



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Markwick

Respondent: The Bevendean Community Pub Ltd

Heard at: London South Employment Tribunal by video hearing (CVP)

On: 7 May 2024

Before: Employment Judge Macey
Ms J Forecast
Mr A Peart

Representation

Claimant: Mr Grover, non-practising solicitor

Respondent: Mrs Kaur-Singh, solicitor

RESERVED REMEDY JUDGMENT

1. The respondent shall pay compensation to the claimant of **£43,103.98** made up as follows:
 - a. A basic award for unfair dismissal of £1,179.96
 - b. A compensatory award for unfair dismissal of £470.40.
 - c. Compensation for unlawful discrimination, inclusive of interest, of £41,453.62.

REASONS

INTRODUCTION AND ISSUES

1. In its decision on liability, the tribunal found that the claimant was unfairly dismissed and that the respondent subjected her to direct age discrimination by dismissing her in 2022. The tribunal also found that the

respondent subjected the claimant to direct age discrimination by the following acts:

- a. On or around 13 January 2022, Ms Hamilton allocated the claimant only two days (12 hours) in the weekly rota, when the claimant's contract was for 23.5 hours.
 - b. On or around 5 February 2022 Ms Hamilton allocated the claimant only 16 hours in the weekly rota.
 - c. Ms Hamilton did not allocate the claimant a shift on Saturday 5 February 2022 and gave work instead to a new member of staff.
 - d. On 17 February 2022 when the claimant mentioned how unhappy she was feeling Ms Hamilton said, "Why are you still here?".
 - e. On 19 May 2022 Ms Hamilton removed the claimant from the staff group chat on WhatsApp.
2. The tribunal at the liability hearing concluded that all these acts and the dismissal of the claimant were a continuing act of discrimination.
 3. For this hearing on remedy, we heard from Mr Grover and Mrs Kaur-Singh. The claimant also gave oral evidence and was questioned by Mrs Kaur-Singh. We had a witness statement from the claimant and a small trial bundle of 61 pages including the claimant's updated schedule of loss and the respondent's counter-schedule of loss.
 4. The claimant confirmed in her schedule of loss that she was seeking compensation because she had commenced new employment in June 2023 that is ongoing.
 5. The parties confirmed at the beginning of the remedy hearing that they agreed that the claimant's gross monthly pay was £885 and that the claimant's net monthly pay was £865.
 6. The parties also confirmed at the beginning of the remedy hearing that they agreed that we could assess the claimant's loss of earnings and loss of benefits under the Equality Act 2010 ("EQA").
 7. Prior to submissions the parties agreed that £24.10 per week was the figure the tribunal should use to calculate the claimant's loss of benefits. The period for this loss, however, was not agreed.
 8. During submissions the respondent confirmed that the parties agreed the amount of the basic award as being £1,179.96.
 9. The remaining issues to be decided on compensation were as follows:

Remedy for unfair dismissal

- 1.1. If there is a compensatory award, how much should it be? The tribunal will decide:
 - 1.1.1. Excepting loss of earnings and loss of benefits what financial losses has the dismissal caused the claimant?
 - 1.1.2. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 1.1.3. If so, should the claimant's compensation be reduced? By how much?
 - 1.1.4. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 1.1.5. Did the respondent or the claimant unreasonably fail to comply with it?
 - 1.1.6. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 1.1.7. If the claimant was unfairly dismissed, did she cause or contribute to her dismissal by blameworthy conduct?
 - 1.1.8. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 1.1.9. Does the statutory cap of fifty-two weeks' pay apply?

Remedy for Discrimination

- 1.2. Should the tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 1.3. What financial losses has the discrimination caused the claimant?
- 1.4. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 1.5. If not, for what period of loss should the claimant be compensated?
- 1.6. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 1.7. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 1.8. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 1.9. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 1.10. Did the respondent or the claimant unreasonably fail to comply with it?

- 1.11. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 1.12. Should interest be awarded? How much?

LAW ON REMEDY

Compensation for unfair dismissal

10. 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”)).
11. 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 £571 (see ERA section 227). As the claimant was aged 58 when she was dismissed, the relevant rate is one and a half week’s gross pay, capped at £571, for each full year of service.
12. The provisions relating to the compensatory award are contained in ERA sections 123, 124, 124A and 126.
13. A compensatory award is intended to compensate for loss actually 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: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation.
14. 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 employment rights. The award for loss of statutory employment 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.
15. An employee who has been unfairly dismissed must mitigate her loss by taking reasonable steps to reduce her losses to the lowest reasonable amount. This does not mean she has to take “all possible” steps. The burden of proving a failure by a claimant to mitigate lies on the respondent.

