Case Number: 2203810/2022

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS C BRAYSON**
MR R MILLER

BETWEEN:

Mr O Ajanaku

Claimant

AND

Monsas Ltd

Respondent

ON: **11 March 2024**
Appearances:
For the Claimant: **In person**
For the Respondent: **Ms A Smith, counsel**

JUDGMENT ON REMEDY

The unanimous Judgment of the Tribunal is that the respondent shall pay to the claimant the sum of **£17,183.47.**

REASONS

1. This decision was given orally on 11 March 2024. The claimant requested written reasons.

2. The parties worked with the tribunal on the mathematical calculations set out below, once the findings were made.

3. By a judgment with reasons sent to the parties on 6 October 2023 the claims for discrimination arising from disability and for notice pay succeed. The claims for direct and indirect disability discrimination, victimisation, failure to make reasonable adjustments, disability related harassment and holiday pay fail and were dismissed.

This remote hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

6. The parties were able to hear what the tribunal heard. From a technical perspective, there were no difficulties.

7. The participants were told that was an offence to record the proceedings.

8. We did not hear any witness evidence for the reasons set out below.

The issues

9. The issues for this remedy hearing were identified as follows:

10. What award for injury to feelings should be made? The parties agree that the relevant Vento bands for a claim presented on 8 June 2022 were:

    a. lower band – £990 to £9,900
    b. middle band – £9,900 to £29,600
    c. higher band – £29,600 to £49,300

11. Should there be an ACAS uplift because of an unreasonable failure to follow the ACAS Code? The respondent accepted that because of section 207A Trade Union and Labour Relations (Consolidation) Act 1992 read in conjunction with Schedule A2, this jurisdiction was engaged.

Witnesses and documents

12. We had the original electronic bundle of documents for the full merits hearing which was originally 249 pages and had been updated to 294 pages. Both parties confirmed that given the position they had reached in terms of agreed matters, there were no additional documents to which we needed to be taken.

13. The claimant submitted an updated Schedule of Loss.

14. There was a witness statement from the claimant's brother Mr Ayo Ajanaku. The respondent had no cross-examination for the claimant's brother so his evidence was uncontested and was accepted. We also had a short paragraph in the claimant's original witness statement on injury to feelings which was also unchallenged in evidence. This is set out below.

15. We had written submissions from both parties to which they spoke. They

are not replicated here. All submissions and any authorities referred to were fully considered, whether or not expressly referred to below.

Agreed matters

16. The parties agree that the claimant's gross basic pay was £26,000 per annum; that a gross week's pay was £500 and a net week's pay was £415.

17. Loss of earnings was agreed at £1,245.00. The parties took account of our finding that the claimant would have been dismissed in any event by reason of redundancy on 31 May 2022, being three weeks after his dismissal on 10 May 2022.

18. It was agreed that the award for notice pay should be made gross. The sum was agreed at £5,395.

19. The parties agreed the method of calculation of interest on awards and that the mid-point for the award for financial loss was 4 October 2023.

Findings on remedy

Was there an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance procedures

20. The respondent accepted that they did not comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. There were two paragraphs in particular highlighted by the claimant. These were: Paragraph 9 the failure to inform the claimant of the disciplinary case to answer, with sufficient information and identifying the possible consequences and Paragraph 13 the failure to allow him the right to be accompanied.

21. We made findings of fact as to this at paragraph 124 of our liability decision.

22. We find that there was a failure to comply with the Code, so we have gone on to consider whether that failure was unreasonable.

23. We find that it was an unreasonable failure for the factual reasons set out in paragraph 134 of the liability judgment. The respondent moved to a summary dismissal without an investigation, at a hearing where the claimant did not have advance notice of the disciplinary charges against him, he had no time to prepare and was not given the right to be accompanied.

24. The respondent submitted that at paragraph 134 we had made a finding that a lesser sanction would have been proportionate. We found that there were lesser and more proportionate sanctions available, but not necessarily that they should have been applied. At paragraph 135 we found that a warning might have been justified, not that it was justified in

the circumstances. A properly conducted disciplinary process would enable that decision to be made. It was not our express finding that the claimant's conduct justified a warning.

