EMPLOYMENT TRIBUNALS

Claimant: Ms K Edwins

Respondent: Artem Ltd

Heard at: Watford Employment Tribunal (In public; In person)

On: **8 September 2023**

Before: Employment Judge Quill; Ms S Boot; Mr P Miller

REMEDY JUDGMENT

(1) The total amount of compensation that the Claimant is entitled to receive, prior to grossing up, is £97,554.23.

(2) The details of that are

- (i) the basic award is £15,064
- (ii) Injury to feelings is £13,000.
- (iii) There is interest on the injury to feelings of £3,199.78.
- (iv) For the dismissal: £66290.45, calculated as follows:
  a. £500 for loss of statutory rights,
  b. £61,690.14 for loss of earnings
  c. £11,465.91 for interest on that loss of earnings.
  d. Those three things together (£500 for loss of statutory rights, £61,690.14, £11,465.91 for interest) sum to £73,656.05. We have applied a 10% reduction for Polkey and Chagger leaving a total of £66,290.45 for the dismissal

(3) There is no uplift for alleged breach of ACAS Code and we do not make any recommendations.

(4) After grossing up. the Respondent is ordered to pay the Claimant the sum of **£112,007.32**

REASONS

The Law

1. The purpose of compensation is to provide proper compensation for the wrong which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

2. For financial losses, we must identify the financial losses which actually flow from complaints which we upheld. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way.

3. For injury to feelings, we must not lightly assume that injury to feelings inevitably follows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether an injury to feelings has been sustained. Some persons who are discriminated against may feel deeply hurt and others may consider it a matter of little consequence and suffer little, if any, distress.

4. As with financial losses, we must be careful not to take into account any injury to feelings (even if caused by the Respondent) caused by anything other than the actual contraventions of the Equality Act 2010 as per the liability decision.

5. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] EWCA Civ 1871*, *[2003] IRLR 102*, *[2003] ICR 318, CA*, and taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

    a. The top band was (at the time) between £15,000 and £25,000. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.

    b. The middle band was, initially, £5,000 and £15,000. It is to be used for serious cases, which do not merit an award in the highest band.

    c. The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

6. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - with effect from 1 April 2013 - the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift provided for in *Simmons v*

Castle should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.

7. There is presidential guidance which takes account of the above, and which is updated from time to time. The relevant guidance applicable to this claim is:

> *In respect of claims presented on or after 6 April 2020, 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.*

8. Section 123 of the Employment Rights Act 1996 ("ERA") provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal. However, compensation for unfair dismissal under s.123(1) cannot include awards for non-economic loss such as injury to feelings (see the House of Lords decision in Dunnachie v Kingston upon Hull).

9. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

10. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.
    a. In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.
    b. In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).
    c. If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

11. There is no one single "one size fits all" method of carrying out the task. The tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "what are the chances that the claimant have been dismissed if the process had been fair?", it is not asking itself "would a hypothetical reasonable

employer have dismissed"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair dismissal not taken place, and had the respondent acted fairly and reasonably instead.

12. A similar approach should be taken when analysing and deciding what financial loss to award for a dismissal which has been found to be a breach of the Equality Act 2010. In other words, the Tribunal must ask itself what might have happened in the absence of such contraventions, and consider the possibility that there might have been a dismissal which was (not unfair and) not discriminatory and not an act of victimisation or harassment. See Chagger v Abbey National plc Neutral Citation Number [2009] EWCA Civ 1202 (where it was said that: *The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination*)

13. Under both EQA and ERA, tribunals apply the same rules concerning the duty to mitigate loss as apply to damages recoverable under the common law. Where the employee has successfully mitigated, a respondent receives the benefit of the sums that the claimant has earned by way of mitigation.

14. When assessing the deduction (if any) for an employee's failure to mitigate their loss, the tribunal does not reduce the compensatory award that it would otherwise make by a percentage factor. The correct approach is to make a decision about the date on which the Claimant would have found work had they been acting reasonably to seek to mitigate their losses, and then make an assessment of what income they would have had from such work.

