Case No: 2201252/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Sow

Respondent: Bidvest Noonan (UK) Limited

Heard at: **London Central** **On:** **11 April 2024**

Before: **Employment Judge Goodman**
Ms C. Aslett
Ms L. Jones

RECONSIDERATION JUDGMENT

1. The award of compensation for failing to permit the claimant to exercise his right to take annual leave has been increased by 25% because of failure by the respondent to comply with the ACAS Code of Practice on Grievance.

2. The judgment sum is increased to £3,125.

REASONS

1. In a judgment sent to the parties on 12 January 2024 the tribunal found for the claimant in a claim that the respondent had failed to permit him to take annual leave and awarded compensation in the sum of £2,500. Claims of race discrimination and race harassment did not succeed.

2. In the reasons the tribunal explained (paragraphs 70-72) that having not canvassed with the parties whether the award should be increased for any failure to follow the ACAS Code, the tribunal invited the parties to make written representations on this point by 29 January. The panel then arranged to reconvene, without the parties, to consider representations on 11 April. It is regretted that they could find no fit for earlier discussion.

3. Today we met for that purpose.

4. The respondent wrote to the tribunal on 24 January 2024 seeking reconsideration of personal injury element of the award of compensation. The letter is silent on the ACAS uplift point.

5. The claimant wrote to the tribunal on 29 January seeking (in effect) reconsideration of the decisions on race discrimination and harassment. On the ACAS point, he expressed his frustration at having had to ask, at various levels, to take leave six times without success. He asked for the award to be increased.

6. The judge chairing the employment tribunal considered the two applications for reconsideration and decided that neither party's application had any reasonable prospect of success. A decision to that effect was sent to the parties on 6 February 2024.

Relevant Rules of Procedure

7. The Employment Tribunals Rules of Procedure 2013 provide for reconsideration of judgment. The relevant rules are:

> 70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> **Process**
> 72.—
> (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
> (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
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> **Reconsideration by the Tribunal on its own initiative**
> 73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with

rule 72(2) (as if an application had been made and not refused).

8. The ACAS Code point is probably best positioned as our decision to reconsider a decision of our own initiative, although strictly speaking we had wanted to consider this point but did not think it just to do so before the parties had had an opportunity to make representations. We have used the procedure in rule 72(2) as a hearing would be disproportionately costly.

Relevant law - Uplift of Awards for failing to follow ACAS Code

9. As set out in paragraph 70 of the judgement of 12 January 2024:

> Section 207A of the Trade Union and Labour Relations (Consolidation) Act provides that where it appears to the employment tribunal that there is a relevant code of practise, that the employer failed to comply with the code in relation to that matter, and 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 to the employee by no more than 25%. Claims under regulation 30 of the Working Time Regulations 1998 are covered by this provision.

Discussion

10. Our answer to the first question identified in section 207A is that yes, there is a relevant Code of Practice, the ACAS Code on Discipline and Grievance.

11. The introduction to the Code states in paragraph 1 that: “Grievances are concerns, problems or complaints that employees raise with their employers”.

12. Moving on to the substance of the Code on grievance, paragraph 32 starts: “if it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay... in writing”. The Code continues that employers should arrange for a formal meeting to be held without unreasonable delay after grievances received. There are provisions for what should happen at the meeting and the right to be accompanied. An employer must then decide what action if any to take and communicate to that to the employee without unreasonable delay. There is also provision for a right to appeal.

13. The next question we have to answer in section 207 a is whether the employer failed to comply. Our answer is yes. As we set out in the reasons for the judgement of the 12th of January 2024, having been told that he must submit his request to a line manager, he asked his controller who the line manager was, he was told to contact scheduling, and did so, without reply. He made some telephone calls to other managers. He took a letter to the HR department and understood Abby Bantock would handle it. Then he took a letter, actually headed “grievance”, to the HR department. Failing any response, and believing his leave must be taken before the end of the year, he went to ACAS for early conciliation and then presented a claim to the employment tribunal. As described in the decision the respondent never investigated whether he had applied for leave, or what leave he had taken, but just sent him some money, which was not what he wanted.

14. These facts demonstrate that the respondent took no steps whatsoever to deal with the grievance informally, and no steps, even when proceedings began, to deal with it formally. There was no evidence to show what happened to the written letters he took to HR. Not handling the grievance informally was in breach of the spirit of the Code but of itself does not attract an uplift in the award. Failing to deal with a formal grievance does. Not dealing with the matter informally indicates to us that the failure at the formal stage was not a simple administrative failing but reflected a wide attitude to employee grievances about pay and holiday.

15. Next section 207A requires us to consider whether the employer's failure was unreasonable. We considered that it was. The respondent is a very large employer. It has a human resources department, grievance policies, and computer systems. Despite this, no manager seems to have recognised that the claimant's questions about being allowed to take leave were informal grievances, and the HR department, supplied with not one but two letters, took no action on them whatsoever, otherwise they might have come to light at early conciliation or on filing the claim. There is no explanation of why this was. In the lengthy letter to the employment tribunal seeking reconsideration, the respondent has made no representation on the ACAS Code point.

16. We have to consider whether to make an increase and we decide that there should be. The increase can range from nothing to 25%. In this case we consider the award should be at the maximum. This is a large and long-established employer. The point of the ACAS Code is to sort out complaints and grievances informally if possible, formally if not, as a matter if good employment practice and before they escalate. This was not a complicated grievance, as is sometimes seen in, say, discrimination cases. It was a straightforward but important matter which was entirely neglected. We can only sympathise with the claimant's frustration.

17. We considered – without either party making any representation on this - whether there might be an element of double recovery, given that the award we have already made to compensate the claimant for not being permitted to take his annual leave reflects the scale of the employer's default. We concluded that there was not double recovery. The scale of the default was that the claimant could not take any of his annual leave for the relevant year, and there was no proper reason why he could not. The ACAS Code uplift is different: it has the purpose of underlining to employers that they should use the Code. The respondent did nothing to address this grievance, within the formal process of the Code or otherwise, and it is just that the award should be increased for this purpose.

Conclusion

18. We order that the judgment sum of £2,500 is increased by £625. The total now payable to the claimant is £3,125.

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Employment Judge Goodman

Case No: 2201252/2023

Date: 11 April 2024

JUDGMENT SENT TO THE PARTIES ON

24 April 2024
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FOR THE TRIBUNAL OFFICE

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