



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4105211/2023**

5

**Held in Glasgow on 5 August 2024**

**Employment Judge P O'Donnell**

10 **Ms J Almussawi**

**Claimant  
In Person**

15 **Wejdi Moussa**

**Respondent  
No appearance and  
No representation**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Employment Tribunal is:

1. The claim of unfair dismissal under the Employment Rights Act 1996 is dismissed for want of jurisdiction.
2. The respondent harassed the claimant contrary to s26 of the Equality Act 2010 and the claimant is awarded the sum of £41535.49 (Forty one thousand  
25 five hundred thirty five pounds and forty nine pence).
3. The claimant was dismissed without notice. The Tribunal makes no award in respect of this breach of contract.
4. The claimant is awarded the sum of £262.99 (Two hundred sixty two pounds and ninety nine pence) in respect of holiday pay.
- 30 5. The Tribunal makes an additional award under section 38 of the Employment Act 2002 of £1051.94 (One Thousand fifty one pounds and ninety four pence).

## REASONS

### Introduction

1. As set out in her ET1 claim form (either by ticking particular boxes at 8.1 of the form or in the narrative of her claim at 8.2) and further particulars, the claimant brings the following complaints against the respondent:
- 5
- a. A claim of unfair dismissal under the Employment Rights Act 1996.
  - b. A claim that she has been subject to sexual harassment by the respondent and that she has been dismissed because of her reaction to that harassment contrary to the Equality Act 2010.
  - 10 c. A claim for notice pay.
  - d. A claim for holiday pay.
  - e. A claim that she was not provided with a statement of terms and conditions of employment as required by s1 of the Employment Rights Act 1996
- 15 2. The respondent has not lodged an ET3 response form setting out any defence to these claims. The case has, therefore, proceeded to a final hearing as undefended.

### Evidence

3. The Tribunal heard evidence only from the claimant.
- 20 4. There were no documents referred to in evidence.

### Findings in fact

5. The Tribunal made the following relevant findings in fact.
6. The claimant commenced employment with the respondent on 21 July 2023 in a front of house role carrying out waitressing duties. The respondent runs a restaurant called the Mail Coach.
- 25

7. During her interview for the job, two issues relevant to the case arose. First, the claimant informed the respondent that she would require some days off in August 2023 for exams she was due to sit. The respondent had no issue with this and it was agreed that these would be non-working days rather than holidays. Second, the respondent stared into the claimant's eyes and commented that she had the prettiest eyes he had ever seen. The claimant described feeling that this was creepy but that she needed the job.  
5
8. The claimant's hours of work fluctuated according to the needs of the business. She was not put on the rota with the other employees but would be messaged or phoned by the respondent to tell her when she was needed. In some instances, this was with very short notice.  
10
9. The claimant was paid £10.18 an hour. In her first week she worked 55 hours, in the second week she worked 60 hours, in the third week she worked 40 hours and in her last week of work she worked 18 hours. The reason for the low number of hours in the last week was this was the week when she had taken time off to sit her exams.  
15
10. The claimant was not given any document setting out her terms and conditions of employment. She was paid cash in hand and never received a payslip.
11. On her first shift, the respondent took the claimant into his office and proceeded to adjust her tie and collar. The claimant felt that there was nothing wrong with her uniform. The respondent also insisted on putting the radio used by staff on the claimant; she said twice that she could do this herself but the respondent said that he had to do it. This required the claimant to unbutton her top. The respondent put the radio in the claimant's back pocket which led to him touching her backside. He apologised for this. The respondent never insisted on putting the radio on the claimant again and he never did the same for other staff.  
20  
25
12. The claimant became concerned at the respondent's behaviour towards her in a number of respects:  
30

