



EMPLOYMENT TRIBUNALS

Claimant: Mr R Poniatowski

Respondent: Wealmoor Limited

Heard at: West Midlands (Birmingham)
Employment Tribunal

On: 6 October 2023

Before: Employment Judge Childe

Mrs Hicks

Mrs Bannister

REPRESENTATION:

Claimant: In person

Respondent: Mr Williams (consultant)

REMEDY JUDGMENT

1. The respondent shall pay compensation to the claimant of **£129,970.01 (grossed up)** made up as follows:
 - a. An award of compensation for wrongful dismissal of £1,282.56
 - b. A basic award for unfair dismissal of £776.84
 - c. A compensatory award for unfair dismissal of £450
 - d. Compensation for unlawful discrimination, inclusive of interest, of £108,088.70.
2. The recoupment provisions do not apply.

REASONS

Introduction

1. In its decision on liability, the tribunal found that the claimant was unfairly and wrongfully dismissed and that the respondent discriminated against the claimant by failing to make reasonable adjustments prior to the termination of his contract of employment and by subjecting him to discrimination on the grounds of disability by dismissing him on 24 March 2020. It was further decided that no deduction should be made for contributory fault or to reflect a chance that the claimant might have been dismissed in any event.
2. For this hearing on remedy, we heard from the claimant and Mr Williams. The claimant also gave oral evidence and was questioned by Mr Williams. We had a witness statement from the claimant and a small trial bundle from both parties including the claimant's schedule of loss.
3. The parties helpfully agreed before today the amount of the claimant's gross and net weekly pay while employed by the respondents.
4. The parties also helpfully agreed the calculation for grossing up this award.
5. The claimant's period of continuous service is agreed as 2 years.
6. The claimant was aged 29 when he was dismissed on 24 March 2020.

Issues to be determined

7. The remedy issues the Tribunal will decide are set out below.

Remedy for unfair dismissal

8. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - a. What financial losses has the dismissal caused the claimant?
 - b. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - c. If not, for what period of loss should the claimant be compensated?
 - d. Does the statutory cap of fifty-two weeks' pay apply?
 - e. What basic award is payable to the claimant, if any?

Wrongful Dismissal

9. How much is the claimant's net weekly payment?
10. How much is that net weekly payment, multiplied by four?

Discrimination

11. What financial losses has the discrimination caused the claimant?
12. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
13. If not, for what period of loss should the claimant be compensated?
14. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that? Injury to feelings can include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress or depression.
15. Should interest be awarded? How much?

The law on remedy

Compensation for unfair dismissal

16. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (see section 118 of the Employment Rights Act 1996 (“ERA”)).
17. The provisions relating to the basic award are contained in ERA sections 119 to 122 and in section 126. The award is calculated according to a formula based on age, length of service and gross weekly pay. A week’s pay is subject to a statutory maximum which, at the time of the claimant’s dismissal stood at £388.42 (see ERA section 227). As the claimant was aged 29 when he was dismissed, the relevant rate is one week’s gross pay, capped at £388.42, for each full year of service.
18. The provisions relating to the compensatory award are contained in ERA sections 123, 124, 124A and 126.
19. A compensatory award is intended to compensate for loss suffered and not to penalise the employer for its actions. Furthermore, where a loss of earnings would have been taxable in a claimant’s hands, loss must be calculated net of tax and NI (see *British Transport Commission v Gourley* [1956] AC 185). The relevant questions are:
 - a. whether the loss was occasioned or caused by the dismissal.
 - b. whether it is attributable to the conduct of the employer; and
 - c. whether it is just and equitable to award compensation.

20. Permissible heads of loss include past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights. The award for loss of statutory rights reflects the fact that the dismissed employee will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed.; The award is generally for a conventional amount, at present somewhere in the region of £450.
21. It was decided as part of the hearing on liability and recorded in the judgment on liability that no deduction would be made for misconduct prior to dismissal, contributory fault or Polkey.
22. An employee who has been unfairly dismissed must mitigate their loss by taking reasonable steps to reduce their losses to the lowest reasonable amount. This does not mean they have to take 'all possible' steps. The burden of proving a failure by a claimant to mitigate lies on the respondent.
23. ERA section 124 places a cap on the compensatory award for unfair dismissal which, at the date of the claimant's dismissal, was the lower of £86,444 or 52 weeks' pay.

