Case Numbers: 3219822/2020
3204945/2021

EMPLOYMENT TRIBUNALS

Claimant:	**Mr S. Famojuro**
Respondents:	**(1) Boots Management Services Limited** **(2) Mrs E. Walker**
Heard at:	**East London Hearing Centre**
On:	**22 May 2024; and** **14 June 2024 (in chambers)**
Before:	**Employment Judge Massarella** **Ms J. Clark**

Representation

Claimant:	Mr N. Toms (Counsel)
Respondents:	Ms P. Leonard (Counsel)

RESERVED JUDGMENT ON REMEDY

The judgment of the Tribunal in relation to the First and Second Respondents is that: -

1. **in respect of the successful claims of harassment related to race at Issue 5(a)(i) to (vi), we order the Respondents to pay to the Claimant the sum of £18,000 for injury to feelings; and**

2. **interest on that sum in the amount of £5,633.75;**

3. **we order the Respondents to pay to the Claimant the sum of £5,000 in respect of aggravated damages; and**

4. **interest on that sum in the amount of £1,564.93;**

5. **costs in the amount of £13,537.25**;

6. **the First and Second Respondents are jointly and severally liable for these awards.**

The judgment of the Tribunal in relation to the First Respondent only is that:-

7. in respect of the successful claim of harassment related to race at Issue 5(a)(vii), the First Respondent shall pay to the Claimant the sum of £2,500 for injury to feelings; and

8. interest on that sum in the amount of £782.47;

9. the First Respondent shall pay to the Claimant an additional sum of £2,500 in respect of aggravated damages; and

10. interest on that sum in the amount of £782.47;

11. we award an ACAS uplift on both awards of injury to feelings in the amount of £3,075; and

12. interest on that sum in the amount of £962.43;

13. we award an ACAS uplift on both awards of aggravated damages in the amount of £1,125; and

14. interest on that sum in the amount of £351.86;

15. in relation to the successful unfair (constructive) dismissal claim, the Claimant is entitled to a basic award of £2,485.20; and

16. an award for loss of statutory rights in the amount of £500.

REASONS

Procedural history

1. By a judgment on liability sent to the parties on 9 October 2023, the Tribunal upheld the following claims:

    1.1. against the First Respondent, seven claims of harassment related to race, and the claim of unfair (constructive) dismissal;

    1.2. against the Second Respondent, six of the seven claims of harassment related to race upheld against the First Respondent.

2. The Tribunal listed the case for a one-day remedy hearing. One of the Tribunal non-legal members was unable to sit on the available dates. Without objection from either party, we continued as a two-person panel.

The remedy hearing

3. We were provided with an agreed bundle of documents of 158 pages. The Claimant provided a schedule of loss and a witness statement and was cross-examined; the Respondents did not call any witnesses and did not submit a counter-schedule. Both Counsel had prepared helpful written submissions,

which the Tribunal read before hearing further oral submissions; further written submissions were lodged between the hearing date and the date set for our deliberations in chambers.

4. The Claimant sought awards for loss of earnings, injury to feelings, aggravated damages, an ACAS uplift and interest; there was also an application for costs against the Respondents.

The law

Compensation for acts of discrimination

5. Compensation for discrimination is assessed on tortious principles (ss.119(2) and s.124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that she would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable in the circumstances, as would be the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

6. In assessing compensation for discriminatory acts, it is necessary to ask what would have occurred had there been no unlawful discrimination. For example, in a dismissal case, if there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss (*Chagger v Abbey National PLC and another* [2010] IRLR 47).

Injury to feelings

7. The matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102).

8. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

9. In recent years the bands have been increased annually by Presidential Guidance. The Claimant issued his first case, which contains the successful claims of discrimination, in November 2020. According to the Third Presidential Addendum, the bands were then as follows

   9.1. a lower band of £900 to £9,000 (less serious cases);

   9.2. a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and

   9.3. an upper band of £27,000 to £45,000 (the most serious cases),

   9.4. with the most exceptional cases capable of exceeding £45,000.