- 5 a. He would ask her if she wanted a lift home at the end of each shift. He did not ask other employees if they required a lift. The claimant would tell the respondent that she had pre-booked a taxi or that her boyfriend was coming to pick her up in order to avoid being in a car with him.
- b. On two occasions, he gave her £20 extra over her wages. He told her that this was for doing "a good job" but that it was to be a secret and she was not to tell anyone. The claimant asked other employees if they received a similar payment and they replied that they had not.
- 10 c. On every shift, the respondent would stop the claimant to adjust her apron or collar. She did not see him doing the same with other employees. She said to him that she could do this herself but he continued in this behaviour.
- 15 d. The respondent would wink at the claimant each time she walked past him.
13. The claimant spoke to other front of house staff (who were also women) about the respondent's behaviour. They said that they had not experienced anything similar but that he had behaved in the same way to a previous female employee.
- 20 14. In the claimant's second week of employment, the respondent asked her to come into his office. He told her that he could hear everything being said by way of the security cameras in the premises. In particular, he had heard what she had been discussing with other employees about his behaviour and told her that she should be careful.
- 25 15. The claimant felt worried about the respondent's behaviour towards her. She was scared of people when going home from work and would not let anyone touch her including her boyfriend.
16. The claimant reminded the respondent about the days off for her exams and he asked her to fill these out on a holiday form although it was agreed between

them that the days in question would not be holidays. The claimant did so and there was no issue with her taking these days off.

17. After her exams, the claimant contacted the respondent to say that she was available for shifts but got no response. She continued to phone and message the respondent for two weeks with no reply. The respondent then blocked her number.
18. The claimant started two temporary part-time jobs on 7 October 2023; one in a bar as bar staff and the other as a waitress in a restaurant. She worked 3 days a week in each job earning National Minimum Wage (£10.18 an hour) for a total of 15 hours each day. She left these jobs after 2 weeks.
19. She then started working in a door-to-door sales job on a commission only basis. She left this job after two weeks because she was working alone and had continued to feel worried around people after her experience with the respondent. She was paid £340 commission in total.
20. From 30 March 2024, the claimant has been in receipt of Universal Credit. She received £281 in her first month but this rose to £717 a month after she submitted a sick note from her doctor relating to mental health difficulties she experienced arising from the respondent's treatment of her. The claimant has received a total of £2235.23 in benefits up to the date of the hearing and will continue to receive Universal Credit at £717 a month.

### Relevant Law

21. In order to be able to bring a claim for unfair dismissal, an employee must have at least two years' service in terms of section 108(1) of the Employment Rights Act 1996. There are categories of "automatic" unfair dismissal for which the two year rule is disapplied but none of these apply in the present case.
22. Harassment is defined in s26 of the Equality Act 2010:

#### 26 Harassment

(1) A person (A) harasses another (B) if—

- (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) *the conduct has the purpose or effect of—*
- 5 (i) *violating B's dignity, or*
- (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (2) *A also harasses B if—*
- (a) *A engages in unwanted conduct of a sexual nature, and*
- (b) *the conduct has the purpose or effect referred to in subsection*
- 10 *(1)(b).*
- (3) *A also harasses B if—*
- (a) *A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
- (b) *the conduct has the purpose or effect referred to in subsection*
- 15 *(1)(b), and*
- (c) *because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*
- (4) *In deciding whether conduct has the effect referred to in subsection*
- 20 *(1)(b), each of the following must be taken into account—*
- (a) *the perception of B;*
- (b) *the other circumstances of the case;*
- (c) *whether it is reasonable for the conduct to have that effect.*

23. In *Hartley v Foreign and Commonwealth Office* UKEAT/0033/15 (27 May  
25 2016, unreported) it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where

the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

24. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).
25. In deciding whether a dismissal has taken place, the general rule is that unambiguous words of dismissal (or resignation) should be taken at face value with no need for analysis of the surrounding circumstances (*Sothorn v Franks Charlesly & Co* [1981] IRLR 278).
26. Where there are ambiguous words or conduct then an employee should investigate further before jumping to the conclusion that they have been dismissed (see, for example, *Leeman v Johnson Gibbons Tools Ltd* [1976] IRLR 11).
27. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the Employment Rights Act 1996 which is based on length of service.
28. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.
29. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
30. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year.
31. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:

(1) *This regulation applies where—*

(a) *a worker's employment is terminated during the course of his leave year, and*

(b) *on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.*

(2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

(3) *The payment due under paragraph (2) shall be—*

(a) *such sum as may be provided for the purposes of this regulation in a relevant agreement, or*

(b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

*(AxB)-C*

*where—*

*A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];*

*B is the proportion of the worker's leave year which expired before the termination date, and*

*C is the period of leave taken by the worker between the start of the leave year and the termination date.*

32. Section 1 of the 1996 Act states that an employer must give an employee a written statement setting out specific information about their terms and conditions of employment.