25. We found at paragraph 158 that had the claimant known that the request for a medical certificate was consistent with the policy, it would have amounted to misconduct but not gross misconduct. We agree with the claimant's submission that paragraph 157-158 of our decision, deals with the hypothetical because we found that he did not know about the terms of the respondent's policy on the provision of medical certificates.

26. We find that this was an unreasonable failure to comply with the Code. It was a serious breach involving a number of failures to comply with procedural safeguards. We also found at paragraph 125 that the respondent relied on their Handbook in terms of their requirements of the claimant on medical certification and their reasons for disciplining him, but failed to follow their own Handbook in terms of compliance with the disciplinary process and thus the ACAS Code.

27. The respondent submitted that if we were not with them on the issue of unreasonableness, then it should be a "*very minimum*" uplift case. Our unanimous decision is that this is a case for a small uplift for the following reasons: The respondent was a small company of 12-14 people. They did not have a dedicated HR function and they had never had anyone off sick before for more than a couple of days (paragraph 76), so this was unfamiliar territory for them. Our unanimous decision is to award an uplift of 5%.

Injury to feelings

28. In his witness statement for the full merits hearing in September 2023 the claimant gave half a paragraph as to remedy (paragraph 33) as follows: *"I have been extremely distressed over this ordeal, whilst at the company and in the aftermath, whilst experiencing episodes of anxiety and depression because I was made to feel less than. I felt as though something a significant as my life was not taken seriously, or handled with care and compassion, but rather callousness. And in a sense that has been the most difficult thing to overcome."* As this was unchallenged evidence we accept and find that this was the effect upon the claimant's feelings.

29. The claimant's brother's unchallenged evidence was that the claimant was deeply affected by his dismissal and that it left him feeling embarrassed and distressed. The claimant's brother said that this led him to withdraw from his family and have "*multiple episodes of depression"* but that the claimant declined to seek professional counselling. The claimant's brother said that the claimant suffered anxiety and humiliation and that he has heighted anxiety whenever a manager seeks a one to one meeting because it triggers memories of his dismissal.

30. We had no medical evidence from the claimant so we were unable to make a finding as to any diagnosis of depression or anxiety arising from the discrimination. The claimant's brother made the point that the claimant declined to seek treatment. We also had no indication of the time period over which this effect was said to have taken place. We make no finding of personal injury being caused by the discrimination.

31. We find that a discriminatory dismissal is an event that inevitably causes and did cause the claimant distress and upset. He felt callously treated in the light of his disability.

32. The respondent's submission was that the injury to feelings should be lessened by the fact that the claimant would have been dismissed three weeks later for redundancy in any event. We do not agree that this minimises the injury to his feelings in terms of a discriminatory conduct dismissal. We find that the claimant's feelings were justifiably injured at the fact of a conduct dismissal and that this was what would appear on his employment record.

33. The respondent contended for the lower Vento band; the claimant contended for the middle band (his written submission paragraph 13).

34. We considered the case of ***Voith Turbo Ltd v Stowe 2005 IRLR 228*** cited by the claimant. We also considered a paragraph in the IDS Handbook Volume 5 paragraph 37.103 relied upon by the respondent. At paragraph 7 of the judgment in that case, the EAT said that it agreed with the submission that *"that dismissal on grounds of race discrimination is surely a very serious incident and cannot be described as one-off or isolated".* The tribunal in that case had awarded injury to feelings in the middle band and the EAT held that it was right to do so.

35. We reminded ourselves that the claimant's case failed under a number of the jurisdictional headings and that he succeeded only on the discrimination claim for "arising from" disability. We found at paragraph 213 that the discrimination arising from disability was a significant part of the reason for dismissal.

36. We find that this dismissal for discrimination arising from disability, merits an award in the middle-band, applying ***Voight*** and due to the seriousness of the act of discrimination. We find that the award lies at the lower end of the middle band and we make an award for injury to feelings of £10,000.