16. 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 £93,878 or 52 weeks' pay.

Remedies for discrimination

17. Where a tribunal finds that an employer has discriminated against an employee, there are three types of remedy available (section 124 of the EQA). The tribunal may:
- a. Make a declaration as to the rights of the claimant and the respondent in relation to matters to which the proceedings relate;
 - b. Order the respondent to pay compensation to the claimant;
 - c. Make a recommendation 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 claimant.
18. 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 she has been discriminated against by the respondent in our liability judgment.

Recommendations

19. A tribunal which finds discrimination proved may make a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate (see section 124(3) EQA).
20. Where a recommendation is made and the respondent then fails, without reasonable excuse, to comply with it, the tribunal may increase the amount of compensation to be paid (see section 124(7) EQA).
21. Tribunals have a wide discretion when it comes to recommendations but a recommendation must be practicable in terms of its beneficial effect on the claimant.

Compensation for discrimination

22. The central aim of any award of compensation is to put the claimant in the position, so far as is reasonable, that she would have been in had the discrimination not occurred (**Ministry of Defence -v- Wheeler [1998] IRLR 23**). 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.
23. There are several key differences, however:
- a. There is no statutory cap on the amount of compensation.
 - b. The tribunal does not award simply what it considers "just and equitable" but must assess loss under the same principles as apply

to torts (see EQA section 124(6) and section 119(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, aggravated damages, and general damages for personal injury.
- d. The Recoupment Regulations do not apply.

24. The tribunal has power to, and generally should award interest on past losses.

Compensation for injury to feelings

25. An award for injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment she 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**).

26. 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 (No. 2) [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 cases 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.

27. The court of appeal in **Vento -v- Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102** identified three broad bands of compensation for injury to feelings. There is within each band considerable flexibility, allowing tribunals to fix what is fair, reasonable, and just compensation in the particular circumstances of the case.

Compensation must relate to the level of injury to feelings experienced by the particular claimant.

28. Presidential Guidance states that in respect of claims presented on or after 6 April 2022, and taking account of **Simmons -v- Castle [2012] EWCA Civ 1039**, the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and upper award of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300. This claim was presented on 21 October 2022.

Interest

29. A tribunal can, and usually will award interest on awards of compensation made in discrimination claims under section 124(2)(b) EQA and the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (“the Regulations”). Interest is limited to past loss, that is loss to the date of the remedy hearing. The current rate of interest is 8%.
30. 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 when the tribunal calculates the award (reg 4).
31. 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

32. It is for a claimant to prove her loss and 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.

Claimant is obliged to take reasonable steps to mitigate her loss

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

Taxation of awards above £30,000

34. When the calculation of the claimant’s losses exceed the tax-free threshold of £30,000 in section 401 of the Income Tax (Earnings & Pensions) Act 2003 the calculation of the claimant’s award becomes more complicated.
35. **Chief Constable of Northumbria Police -v- Erichsen EAT 0027/15** explained two ways of dealing with this complication:

"68.There are two ways of dealing with this complication. Authority can be found for both of them.

69. The first is a rough and ready way: it is to assess the loss using gross figures, on the basis that the additional amount included in the assessment of loss will in a rough and ready way compensate the Claimant for the tax he will pay on the award of compensation.

70. The second is a more principled way: it is to assess the loss using net figures, but then to add an allowance to the award of compensation for the tax which will be payable on it. This process is known as "grossing up". Ms Stout submitted to me that this was the better approach, and the one more generally adopted: she referred to Harvey on Industrial Relations Law at B11–27 and the cases there cited. I agree with her. But this does depend on the parties putting forward the appropriate calculations to the tribunal."

Choice of basis of compensation

36. 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.

The relevance of Codes of Practice

37. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A) an award of compensation for unfair dismissal can be increased by up to 25% if the employer has unreasonably failed to comply with a relevant Code of Practice issued by ACAS or the Secretary of State (there is a corresponding power to reduce awards by up to 25% where an employee unreasonably failed to comply with a relevant Code). The power to increase or reduce does not apply to a basic award for unfair dismissal (see sections 118 and 124A of the ERA).

CONCLUSIONS

Remedy for unfair dismissal compensatory award

Issue 1.1.1 - Excepting loss of earnings and loss of benefits what financial losses has the dismissal caused the claimant?

38. On her updated schedule of loss, the claimant claimed £20 for reasonable expenses incurred in seeking new employment. The respondent put the claimant to proof. The claimant says that these were her travel expenses to attend agencies and job interviews. The respondent did not cross-examine the claimant on this point and we accept the claimant's evidence.