15. So the approach is:
    a. Consider what steps it would have been reasonable for the claimant to have had to take to mitigate their loss;
    b. Ask if the claimant failed to take reasonable steps to mitigate their loss;
    c. Decide to what extent would the claimant have mitigated their loss had they taken those steps.

16. It is for the Respondent to prove that the Claimant has unreasonably failed to take appropriate steps, and that – on balance of probabilities - had those steps been taken, then the losses would have been mitigated (either reduced to zero ongoing losses, or reduced to some other ongoing loss) from a particular date.

Recommendations

17. Section 124(2)(c) EQA states that an employment tribunal may make an appropriate recommendation. An appropriate recommendation is a recommendation that (within a specified period) the respondent takes specified

steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

ACAS

18. The ACAS Code of Practice on disciplinary and grievance procedures must be taken into account by the employment tribunal if it is relevant to a question arising during the proceedings.

19. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 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 concerns a matter to which a relevant Code of Practice applies,
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> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
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> 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%.

20. So, a failure to complain with a Code has to be an unreasonable failure for this provision to have effect. Some failures might not be unreasonable, and so that is one of the decisions the Tribunal has to make.

21. In Wardle v. Crédit Agricole Corporate Bank [2011] ICR 1290, a case decided under the previous litigation, but which contains guidance which is still applicable under the current legislation, the court of appeal said:

> Once the tribunal has fixed on the appropriate uplift by focussing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms. As I have said, this must not be disproportionate but there is no simple formula for determining when the amount should be so characterised. However, the law sets its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of doing just that …

22. So the correct approach is to first consider if there was an applicable code, and if so, decide if the party (in this case, the Respondent) had obligations under the code, and, if so, if it breached them. Then decide if that breach was unreasonable. If so, then decide if there should be an uplift, and fix the amount. The maximum is 25%, and that might be – but is not necessarily – appropriate in cases where there is a complete failure. However, taking into account whether there was partial compliance, and other relevant factors, including the Respondent's size and resources, and the reasons for the default, then the uplift (if any) can be fixed at any appropriate figure which does not exceed 25%.

23. After all that is done, the Tribunal the tribunal should apply a common sense and proportionality check. If the simple application of the percentage would result in a cash amount that seems to be too large a sum to compensate the claimant for the specific wrongdoing in question (that is, the specific failures to comply with the requirements of an applicable ACAS code), then the Tribunal must reduce the

award to an amount which is proportionate, so as to ensure that, in the words of the statute, the award is actually "just and equitable".

Analysis and conclusions

24. In this case, we consider it more appropriate to make our financial awards under section 124 of the Equality Act 2010 than under of the Employment Rights Act 1996. There is – we are told – an appeal against the decision that there was a discriminatory dismissal. If the appeal were to be successful, then the remedy decisions would have to be revisited.

25. There is no dispute between the parties that the correct basic award is the figure of £15,064, based on 28 multiplied by the appropriate statutory cap.

26. It is also agreed that the claimant's weekly income/benefits pre-dismissal were the aggregate of £708.24 basic net pay, £81.01 for pension and £7.38 for life cover.

27. We accept the claimant's argument that the appropriate amount to award for loss of statutory rights is £500 taking into account the claimant had the maximum length of service for such rights; for example, she had more than 20 years for redundancy pay/basic award and more than the maximum 12 years for notice rights.

28. In terms of injury to feelings, it is our assessment that the claimant did suffer a genuine injury to her feelings by the discriminatory dismissal which followed the events on 12 August 2020 with the constructive dismissal taking effect the following day.

29. The discrimination did have significant impact on her; amongst other things the things that she was affected by were that this was an employer that she regarded as part of the family. She had been there for more than 20 years and she had been in her role of Finance Director for a long period of time. Concerns over her performance had not been raised with her and at a liability hearing the respondent said that they had no plans to raise concerns over her performance with her, which was repeated here today in cross examination by Mr Kelt.

30. The injury to the claimant's feelings caused by the events at that meeting (that is the events which caused the discriminatory constructive dismissal) did not disappear very quickly; they lasted at least through the remainder of 2020, which was when the claimant was going through the grievance process.

31. That being said, we consider that the effects were likely to have diminished significantly by the start of 2021 and we do not accept that the effects on the claimant were such that from July 2021 and later, the injury to her feelings were such that it significantly affected what she was doing day to day and/or that it significantly impeded any search for jobs.

