Respondent's pleaded case that the Claimant was in breach of the ACAS Code by not appealing the outcome of his grievance. It was not put to the Claimant in cross-examination. The Respondent's counter Schedule of Loss does not state that a reduction must be applied for failure to breach of the ACAS Code.

95. Whilst the ACAS Code states at [41]:

> *Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing*.

in this case, as I found in the Liability Judgment (see paragraphs 106), before the outcome of the grievance meeting had been communicated to the Claimant, the Respondent was already in fundamental breach of contract and by its actions had destroyed the relationship of trust and confidence with the Claimant. Furthermore, the Respondent's grievance outcome letter did not offer the Claimant the option to appeal. Finally, since the Claimant's grievance was rejected by Mr Brown, who is the owner and the most senior person at the Respondent, it is hard to imagine who at the Respondent's organisation would have been in a position to overrule him if the Claimant had appealed.

96. Accordingly, I find that in those circumstances it was not unreasonable for the Claimant not to appeal the outcome of the grievance.

97. For these reasons I made no uplift or reduction to the awarded compensation.

Employment Judge Klimov

25 March 2023

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