



EMPLOYMENT TRIBUNALS

Claimant: Mr. A. Daniel

Respondents: Mr. C. Spence, Mrs. M Spence and Mr. A Spence T/A G.E. Spence and Sons (a partnership)

Heard at: Teesside Justice Centre

On: 07 August 2023

Before: Employment Judge T.R. Smith

Ms. S. Mee

Ms. B. Kirby

Representation

Claimant: Ms. Mellor (Claimant's sister)

Respondent: Mr. Fakunle (Solicitor)

JUDGMENT

1. The claimant is awarded a basic award of £11,400 for his unfair dismissal. No compensatory award is made, the said application having been withdrawn

2. The claimant's claim for loss of statutory rights is dismissed.

3. Section 208A of the Trade Union and Labour Relations (Consolidation) Act 1992 does not apply to any award made by the tribunal.

4. The claimant is awarded £3,926.52 as damages for breach of contract.

5. The claimant is awarded £1520 (four week's pay) under section 38 of the Employment Act 2002.

6.The claimant is awarded £9000 for injury to feelings.

7.The claimant is entitled to interest injury to feelings amounting to £964.60.

Written Reasons

Abbreviations

ERA 96. The Employment Rights Act 1996.

EQA10. The Equality Act 2010.

EA 02. The Employment Act 2002.

NMW 98. The National Minimum Wage Act 1998.

TULCRA 92. The Trade Union and Labour Relations. (Consolidation) Act 1992.

ITEPA 2003. The Income Tax (Earnings and Pensions) Act 2003.

The issues

1.The tribunal, having found on 10 May 2023 (“the liability judgement”) that the claimant’s complaints of unfair dismissal, discrimination arising from disability, breach of contract/wrongful dismissal and a failure to provide a statement of employment particulars were well founded, convened to determine remedy.

2.The claimant indicated at the start of the hearing that he was no longer seeking a compensatory award for unfair dismissal.

3.He also confirmed he was not seeking re-instatement or re-engagement.

4.Although reference was made in the claimant’s statement to not having been paid the NMW 98, it had been agreed at the liability hearing that this matter was not being pursued before the tribunal, and would be dealt with in another forum. The tribunal has therefore not addressed this matter in its liability judgement, other than ensuring that in calculating a week’s pay, the hourly rate utilised met the relevant NMW 98 threshold.

The evidence

5.The claimant provided an undated supplemental statement addressing the issue of remedy and gave oral evidence.

6.Mr. C. Spence provided an undated supplemental statement, late, but with the permission of the tribunal was permitted to adduce it in evidence, and gave oral evidence on oath.

7.The tribunal also had before it a supplemental bundle which initially consisted of 328 pages. This was supplemented at the start of the hearing. The final bundle totaled 333 pages. A reference in this judgement to a page number is a reference to that supplemental bundle, unless otherwise indicated.

Findings of fact

8.This judgement should be read in conjunction with those findings recorded in the liability judgement.

9.The claimant started work with the respondent on 01 June 1981 and his employment terminated on 05 April 2022.

10.The respondents sought to effectively rescind the dismissal by means of a note to the claimant dated 03 May 2022. Various attempts were then made to engage with the claimant as regards discussing his sickness and future employability. He was placed back on the respondent's books. The claimant refused to engage, as he had received advice that he had been dismissed.

11.The claimant presented his claim to the tribunal on 03 May 2022.

12.The claimant was born on the 30 April 1958 and was therefore aged 63 at termination.

13.The claimant was employed by the respondent as a farm worker. He worked fulltime, 40 hours per week. The respondent operated a mixed farm and the claimant was its only employee.

14.The work undertaken by the claimant was physical and often involved working in dirty, inclement conditions.

15. On 07 January 2021 the claimant suffered an injury at work when he slipped and fell on ice.

16. The claimant stated that following the accident, and consequential emergency back surgery, he was left in very low spirits, felt depressed and suffered from shock.

17. Whilst absent from work the claimant suffered significant pain and was left with unsteadiness when walking, weakness in his left leg and numbness of his feet. He found it hard to come to terms with the fact he could not do routine tasks such as dressing and personal care, without the assistance of his wife.

18. He experienced irritability, lack of sleep and depression.

19. The claimant described his situation as worsening during the late summer of 2021 in terms of anxiety and depression. He continued to suffer physical pain. His contractual sick pay had run out and he was concerned as regards money. He had difficulties coming to terms with the fact he could no longer do things he had done previously and enjoyed. For example, he could not pursue his hobbies of fishing, shooting, gardening or even walking the family dog.