32. Had the claimant been affected as severely as she has described in her witness evidence, then we would have expected to see some medical evidence to support that. There could also have been evidence from friends and family talking about

what they had observed. However, as the claimant accepts in her evidence, she did not consult her GP until after the liability hearing.

33. This is not an upper Vento band case. We do not think that the injury to feelings merits that award, and while the respondent's discriminatory conduct is only indirectly relevant to the size of the injury to feelings award, it was our decision that the discrimination was on the 12 August 2020 and not prior to that.

34. Given the severe effects on the claimant, we do not think it is a lower band case either. In fairness to the respondent, it has not sought to persuade us to make an award in the lower band.

35. We therefore think it is a middle band case. As mentioned, the middle band is £9,000 to £27,000. It is our assessment that the appropriate award belongs in the lower half of the middle band and it is our assessment that £13,000 is the correct figure for injury to feelings.

36. We have awarded interest on that the interest is for the period 12 August 2020, the date of the discrimination, to todays date, 8 September 2023 and that is 1,123 days. Interest is awarded at 8% per annum for the entirety of that period and the calculation produces and interest figure of £3,199.78.

37. In terms of mitigation of losses, the tribunal's decision is that the claimant has not acted reasonably so as to mitigate her losses.

38. We do accept that between pages 129 and 131 of the hearing bundle those comments there are truthful and accurate. The claimant did send her CV as itemised on those 11 occasions. Even though she had not produced evidence of it, we take her at her word, and we believe her.

39. The claimant did not start looking for work promptly after the end of her employment. We take into account that at least a partial explanation for not looking for work immediately after August 2020 was that she was undergoing a grievance procedure at the time. That being said, we also take into account that people who are current employees of employers do undergo grievance procedures; it does not have to be a full-time occupation, such that a person can do nothing at all (between 9am and 5pm, say, or in the evening after work) other than prepare documents or arguments for a grievance. So the emotional distress of the discriminatory dismissal (which continued during the grievance process) is relevant to arguments about mitigation of loss. However, the actual time spent on the grievance is a less persuasive argument that the Claimant was unable to start a job search.

40. The claimant received the grievance outcome and she chose not to go to the appeal. She would have potentially been able to start looking for work promptly after the grievance outcome.

41. In any event, on her own case she was able to, and did, start looking for work from 25 February 2021 onwards (or thereabouts). The Claimant told the Tribunal that she spent perhaps one or two hours per day looking for work. Our decision is

that one or two hours per day looking for work was not reasonable in all the circumstances, taking into account the limited number of opportunities the Claimant was able to find in those hours.

42. It seems to us that it was not reasonable to have spent longer than one or two hours per day looking for work in these circumstances. On the Claimant's case, spending that amount of time searching only enabled her to find 10, or perhaps 11, opportunities to supply her CV to a potential employer.

43. The amount of time which the Claimant spent looking for work was not sufficient for her to find agencies that were more specialised in the type of work that she was looking for initially. Further, when she decided (which she had every right to do) that she would look for work in the charity sector (instead of or as well as other sectors), she did not find agencies that specialised in that particular area of work either.

44. It is our finding that more than these 10 or 11 opportunities would have obtained from a diligent search for work. Based on the claimant's assurance, we accept that she spent 1 or 2 hours per day looking. However, it would have been obvious to any reasonable person who was seeking to mitigate their losses (in the same way that they would do if they were not expecting to be compensated for those losses by a respondent), that finding only:

    a. One opportunity in February 2021
    b. Four in March 2021
    c. Two in April 2021
    d. Two in May 2021
    e. One in June 2021
    f. One in July 2021

    meant they were not doing enough to find work.

45. On her the Claimant's own case, she sent off her CV these 10 or 11 times, and received no reply and had no means of chasing up to see why she had been unsuccessful. That was not a sufficient attempt to find work.

46. Part of the claimant's argument is that after July 2021 she could not look at all (and that even before July 2021 she could only look online and not go in person to locations). One of the suggested reasons for this is the pandemic; another is the injury to feelings (and alleged illness) caused by the Respondent.