33. Section 38 of the Employment Rights 2002 provides that where the Tribunal finds in favour of a claimant in respect of proceedings listed in Schedule 5 of the Act and the Tribunal finds that the employer was in breach of its duties under section 1(1) of the Employment Rights Act 1996 then the Tribunal must  
5 increase the award to the claimant by a sum equivalent to two weeks' wages and can increase the award by a sum equivalent to four weeks' wages.

### Decision

34. The Tribunal will deal with each of the claims in turn.

35. First, in relation to the claim of unfair dismissal under the Employment Rights  
10 Act 1996, the Tribunal does not have the power to hear this claim; the claimant does not have two years' service with the respondent as required under s108 of the Act and none of the categories of dismissal for which this rule is disapplied are relevant to this case. The claim of unfair dismissal under the Employment Rights Act 1996 is, therefore, dismissed for want of jurisdiction.

15 36. Second, there is the claim of harassment under s26 of the Equality Act 2010. This can be split into two parts; the behaviour of the respondent towards the claimant and the claimant's dismissal.

37. The Tribunal is satisfied that the respondent's behaviour towards the claimant set out above when taken as a whole amounts to harassment under either  
20 s26(1) and/or s26(2):

a. The Tribunal considers that the following conduct is what amounts to harassment:

- i. The comment about the claimant's eyes at the interview.
- ii. The adjusting of the claimant's clothing throughout her  
25 employment.
- iii. The insistence by the respondent that he had to put on the claimant's radio on her first shift which resulted in physical contact.

- iv. The repeated offers of giving her a lift home.
  - v. Giving her extra money which was to remain secret.
  - vi. Winking at her.
- b. This conduct was clearly unwanted by the claimant; she did nothing to encourage it and actively discouraged it but the respondent persisted. She complained to other employees about it, something which the respondent was aware of and so would have known that the claimant did not want him to behave in this way.
- c. The Tribunal is satisfied that the conduct had the prohibited effect in terms of s26(1)(b); the claimant described feeling worried and scared by the conduct and that it led to her avoiding being touched by anyone. The Tribunal considers that it was reasonable for the conduct to have the prohibited effect; the claimant was being singled out for this behaviour; comments were made about her appearance; she was being subject to unwanted physical conduct; she was being given money by the respondent for no apparent reason which was not being given to other employees. The Tribunal considers that any reasonable employee in similar circumstances would consider that the environment in which they were having to work was intimidating or humiliating or that their dignity was being violated.
- d. The Tribunal also accepts that this conduct was either related to the claimant's sex or was of a sexual nature. Although the respondent did not make explicit sexual comments or make reference to the claimant's sex, the Tribunal considers that it can draw the necessary inference from the facts of the case. In particular, the comment about the claimant's eyes, the repeated attempts by the respondent to drive the claimant home alone, the giving of money which was to remain secret, the unnecessary physical contact and the fact that the respondent had behaved in a similar manner to another female employee are all matters from which the Tribunal considers that, in the absence of any explanation for this behaviour, it can draw an adverse

inference that the behaviour was related to the fact that the claimant was a woman and/or it was conduct of a sexual nature.

38. Turning to the end of the claimant's employment, the Tribunal is satisfied that the claimant was dismissed. There were no express words of dismissal but the Tribunal considers that the respondent's actions in making no contact with the claimant after her time off for taking exams, not replying to her phone calls and messages and blocking her number clearly indicate that the respondent had brought the employment relationship to an end. If there was any ambiguity then the claimant had made every effort to resolve this by seeking to contact the respondent for a two week period to no avail. By the end of this period, the Tribunal is satisfied that she was entitled to consider that her employment was at an end.
39. The question is whether the claimant was dismissed for rejecting the respondent's harassment which would amount to harassment contrary to s26(3) of the Equality Act.
40. The Tribunal has no evidence whatsoever as to why the respondent ceased contact with the claimant and so has to consider what inferences it can draw from the facts of the case.
41. The timing of events does, on the face of it, suggest a link with the claimant taking time off for her exams; she was being given a large number of hours in the preceding weeks but the respondent ceased contact when she took time off. However, there is no evidence that the respondent had any issue with the claimant having this time off; he was perfectly happy to agree to this at the claimant's interview and had no objection when the claimant raised it closer to the time.
42. The respondent was aware that the claimant was discussing his behaviour with other employees and specifically raised this with her, warning her to be careful. This indicates that he did have an issue with what she was saying.
43. In the absence of any explanation for the claimant's dismissal, the Tribunal is prepared to draw the inference that she was dismissed because she was

rejecting the respondent's harassment. The respondent clearly had an issue with the claimant complaining to other staff about this and she was refusing to engage with the respondent's conduct towards her. The only other potential explanation (that is, the claimant having time off) is nothing more than a coincidence of timing with the respondent never having any issue with the claimant having this time off.