20. From 03 August 2021 the claimant was prescribed, along with his other medication, amitriptyline, an antidepressant, by his GP.

21. He continues to take that medication. Following his dismissal, the dosage did not increase. (271 to 275).

22. It is appropriate to briefly mention that the claimant had been prescribed, prior to his dismissal, Amlodipine, a medication for blood pressure (271 to 275). The initial dosage increased, prior to dismissal but subsequently reverted to the initial dosage. This is relevant because the claimant's evidence was that he believed he was prescribed medication for his blood pressure after his dismissal. The tribunal considered the claimant had made a mistake with his dates due to the passage of time.

23. On 17 August 2021 the claimant was awarded a personal independence payment.

24. On 14 September 2021 the claimant was awarded Industrial Injuries disablement allowance.

25. In early 2022 the claimant considered there had been some improvement in his physical symptoms due to physiotherapy. His anxiety had diminished due to the effect of medication.

26. The claimant was in total shock when on 05 April 2022 he received his P 45. When he had briefly seen Mr. Christopher Spence the previous month, termination had not been mentioned.

27. The claimant described himself as being devastated because he had lost a job he loved simply because of an accident at work. As he said in his own words *"they didn't realise what they had done to me"*.

28. He believed the respondents did not care, which hurt his feelings, given his very long service for the respondent.

29. The claimant accepted before the tribunal that even if there had been a meeting to discuss his health before dismissal, and medical evidence obtained, he was unfit to do his job and dismissal was inevitable and he would not work again in any capacity.

30. Between the accident and termination, the claimant was unfit to work. Throughout that period, he was signed off as unfit by his general practitioner.

31. The tribunal accepted the claimant's mental health, which had been improving due to medication pre dismissal, probably did regress somewhat following the termination of his employment as the claimant attended his GP practice on 14 April 2022 with a racing heart, although it transpired that there was no underlying medical condition. (255). The GPs notes stated in terms of a plan *"go home, cup of tea and a biscuit ring after lunch if no better"*. Tests undertaken at the time showed no significant abnormality. The tribunal accepted that the most likely explanation was the claimant had a panic attack and it was prepared to accept, on the balance of probabilities, that this flowed from his dismissal. However there was nothing else, following dismissal, to demonstrate any deterioration in the claimant's mental health flowing from his dismissal.

32. The claimant was contacted by the respondents following the institution of tribunal proceedings but no apology was given to him for sending a P 45. It was not until 02

June 2021 that he was expressly told that he was still employed (although the tribunal had found the claimant had been dismissed).

33. Following termination, the claimant's mobility remained and remains a problem. The claimant has difficulty walking, bending and lifting, had weakness and ongoing joint pain, back pain and cramping in both legs. He experienced problems with his bladder emptying and increased frequency of urination. He continues to suffer from pain in both legs feet and arms which he finds depressing. The claimant has been referred to "*talking therapies*" in respect of his mental health but this is attributable to the claimant's mental health that flows from his physical injuries.

34. The claimant since termination has been receipt of disability benefits.

35. As at termination the NMW was £9.50 per hour.

36. A 40-hour week therefore produced a gross figure of £380 and a net figure of £327.21.

37. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (SI 1996/2349) do not apply.

Submissions

38. Neither party referred the tribunal to any case law or statute.

39. Both parties referred to their respective updated schedules/ counter schedules of loss.

40. Ms. Mellor stressed the upset the claimant had suffered. She said the dismissal certainly played a part in his current condition. She emphasised the claimant had never received a formal apology. The claimant was seeking a top band (sometimes called an upper band) **Vento** award

41. Mr. Fakunle stressed to the tribunal there should be no double award, or over compensation, having regard to the fact the claimant had an outstanding personal injury claim.

42. He said the claimant had failed to engage in any process prior to his termination. If that had been done the situation that arose may never have arisen and that was relevant to injury to feelings he submitted. The tribunal reminded Mr. Fakunle that

there was no process immediately prior to dismissal. Mr Fakunle that initially he put injury to feelings at about £12,000 but now put them at £15,000.

Conclusion and reasons.

43.The tribunal have addressed each head of loss raised by the parties that were pursued before it.

Breach of contract/wrongful dismissal

44.The tribunal had already found in its liability judgement that the claimant was entitled to 12 weeks' notice under section 86 ERA 96. The respondent had not been able to establish it had grounds to dismiss the claimant summarily. It follows the claimant is entitled to damages for breach of contract.