39. We award £20 for reasonable expenses incurred in looking for employment.

40. The claimant's updated schedule of loss claimed £400 for loss of statutory employment rights.

41. We award £400 for loss of statutory employment rights.

Issue 1.1.2 - Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

42. No submissions on this issue were put forward by the respondent at the remedy hearing.
43. As the conclusions of the tribunal at the liability hearing were that the unfair dismissal was both substantively and procedurally unfair we conclude that there was no chance the claimant would have been fairly dismissed if a fair procedure had been followed, or for some other reason.

Issue 1.1.3 - Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

44. The Code did apply because the respondent dismissed the claimant on the grounds of misconduct.

Issue 1.1.4 - Did the respondent or the claimant unreasonably fail to comply with it?

45. The claimant was not informed of her right to be accompanied to the disciplinary hearing prior to the disciplinary hearing.
46. Ms Hamilton conducted the investigation meeting and the disciplinary hearing. The respondent submitted that it would have been difficult for the respondent to have two different people conducting these two meetings/hearings because the respondent is run by a committee of volunteers. We conclude that this argument is unsatisfactory. A committee member could have been asked to hear the disciplinary hearing or an external HR consultant could have been engaged to conduct the disciplinary hearing.
47. The respondent does not seek to argue that there should be any ACAS reduction of the award.

Issue 1.1.5 - If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

48. The claimant submitted that the award should be increased by 12% and the respondent submits it should be increased by 10%.
49. Balancing the seriousness of the breaches with the respondent being a small employer run by a committee of volunteers, we award a 12% uplift.

Issue 1.1.6 - If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

50. The respondent did not make any submissions on this issue at either the liability hearing or the remedy hearing.
51. At the liability hearing the tribunal made a finding of fact that the contract of employment dated 17 July 2018 with the handwritten hours (23.5) and pay rate (£9) was the claimant's contract of employment with the

respondent. We conclude that the claimant did not cause or contribute to her dismissal by blameworthy conduct.

Issue 1.1.7 – Does the statutory cap of fifty-two weeks' pay apply?

52. The compensatory award for unfair dismissal is £420 with an uplift of 12%. The statutory cap does not apply on these facts.

Remedy for Discrimination

Issue 1.2 - Should the tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

53. The claimant is no longer employed by the respondent. Nor has the claimant submitted any recommendations to the tribunal.

54. We therefore do not make any recommendations.

Issue 1.3 - What financial losses has the discrimination caused the claimant?

55. The claimant did not have employment from 31 May 2022 until she started her new job in June 2023. The total time she did not have income from employment was 53.6 weeks. Her new job's net weekly pay is £301. She therefore only has past loss of earnings and benefits up to June 2023. There is no future loss.

56. For 25 weeks she received state benefits of £51.42 per week.

Issue 1.4 - Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

57. The claimant submitted that she was not in a fit state to search for employment between 31 May 2022 and 26 September 2022. After 26 September 2022 there are documents in the bundle [49-61] evidencing job applications and that she applied for approximately 10 jobs between 26 September 2022 and April 2023.

58. The claimant says that after the allegation of falsifying her contract had been made against her that she was devastated and even attempted to take her own life. Her Doctor diagnosed her with depression and anxiety. This continued after the dismissal. The claimant also says following her dismissal customers of the respondent were informing her that they had been told that she had walked away from her job. This further impacted her mental health. The claimant also says that following her dismissal she spent many days in bed because she had nothing to get up for.

59. The respondent submitted that the claimant should have found other employment within 10 weeks of 31 May 2022 and that her loss of earnings and benefits should be restricted to 10 weeks. The respondent did, however, accept that the claimant did not know the outcome of her appeal against the dismissal until 31 July 2022. The respondent also submitted that there were no documents or evidence from the claimant's Doctor in the remedy hearing bundle to support the claimant's evidence. We noted

that the respondent did not put this to the claimant during cross-examination.

60. In both the liability hearing and the remedy hearing we found the claimant to be genuine and credible. Considering the claimant's evidence and her answers in cross-examination, and that she only knew the outcome of her appeal at the end of July 2022 we conclude that she was not able, due to her mental state, to search for jobs prior to the end of September 2022.
61. After the end of September 2022, the claimant spent a further eight to nine months searching for employment. We noted from the documents in the bundle that none of her applications were for bar work. We took judicial notice of the fact that the hospitality industry took a long time to recover after restrictions due to the coronavirus pandemic were lifted in England in July 2021.
62. We also noted that the respondent did not cross-examine the claimant in respect of other jobs that she could have applied for at the relevant time.
63. Considering all the above we conclude that the claimant took reasonable steps to search for employment up to 31 March 2023 and the respondent has not established that she has failed to mitigate her loss during this time.