44. In these circumstances, the Tribunal finds that the claimant's dismissal was an act of harassment contrary to s26(3) of the Equality Act 2010.

45. Having found that the claimant was dismissed, it is clear from the facts that she was dismissed without notice. She was entitled to one week's notice under s86 of the Employment Rights Act and the respondent has breached her contract by failing to give this notice.

46. The claimant took no holidays during her employment. She was entitled to 5.6 weeks holiday each year and had worked one full month of the year. She had, therefore, a pro-rated holiday entitlement of 0.5 weeks at the end of her employment.

47. Finally, the respondent had failed to provide the claimant with a statement of terms and conditions of employment as required by s1 of the Employment Rights Act 1996. No document of this nature was provided to the claimant at all.

### **Remedies**

48. In respect of the claim for harassment, there are two heads of compensation for this which the Tribunal will deal with in turn; injury to feelings and compensation for loss of wages.

49. In determining the award for injury to feelings, the Tribunal took account of the most recent Presidential Guidance on the award of injury to feelings and concluded that it would be appropriate to make an award at the upper end of the first *Vento* band. In coming to this decision, the Tribunal took account of the following factors:

- a. Although there were multiple instances of harassment, they took place over a relatively short period.
- b. The nature of the harassment was more than something minor or trivial but was not of the type of conduct which would attract an award in the middle Vento band.
- c. The claimant described an impact on her that went beyond the workplace and influenced how she behaved with those close to her.
50. The Tribunal, therefore, considered that an award of **£10000 (TEN THOUSAND POUNDS)** should be awarded.
- 10 51. The Tribunal considered that it was appropriate to award interest on this sum in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. In this case, the date of the contravention is 27 August 2023 (that is, the date of dismissal) and the “day of calculation” is 5 August 2024 when the Tribunal made its award.
- 15 52. Applying the formula in the Regulations, the Tribunal awards the sum of **£753.46 (SEVEN HUNDRED FIFTY THREE POUNDS AND FORTY SIX PENCE)** as interest on the compensation for injury to feelings.
53. The Tribunal, therefore, awards the sum of **£10753.46 (TEN THOUSAND SEVEN HUNDRED FIFTY THREE POUNDS AND FORTY SIX PENCE)** as compensation for injury to feelings (inclusive of interest).
- 20 54. Given that the Tribunal has held that the claimant’s dismissal was an act of harassment then it considers that it is just and equitable to award the claimant compensation for loss of wages flowing from her dismissal.
55. There were a number of issues that the Tribunal required to determine in considering what compensation for financial loss it would be just and equitable to award in respect of the claim for discrimination arising from disability.
- 25 56. First, there was the question of what figure should be used for the claimant’s weekly wage. She had only worked for a short period and worked a varying amount of hours each week. The Tribunal considered that it would be just

and equitable to calculate an average weekly wage based on an average of her first three weeks of employment with the respondent. The Tribunal did not include the fourth week as this was not representative of her hours of work given that she had unpaid time off to sit her exams in that week. This method produced a weekly wage of £525.97.

5

57. Second, there is the question of the period over which any compensation should be awarded. The Tribunal considered that the period for past loss should be from the date of dismissal to the date of the hearing. Although the claimant found other jobs which did not continue, there was no evidence before the Tribunal that this amounted to an intervening act which broke the chain of causation between the claimant's dismissal and any loss of wages.

10

58. The claimant does, of course, have to give credit for any earnings in those other jobs to avoid receiving a windfall.

59. Third, the Tribunal considered that an appropriate period for future loss would be 12 weeks. The Tribunal considers that it would take this period of time for the claimant to secure employment at the same level of earnings with the respondent.