45.Damages for breach of contract/wrongful dismissal are therefore :-

12 weeks x £327.21 = £3,926.52.

Loss of statutory rights

46.The tribunal declined to make an award of loss of statutory rights. The reason for this is the purpose of the award is to compensate an employee for the fact they must accrue two years continuous service to obtain unfair dismissal and redundancy rights.

47.Given the claimant accepted he would never return to work due to his health condition, he is not entitled to be compensated under this head because he has suffered no loss.

Uplift.

48.The claimant contended there should be an uplift on various heads of his claim under Section 207A (2) of TULCRA which provides: –

“(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 concerned the 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%”.*

49. Thus, section 207A of TULCRA provides, in summary a discretion to a tribunal to increase an award, if it is just and equitable, by no more than 25% in the circumstances set out in that section.

50. The claimant seeks a maximum uplift.

51. The tribunal declined to make an uplift.

52. The uplift is only applicable if the ACAS Code of Practice number one, code of practice on disciplinary and grievance procedures (2015) is engaged.

53. It was held in **Holmes -v- QinetiQ Ltd 2016 IRLR 664** that the code was not applicable in cases of an ill health dismissal and the tribunal considered that this dismissal is best described as such a dismissal, as it was the claimant's absence that was the reason the dismissal took place.

54. Nor can there be an uplift in respect of the breach of contract complaint because, while that would fall within schedule A2 of section 208A of TULCRA the claimant had not engaged the ACAS code of practice by presenting a grievance.

A basic award

55. As the claimant was dismissed unfairly, he is entitled to a basic award. The tribunal calculated the basic award, applying section 119 ERA96 and concluded, that the basic award amounted to £11,400. (Length of service capped at 20 years with a multiplier of 30, given the claimant's age, and gross weekly wage of £380.)

56. It disagreed with the higher calculation provided by the respondent because the respondent had assumed that 40 years full-service could be taken into account in respect of the calculation and also used an incorrect gross weeks' pay figure.

Section 38 EA 02

57. The tribunal is satisfied the claimant has succeeded in a claim set out in schedule 5 to EAO2.

58. Although the statutory language appears to be predicated on the fact that an award is mandatory that is not the legal position, see **Levy -v- 34 ad Co Ltd UKEAT/0033/20**.

59. However here was a case where no written particulars were given and no attempt was made, at any stage, to correct the matter in respect of a long serving employee.

60. The tribunal considered it was appropriate to make an award, given the respondent was on notice of the application, and that an appropriate award would be 4 weeks' pay.

61. It was persuaded there were particular circumstances which required the award to be increased to 4 weeks' pay. Those circumstances were the fact the claimant had worked for the respondent for 40 years, had access to the NFU and its accountants for advice and took no steps whatsoever to correct the omission over such a long period of time. The tribunal also noted in the respondent's counter schedule it accepted an award of 4 weeks' pay.

62. The claimant is therefore awarded four weeks under this head of claim, namely £1520.

Injury to feelings.

63. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment he has received. It is compensatory, not punitive.

64. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (see **Komeng v Creative Support Ltd UKEAT/0275/18/JOJ**).

65. The general principles that apply to assessing an appropriate injury to feelings award were set out by the EAT in **Prison Service v Johnson [1997] IRLR 162, para 27** and which the tribunal has applied:

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;
- Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination 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;
- Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;
- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;
- Tribunals should bear in mind the need for public respect for the level of awards made. 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 (see **Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102**).

66. In **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings. The top band was for the most serious of cases such as where there was a lengthy campaign of harassment on the grounds of the protected characteristic, the middle band for serious cases that did not merit a higher award and the lower band for less serious cases, for example where there was a one-off event of discrimination.

67. The Presidents of the Employment Tribunals in England & Wales and Scotland has issued 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury, which the tribunal considered.

68. The relevant bands for claims on or after 06 April 2022 were as follows: –

- Lower band £990 to £9900
- Middle band £9900 to £29600
- Upper band £29600 to £49300

69. Interest can be awarded on the sum for injury to feelings under Reg 6(1)(a) of the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 which provides that the period over which interest accrues begins with the date of the discrimination and ends on the date the tribunal calculates compensation.

70. From 6 April 2018, any compensation for injury to feelings in a termination payment will be taxable to the extent that the £30,000 'allowance' has been exceeded, following an amendment to s406 ITEPA 2003, except where the compensation is for a psychiatric injury.