47. We acknowledge, and take into account, that in early 2021, physically attending (for example) an employment agency would have been difficult because of the pandemic. We do not accept that the pandemic would have prevented the Claimant finding agencies on line and communicating by phone/email/video.

48. We do not accept that, in 2021, the injury to feelings caused by the respondent was so significant that it prevented her from looking for work, including by physically visiting the premises of agencies and prospective employers.

49. Furthermore, and in any event, if it were true that there was a good reason for not physically attending agencies etc, then, in such circumstances, the Claimant's duty to mitigate required her to do a lot more online research. A diligent approach would have enabled her to find appropriate vacancies, and/or agencies and/or appropriate other help and guidance with finding work.

50. The claimant was not unable to do internet research (for health or any other reason) as is demonstrated by the internet research that she did for the litigation.

51. It is the respondent's argument that had the claimant acted reasonably to search for work throughout the period she was obliged to do, in other words from her dismissal onwards, then she would have found at least some work after 12 months. They suggested that even if (which they did not accept) there was only, for example, intermittent temping work through an agency or work which was less demanding (and therefore less well remunerated per hour), there would have been some work.

52. It is the respondent's argument that after six months or so of such intermittent, or less well paid work (so by 18 months after the dismissal), the claimant would have bene able to find a job which matched her earnings from the respondent in salary, pension and life cover and other benefits.

53. We agree with the respondent's assessment. We accept that the claimant, had she acted reasonably to look for work, would have been able to find some work after no more than 12 months and that after no more than 18 months she would have fully mitigated her ongoing losses.

54. We therefore award compensation in full (subject to Chagger which we will come onto) for the first 12 months period. We have not been satisfied that she would have found a job in less than 12 months even if she had acted reasonably. However, on the balance of probabilities, she should have been able to earn at least half as much as her income/benefits from the respondent for the next six months.

55. Furthermore, on the balance of probabilities, had she acted reasonably, then after 18 months, so from around February 2022 onwards, she would have replaced her income/benefits entirely.

56. The income/benefits per week (net) was £708.24 plus £81.01, plus £7.38 in aggregate that is £796.63.

57. We award 52 weeks at that rate which is £41,424.76.

58. We then award half as much again, so another £20,712.38, based on our assessment of what the losses would have been had the Claimant acted reasonably to mitigate.

59. That gives a total of £61,690.14 for loss of earnings.

60. We award interest on that sum as well and we need to take the midpoint of the period for which we are awarding the loss. We are awarding that loss from August 2020 to February 2022 and because we need to take the mid-point, we therefore award interest on the loss of earnings for 848 days. At 8%, and that produces a figure of £11,465.91.

61. We have to take account of the chances that the claimant's employment would have terminated in any event but for the discriminatory and unfair dismissal.

62. The different things that can lead to termination of employment (which is nont-discriminatory and not unfair) include that the employee decides to leave the job for one reason or another: they might voluntarily decide, for example, they have got a better paid job elsewhere, or some other changes in life circumstances that cause them to do that.

63. It is our assessment that there would have been an extremely low chance of the claimant leaving of her own accord. Of course, we only need to consider the period up to February 2022, because that is the only period for which we have awarded losses. We think there is little chance that the Claimant would have chosen to resign by February 2022.

64. Other termination reasons include an employee resigning because they were dissatisfied with the employer in some way but the dissatisfaction not being unfair or not leading to a constructive dismissal and not being the result of discrimination.

65. Other possibilities include (as the respondent has argued in this case), that had the employer acted fairly and appropriately and without discrimination on 12 August, then a proper response to the claimant's conduct on that particular occasion might have been to say that they thought she was acting inappropriately with the potential to cause a breakdown in relationships and they were therefore going to arrange a fair process to examine the circumstances and consider what the outcome would be. Had the respondent gone down that path, the possibilities of course include that the claimant would have modified her behaviour and there was no further actions as a result of it or that the respondent would ultimately have decided that the claimant's behaviour had not been appropriately modified and she might have been dismissed at some future date.