Issue 1.5 - If not, for what period of loss should the claimant be compensated?

64. We concluded above that the claimant took reasonable steps to search for employment up to 31 March 2023. Therefore, we award her loss of earnings and loss of benefits for 43.4 weeks.
65. The claimant's earnings at the respondent did not exceed her personal tax allowance and therefore only employee national insurance contributions were deducted from her gross salary. We have, therefore, calculated her loss of earnings using gross figures and have used the "rough and ready" approach in **Erichsen**. Neither party provided any calculations to gross up the award in excess of the £30,000 tax threshold.

Issue 1.6 - What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

66. The claimant submitted that her injury to feelings award should be £24,000. The respondent submitted that it should be limited to the lower band of Vento as the act the claimant complains about were relatively minor and insignificant. Mrs Kaur-Singh also drew our attention to the case of **Sawyers -v- East Suffolk and North Essex NHS Foundation Trust [2020] 3201531/2020** in which the claimant was awarded £4,000 for limited acts of harassment for which there was no overt motivation.
67. In respect of the acts of discrimination relating to the allocation of hours the claimant says that her working conditions were unbearable and that she felt isolated and emotional. She dreaded each shift and would lose hours of sleep before each shift. Her self-esteem was also impacted.

68. Prior to the dismissal, but after the allegation had been made against her, the claimant was devastated and attempted to take her own life. The claimant's Doctor diagnosed her with depression and she also experienced anxiety. In the liability judgment we also concluded that the process preceding her dismissal was confusing and that a lack of evidence of the allegation was presented to the claimant.
69. After the dismissal the claimant spent many days in bed because she had nothing to get up for.
70. In cross-examination the claimant confirmed that she was aware that she was being subjected to age discrimination at the time of the unlawful acts.
71. The case of **Sawyers** is an Employment Tribunal case and is therefore not binding on us. The conclusions of the tribunal in that case were different to the conclusions in the present case. The tribunal made a specific finding in that case that the harassment was not overt and that many of the claimant's colleagues had been supportive. In the liability judgment we did not reach a conclusion that the discrimination was not overt nor did we find or conclude that the claimant's colleagues had been supportive.
72. We consider the appropriate award to be in the middle **Vento** band. We award £24,000 for injury to feelings.

Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

73. The claimant did not present any evidence or submissions on this issue. We are not awarding a separate award for personal injury.

Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

74. For the same reasons as detailed in paragraphs 42 and 43 above we conclude that there was no chance that the claimant's employment would have ended in any event.

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

75. Our conclusion is the same as in paragraph 44 above.

Did the respondent or the claimant unreasonably fail to comply with it?

76. Our conclusion is the same in as paragraphs 45 to 47 above.

If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

77. Our conclusion is the same as in paragraphs 48 to 49 above.

Should interest be awarded? How much?

78. Due to the length of time that has passed since the discrimination and the remedy hearing we award interest at 8% on those heads of loss arising under the EQA.

79. On the award for injury to feelings, we have calculated this from the date of dismissal, 31 May 2022 until the date of the remedy hearing, 7 May 2024, a period of 707 days.

80. On the award for past financial loss, we have calculated this from the mid-point between the dismissal date and the date of the remedy hearing, namely 19 May 2023, which is a period of 354 days.

CalculationAwards under the ERA

(1) Basic award for unfair dismissal	£1179.96	
(2) Loss of statutory employment rights	£400	
(3) Expenses in looking for work	£20	
(4) 12% uplift on (2) and (3) above under TULR(C)A	<u>£50.40</u>	
	Total	£1650.36
<u>Awards under the EQA</u>		
(5) Past loss of earnings 31 May 2022 to 31 March 2023 (43.4 weeks)		
43.4 x £204.23 =	£8863.58	
43.4 x 24.10 =	£1045.94	
Minus state benefits (25 weeks @ £51.42 per week)	(£1285.50)	
Plus 12% uplift under TULR(C)A	<u>£1034.88</u>	
	Total	£9658.90
(6) Interest on past loss of earnings $£9658.90 \times (354/365) \times 8\% =$		£749.42
(7) Injury to feelings $£24,000 + 12\% \text{ uplift under TULR(C)A} =$		£26,880
(8) Interest on injury to feelings $£26,880 \times (707/365) \times 8\% =$		£4165.30
Total		£43,103.98

Final award

For the reasons set out above we award the claimant total compensation of **£43,103.98**, comprised as follows:

A basic award of £1,179.96

A compensatory award for unfair dismissal of £470.40

Compensation for unlawful discrimination, inclusive of interest, of £41,453.62.

Employment Judge Macey

Dated: 14 May 2024

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