15

60. Applying these principles to the calculation of the compensation for financial loss, the Tribunal determined the following:

20

a. For the period of past loss from 27 August 2023 to 5 August 2024 (that is, the date of the hearing), there was a period of loss of 50 weeks at £525.97 amounting to £26298.50.

b. For the period of future loss of 12 weeks at £525.97 amounting to £6311.64.

25

c. This gives a total gross loss of £32610.14.

61. From this sum, the following deductions are to be made in respect of earnings made by the claimant after her dismissal and in respect of the Universal Credit paid to her:

a. The commission earned in her sales job of £340.

- b. The earnings from the jobs held in October 2023 amounting to £916.20.
- c. The sum of £2235.23 for Universal Credit paid up to the date of the hearing.
- 5 d. The sum of £2151 for Universal Credit which will be paid for the period of future loss.
- e. The total deductions are, therefore, £5642.43.
62. The net award for financial loss is therefore **£26,967.71 (TWENTY SIX THOUSAND NINE HUNDRED SIXTY SEVEN POUNDS AND SEVENTY**  
10 **ONE PENCE).**
63. Again, the Tribunal considered that it was appropriate to award interest on this sum in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. In this case, the date of the  
15 contravention is 27 August 2023 (that is, the date of dismissal) and the “day of calculation” is 5 August 2024 when the Tribunal made its award.
64. Applying the formula in the Regulations, the Tribunal awards the sum of **£1,015.95 (ONE THOUSAND FIFTEEN POUNDS AND NINETY FIVE**  
**PENCE)** as interest on the compensation for loss of wages.
65. The Tribunal, therefore, makes a total award (subject to the uplift in respect  
20 of the failure to comply with the ACAS Code of Practice) in respect of loss of wages of **£27,983.66 (TWENTY SEVEN THOUSAND NINE HUNDRED EIGHTY THREE POUNDS AND SIXTY SIX PENCE).**
66. The Tribunal has given consideration as to whether an uplift to the compensation for loss of wages in relation to a failure by the respondent to  
25 follow the ACAS Code of Practice in respect of the claimant’s dismissal.
67. There was a complete failure to follow any form of procedure by the respondent. There was no explanation for this and so there was an unreasonable failure by the Respondent to follow the ACAS Code of Practice.

68. In these circumstances, the Tribunal considered that there was a failure to comply with the ACAS Code and that an uplift of 10% was appropriate to reflect the nature of the failure.
69. The uplift applied to the compensation for loss of wages amounts to **£2798.37 (TWO THOUSAND SEVEN HUNDRED NINETY EIGHT POUNDS AND THIRTY SEVEN PENCE)**.
70. The Tribunal, therefore, awards the claimant the sum of **£41,535.49 (FORTY ONE THOUSAND FIVE HUNDRED THIRTY FIVE POUNDS AND FORTY NINE PENCE)** in respect of the claim of harassment.
71. Although the claimant was dismissed without notice, the Tribunal does not make an award for compensation for this breach of contract. The reason for this is that the claimant is already receiving compensation for the loss of wages for her notice period in the compensation awarded under the Equality Act. It would be double-counting and giving the claimant a windfall to award the same compensation again under the breach of contract claim.
72. The claimant is entitled to pay in lieu of untaken holidays. As set out above, she had an untaken holiday entitlement of 0.5 weeks and so, using the sum for her weekly wage calculated above, the Tribunal awards the sum of **£262.99 (TWO HUNDRED SIXTY TWO POUNDS AND NINETY NINE PENCE)**.
73. Having found that the respondent failed to comply with s1 of the Employment Rights Act, the Tribunal must make an award under s38 of the Employment act 2002. The question for the Tribunal was the amount of award to be made.
74. The relevant statutory provisions state that the Tribunal must (emphasis added) make an award equivalent to two weeks' wages in such circumstances and this is the award made by the Tribunal taking account of the claimant's relatively short service with the respondent.



75. In respect of the additional award under section 38 of the Employment Act 2002, this is two weeks' wages at £525.97 a week = **£1051.94 (ONE THOUSAND FIFTY ONE POUNDS AND NINETY FOUR PENCE).**

5

**Employment Judge: P O'Donnell**  
**Date of Judgment: 06 August 2024**  
**Entered in register: 08 August 2024**  
**and copied to parties**

10