71. Although both parties made submissions on injury to feelings the tribunal is not bound by either submission. It must apply the above legal principles to reach a reasoned and just award.

72. The tribunal reminded itself that it had to determine the pain and injury the claimant had suffered which flowed from the one identified discriminatory act, namely his dismissal and it was for the claimant to prove his injury to feelings.

73. The tribunal cannot take into account the physical symptoms the claimant has suffered as a result of his accident as they are wholly unconnected and predate the discriminatory act, although they may be compensated, dependent upon the outcome of his personal injury claim, if he can establish the respondent was wholly or partly responsible for his accident.

74. The tribunal also has had to carefully take into account the fact that claimant was already suffering depression and anxiety prior to the discriminatory act, which flowed from the debilitating effects of his physical injuries and their impact on his day to day life. Thus, the tribunal had to look at what stress and anxiety flowed from the dismissal itself and in particular to what extent it aggravated the claimant's preexisting conditions and for how long.

75. The starting point for the tribunal is that a discriminatory dismissal, without more, is normally in a range towards the top of the lower band and towards the bottom of

the middle band. That however, in the tribunal's judgement is simply a starting point and as in every case a final determination is fact specific.

76. The tribunal considered the following factors and have indicated what weight the tribunal gave to each (if any) in reaching its award:-

- The claimant had no prior warning of his dismissal and the tribunal found he was left shocked, upset and distressed. He was left with a feeling of worthlessness after almost a lifetime of service. The fact the claimant had worked for the respondent for almost all his life led the tribunal to fully accept the claimant's description of how he felt. The factor weighed heavily in favour of the claimant
- Although there was no apology the respondent did communicate with the claimant, soon after the issuing of the P45, to seek to reassure him, in rather curt terms, that he was not dismissed. This was a factor that went a little way to reducing the hurt.
- Although the claimant was critical of the attempts made, post termination of the respondent and the respondent's advisers to seek to reinstate him and have him examined by their own occupational health physician, that was not a factor in the tribunal's judgement that aggravated any award and again went a little way to reduce the hurt.
- The claimant was critical that the respondents did not admit he was disabled before trial and that the matter had to be determined by the tribunal. In fairness to the respondent the claimant had not granted consent for them to access his medical records and, other than fit notes, he had not supplied any medical evidence. It is not appropriate to equate failure to make an early admission with an inference that the respondents were implying the claimant was not telling the truth. The burden of proof is upon the claimant and the respondent's were entitled to require him to establish disability. The tribunal therefore regarded this as a neutral factor in its overall assessment.
- It was suggested on behalf of the respondent that as the dismissal, would have occurred at some point in the future, for legitimate reasons, there should be a reduction in the injury to feelings award to reflect that future possibility. The tribunal rejected that notion. An award reflects the injury to feelings

caused by the knowledge that the reason for the act was discrimination. It cannot be offset by the fact that a lawful dismissal may have been carried out in any event (see **O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615**).

- There was no cogent medical evidence (other than what the tribunal considered likely to have been a panic attack) that the claimant's mental health worsened following termination. His prescription for antidepressants remained the same.
- There was no evidence that the claimant required blood pressure treatment following his dismissal. As the tribunal has already explained the medical evidence showed that he was already receiving treatment prior to dismissal.

77. Doing the best, it can be considered an appropriate award was the top end of the bottom band and the sum of £9000 was an appropriate award. This was on the basis that there was an injury to the claimant's feelings which did heighten his mental distress but in itself it was short term and did not materially impact upon the claimant's pre-existing mental health.

78. Interest is awarded on an injury to feelings award from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Reg 6(1)(a) IT(ADC) Regs 1996).

79. Therefore the interest calculation is :-

05 April 2022 until 07 August 2023, 489 days x £9000 x 8% = £ 964.60.

80. For completeness the tribunal was satisfied in looking at its figures there was no element of double compensation, given the claimant's personal injury claim still had not been resolved.

81. Of course, this judgement may be placed before a civil court when that injury claim is processed so it is aware of what has already been ordered by the tribunal for injury to feelings and exactly the basis on which the award was made.

82. The sum therefore payable to the claimant is as follows: –

- Basic award £11400
- Breach of contract £3926.52
- Section 38 EA 02 £1520

- Injury to feelings £9000
- Interest £ 964.60

83.The total award is therefore **£26,811.12.**

Employment Judge T R Smith

26 September 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.