Remedies for discrimination

24. Where a tribunal finds that an employer has discriminated against an employee, there are three types of remedy available (see section 124 of the Equality Act 2010 ("EQA")). The tribunal may:
- a. make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
 - b. order the respondent to pay compensation to the complainant.

- c. recommend that the respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant.

25. Each of these remedies is discretionary but it is highly unusual for a remedy not to be awarded. We have, in fact, already provided the claimant with a declaration that he has been discriminated against by the respondent in our liability judgment

Compensation for discrimination

26. The central aim of any award of compensation is to put the claimant in the position, so far as is reasonable, that he would have been in had the discrimination not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23 and *Chagger v Abbey National plc* [2010] IRLR 47). The types of financial loss that are recoverable are, in general, the same as for an unfair dismissal compensatory award and include the value of lost earnings and benefits. The same principles of mitigation apply.

27. There are a number of key differences, however:

- a. There is no statutory cap on the amount of compensation.
- b. The tribunal does not award simply what is considered 'just and equitable' but must assess loss under the same principles as apply to torts (see EQA s124(6) and s119(2)), though the two approaches will often lead to the same result.
- c. The tribunal can award compensation for non-financial losses such as injury to feelings.

- d. The Recoupment Regulations do not apply where compensation is awarded for discrimination.
- e. The tribunal has power to, and generally should award interest on past losses.

Compensation for Injury to Feelings

28. An award for 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 and not punitive, but 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* [2019] UKEAT/0275/18).
29. Tribunals have a broad discretion about what level of award to make. The matters compensated for 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). 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, as follows:
- a. 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.
 - b. 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.

- c. 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;
- d. 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;
- e. Tribunals should bear in mind the need for public respect for the level of awards made.

30. Presidential Guidance states that in respect of claims presented on or after 6 April 2019, and taking account of *Simmons v Castle* [2012] EWCA Civ 1039, the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000. This claim was presented on 16 June 2020.

Interest

31. Interest is awarded on injury to feelings awards 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) of the Regulations). Interest is awarded on all sums other than compensation for injury to feelings from the mid-point date (reg 6(1)(b)). The mid-point date is the date halfway through the period

between the date of the discrimination complained of and the date when the tribunal calculates the award (reg 4).

32. The tribunal has a discretion to award interest on a different basis if it considers that serious injustice would otherwise be caused.

Other matters common to compensation under the ERA and EQA

The burden of proof

33. It is for a claimant to prove his loss and, generally speaking, this will include proof of the causal link between the unlawful treatment and the loss. In many cases this will be obvious or relatively easy for a claimant to achieve.

34. As noted above, the claimant is under an obligation to take reasonable steps to mitigate his loss, but it is for the respondent to prove with evidence that he has failed to do so.

Choice of basis for compensation

35. It is a matter for the tribunal to decide whether to award compensation either under the ERA or EQA. It must, however, avoid double recovery.

Conclusions

Compensation under the ERA or EQA?

36. Apart from those awards that can only be made under the ERA, namely a basic award for unfair dismissal and compensation for loss of statutory rights, we have decided to assess the claimant's losses under the EQA. This is so

that we can award interest on the compensation to which the claimant is entitled to reflect the time which has elapsed since his discriminatory dismissal. We find that this reflects the justice of the case.

The basic award and compensation for loss of statutory rights

37. Having regard to the claimant's length of service and age at dismissal we award £776.84.

38. We award £450 for loss of statutory rights.

Loss of earnings

39. Having regard to these factors, we find that the claimant has taken reasonable steps to mitigate his losses and that the respondent has not established that he has failed to mitigate them. Accordingly, we award the claimant his full loss of earnings to date.