66. Finally, although it did not feature much in either the evidence or the submissions, if the claimant had not been dismissed on 12 August, the finance review would presumably have taken place and there would have been certain outcomes to that. Apart from the chances of the claimant resigning in response to the finance review (and we do not think the chances of that are high), there would have been at least a finite possibility that it would have led to a redundancy. We take into account that such redundancy (as well as not being a certain outcome) would have potentially been much later than August 2020 (by the time the finance report was finalised and by the time there had been consultation and by the time the claimant

had served her notice period). We take into account that a hypothetical redundancy would have to be fair and non-discriminatory to affect the Claimant's compensation in this matter.

67. So, for those reasons, we do make a reduction tot take account of the chances that the claimant's employment would have ended anyway, for other reasons, prior to February 2022. However, we only make a reduction of 10% because we do not think the chances of that happening are high.

68. The amounts which are reduced by 10% are the loss of statutory rights (£500) and then for loss of earnings (£61,690.14) and the interest on that (£11,465.91). They aggregate to £73,656.05 and once we have reduced those by 10% that comes to £66,290.45.

69. We were asked then to make an award for breach of the ACAS Code. In short, we have not been satisfied that there actually was a breach of the ACAS Code.

70. The claimant has argued, as she did at the liability hearing, that there was an unreasonable delay in dealing with the grievance.

71. Our decisions are that the time taken to produce the grievance and outcome report was proportionate. The investigator, as we said in the liability reasons, conducted various interviews and produced a lengthy report.

72. As we said in the liability decision, it is not the case that the claimant was simply left in the dark about what was going on. She was given dates by which the grievance outcome was supposed to be ready and while it was not ready by those dates, she was notified each time that the person doing the report required a bit more time.

73. In terms of the appeal, the claimant did not go to the appeal hearing and it is not the respondent who is in breach of the ACAS Code in relation to that.

74. Taking into account the respondent's size and resources, even if (contrary to our decisions), there had been a breach it was not an unreasonable breach on the part of the respondent and it is not appropriate to make an uplift for ACAS.

75. The claimant has also asked us to make recommendations. The claimant's case was successful on the basis that dismissal was discriminatory for the reasons set out in our reasons at the liability stage. She failed in the other alleged examples of discrimination . In these circumstances we do not think it is appropriate to make a recommendation that Mr Kelt undergo training. Of course, if we were to make such a recommendation we need to be specific about the type of training that he was required to do. In all the circumstances we decline to make a recommendation.

76. For the other two requested recommendations, we do not think either is appropriate.

77. In terms of a reference, if an employer fails to give a reference or they give a reference which is in some way not to the claimant's liking, the claimant thinks it is

unlawful, there is the opportunity to seek redress for that. However, it would not be appropriate for an employment tribunal to dictate to an employer what they must say in a reference. The employer has a legal duty not just to the subject of the reference but to the recipient of the reference, it has to be for the employer to decide what they think is truthful, accurate, fair and not negligent in any reference that thy do decide to supply.

78. In terms of apology, we do not think it is appropriate to make a recommendation that the respondent apologise. The claimant has a decision from the employment tribunal which deals with her allegations. She, the claimant, might not agree with every one of the tribunal's findings but it did find in her favour on certain points. It is not appropriate for us to order the respondent that they have to agree with the decisions that the tribunal has made; they have to accept the consequences of those decisions but they are entitled, if they wish, to disagree with them and it would not be an appropriate recommendation that the Respondent (or its employees or directors) have to write the apology that the claimant has requested.

79. So, for those reasons, those are the awards that we have made at the remedy hearing of this case.

80. We gave our decision and reasons for the above orally.

81. We ordered the Claimant to provide tax information and evidence to the Respondent by 16 September 2023. We ordered both parties to write within 14 days with (as the case may be) an agreed grossed up figure, or else their respective arguments.

82. The Claimant has written to the Tribunal and the Respondent on 28 September 2023, and subsequently. The Respondent has not written to the Tribunal and, according to the Claimant's representative's comments, has not engaged with the Claimant on the matter. The Claimant appears to have adopted the correct method for grossing up, and, given that the Respondent had not objected, it is appropriate to decide that the grossed up figure is £112,007.32 for the reasons stated in the 28 September 2023 email.

Employment Judge Quill

Date 6 December 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
7 December 2023

FOR EMPLOYMENT TRIBUNALS