37. We have considered whether the award for injury to feelings should also attract the uplift of 5%. We consider that it would be overlap or double counting to apply the uplift to the award for injury to feelings which we award in its own right and we decline to uplift it by 5%. We make that award in the sum of £10,000 as the full compensation for the injury to the claimant's feelings.

The relevant law on remedy

38. Section 124 of the Equality Act 2010 provides that where a tribunal finds that there has been a contravention of a relevant provision the tribunal may make a declaration as to the rights of the parties; an order requiring the payment of compensation and an appropriate recommendation.

39. In assessing financial loss the aim is to put the claimant in the position that he would have been in, but for the discriminatory act. Loss caused by anything other than the discrimination is not recoverable.

40. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunals must remind themselves of the value in everyday life of the award by reference purchasing power or earnings.

41. The principles in assessing awards for injury to feelings were summarised by the EAT in ***HM Prison Service v Johnson 1997 IRLR 162*** as follows (paragraph 27):

> *"(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.*
>
> *(2) 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, to use Lord Bingham's phrase, be seen as the way to untaxed riches.*
>
> *(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.*
>
> *(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*
>
> *(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made."*

42. ***Komeng v Creative Support Ltd EAT/0275/18*** holds that the tribunal must direct itself to the effect of the unlawful discrimination on the claimant not the gravity of the acts of the respondent.

43. The middle Vento band is reserved for serious cases and the lower band

for mostly isolated or one-off occurrences - ***Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318.***

44. Anger and frustration can give rise to an award for injury to feelings ***Assoukou v Select Service Partners Ltd 2006 All ER (D) 122.*** The EAT in ***Murray v Powertech (Scotland) Ltd 1992 IRLR 257*** held that the matter of hurt feelings can be "*simply stated*" and it is then a matter for the tribunal to consider what degree of hurt feelings had been sustained and to award accordingly (judgment paragraph 7).

45. The claimant drew our attention to the decision of the EAT in ***Voith Turbo Ltd v Stowe 2005 IRLR 228*** in which it was held that a dismissal on the grounds of race discrimination "*is surely a very serious incident and cannot be described as one-off or isolated".*

46. The tribunal has to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the ***Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803*** (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated. For financial loss interest commences at a mid-point. The rate of interest is 8%.

Conclusions on remedy

Financial loss

47. The claimant's loss of earnings figure was agreed at £1,245. The award for notice pay was agreed at £5,395. This includes the three weeks' loss of earnings. We apply the 5% uplift on £5,395 producing £269.75 making a total of **£5,664.75**.

48. The parties agreed the midpoint for the calculation of interest on financial loss as 4 October 2023.

49. The parties agreed that the amount of the award for the three weeks from 10 – 31 May 2022 is **£1,245.** The uplift on £1,245 at 5% **£62.25** and the subtotal is **£1,307.25**. The interest of 8% is awarded for financial loss from a midpoint of 4 October 2023 to the date of this hearing on 11 March 2024 of 160 days is **£45.84**. Interest is not awarded on the balance of the notice pay as this was not an award on a discrimination claim.

Injury to feelings

50. The award for injury to feelings made above is £10,000. The award of interest on that amount is from 10 May 2022 to 11 March 2024 which is 672 days. The interest is 8% on £10,000 for 672 days. The daily rate of interest is £2.19 x 672 = **£1,472.88.** The parties agreed this figure.

51. The total of the award for injury to feelings plus interest is **£11,472.88.**

Conclusions

52. The award for notice pay was £5,395. The 5% uplift on that sum was £269.75. The subtotal of those sums £5,664.75.

53. The interest is only on the financial loss flowing from the discrimination, being the sum of £1,245 + uplift of £62.25 = £1,307.25.

54. The interest of £45.84 on the financial loss flowing from the discrimination is added to the notice sum of £5,664.75, making **£5,710.59.**

55. The award for injury to feelings is £10,000 plus interest of £1,472.88 making a subtotal of **£11,472.88.**

56. The award to the claimant is for the total sum of **£17,183.47.**

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Employment Judge Elliott
Date: 11 March 2024

Judgment sent to the parties and entered in the Register on: 21 March 2024

_____ for the Tribunal