40. We have accepted the claimant submissions that had he remained employed by the respondent he would have continued to work for 30 hours per week for 12 months as a forklift truck driver, working six hours each night five days a week. From 25 March 2021 we find he would have then worked for 40 hours per week. We have used the gross hourly rate calculations agreed between the parties and adjusted them so they are net.

41. The recoupment regulations do not apply as the award is compensation for discrimination.

Injury to feelings

42. We accept the claimant's submission that the impact of the respondent's treatment his claimant was significant. The claimant has spoken candidly about his depressive condition and his feelings of suicide at times, and we accept the claimant's evidence in its entirety.

43. We consider the appropriate award to be in the upper part of the middle Vento band. We award £23,000 for injury to feelings.

Interest for discrimination

44. We award interest at 8% on those heads of loss arising under the EQA.

- a. On the award for injury to feelings, we have calculated this from the date of dismissal, 24 March 2020 until today, 6 October 2023, a period of 1291 days.
- b. On the award for past financial loss, we have calculated this from the mid-point between the dismissal date and today, namely 30 December 2021 which is a period of 646 days.

Calculation

Award for wrongful dismissal

1.	4 x £320.64	£1,282.56	
	Total		£1,282.56

Awards under the ERA

1.	Basic award for unfair dismissal:	£776.84	
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	2 x £388.42 =		
2	Loss of statutory rights	£450	
	Total		£1,226.84

Awards under EqA

1	Past loss of earnings 25 March 2020 – 24 March 2021 (52 weeks @ £261.15 net (based on a 30-hour week))	£13,579.71	
	25 March 2021 – 24 March 2022 (52 weeks @ £326.78 net (based on a 40-hour week))	£16,992.63	
	25 March 2022 – 24 March 2023 (52 weeks @ £342.81 net (based on a 40-hour week))	£17,826.40	
	25 March 2023 – 6 October 2023 (28 weeks x £432 net (based on a 40-hour week)).	£12,398.40	
	Sub-total	£60,797.14	
2	Interest on past loss of earnings 646 (no of days-mid point) x 0.08 (8%) x 1/365 (daily calculation) x £60,797.14 (sum awarded for past losses)	£8,608.21	
3	Medical report	£16.00	
	Total Past Loss (ADD 1,2 and 3)	£69,421.35	
	Less losses for wrongful dismissal	£1,282.56	
	Total Past loss		£68,138.79
4	Future loss of earnings 6 October 2023 to 6 April 2024 (26 weeks @ £401.61 net (based on a 40-hour week))	£10,441.86	
	Total Future Loss		£10,441.86
5	Injury to Feelings	£23,000	
6	Interest on Injury to Feelings 1291 (no of days) x 0.08 (8%) x 1/365 (daily calculation) x £23,000 (sum awarded for past losses)	£6,508.05	

	Total Injury to Feelings (ADD 5 and 6)		£29,508.05
	Total		£108,088.70

Grossing up

45. As our calculation of the claimant's losses exceeds the tax-free threshold of £30,000 in section 401 of the Income Tax (Earnings & Pensions) Act 2003, it is necessary to gross up the excess to take account of the fact that it will be taxed as income in the claimant's hands.

46. The basic award is £776.84 and is taxable.

47. The compensatory award is £109,821.26 and is taxable.

48. The tax-free element is £30,000.

49. The amount of compensation up to the tax-free element is £30,000 - £776.24 = £29,223.76.

50. The amount of compensation that should be taxed is = £109,821.26
(£1,282.56 damages for wrongful dismissal, plus £450 loss of statutory rights plus £108,088.70 for compensation for unlawful discrimination) - £29,223.76 = £80,597.50.

51. The grossed-up compensation for £80,597.50 is $£80,597.50 / 0.8 =$
£100,746.25.

52. Total compensation = £29,223.76 plus £100,746.25 = **£129,970.01**

Employment Judge Childe

Mrs Hicks

Mrs Bannister

6 October 2023

FOR THE TRIBUNAL OFFICE