10. 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. 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 (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

11. The Tribunal must focus on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently (*Essa v Lang* [2004] IRLR 313).

Aggravated damages

12. In *Commissioner of Police of the Metropolis v Shaw* [2012] ICR 533, Underhill P summarised the correct approach to aggravated damages at [20-24], from which the following principles emerge:

   12.1. an award is compensatory, rather than punitive;

   12.2. aggravated damages are an aspect of injury to feelings and are awarded on the basis that the aggravating features have increased the impact of the conduct on the claimant;

   12.3. an award may reflect the manner in which the wrong was committed; the phrase 'high-handed, malicious, insulting or oppressive' is often referred to; this is not an exhaustive list, an award may reflect any exceptional or contumelious conduct;

   12.4. an award may reflect the motives of the wrongdoer, provided the claimant is aware of it; discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity;

   12.5. it may reflect conduct subsequent to the wrong complained of, such as the manner in which the employer conducts the proceedings, or where the employer rubs salt in the wounds by plainly showing that he does not

take the complaint seriously; a failure by the employer to apologise may come into this category;

12.6. the dividing line between the award for injury to feelings on the one hand and the award of aggravated damages on the other will always be very blurred, and tribunals must beware of the risk of unwittingly compensating Claimants under both heads for what is in fact the same loss; the ultimate question must be whether the overall award is proportionate to the totality of the suffering caused to the Claimant;

12.7. as a matter of broad common sense, the more heinous the conduct the greater the impact is likely to have been on the Claimant's feelings; nevertheless this should be applied with caution, because a focus on the Respondent's conduct can too easily lead a tribunal into fixing compensation by reference to what it thinks is appropriate by way of punishment;

12.8. tribunals should always bear in mind that the ultimate question is 'what additional distress was caused to this particular Claimant, in the particular circumstances of this case, by the aggravating feature in question?', even if in practice the approach to fixing compensation for that distress has to be to some extent 'arbitrary or conventional'.

13. Underhill P observed that the great majority of the awards had been in the range £5,000 to £7,000. Uprated for inflation, this equates to a range of approximately £7,000 to £10,000 in 2024.

ACAS uplift

14. An award for compensation can be increased or reduced, by up to 25%, if the employer/employee has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s207(A) TULRC(A) 1992). At present ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) is the only relevant code of practice.

15. In *Slade v Biggs* [2022] IRLR 216 EAT at [77], Griffiths J set out the correct approach.

> **'In future, when considering what should be the effect of an employer's failure to comply with a relevant Code under s 207A of TULRCA, tribunals might choose to apply a four-stage test, in order to navigate the various points which I have been considering in this appeal:**
>
> **(i) Is the case such as to make it just and equitable to award any ACAS uplift?**
>
> **(ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?**
>
> **Any uplift must reflect 'all the circumstances', including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.**
>
> **(iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?**

> **This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise. The EAT must be reluctant to second guess the ET's decision either to adjust or not adjust the percentage in this respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can never be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error.**
>
> > **(iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?**
>
> **Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is 'just and equitable in all the circumstances', and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is 'just and equitable' by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested. Indeed, the reduction by Parliament in the range from 50% to 25%, after the decision in Wardle may be taken to be a reconsideration of what is proportionate in the most serious cases, and, therefore, a strong indication on that aspect.'**

Interest

16. The Tribunal must consider whether to award interest on the sums awarded without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[1]

17. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[2] The interest rate now to be applied is 8%.

18. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

19. Where a tribunal considers that serious injustice would be caused if interest were to be calculated according to the approaches above, it can calculate interest on such different periods as it considers appropriate (Reg 6(3) IT(IADC) Regs 1996).

20. In *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833 the EAT held at [38-41] that whether or not it is right to depart from the approach to interest set out in the regulations is a matter of discretion for the Tribunal.

[1] SI 1006/2803
[2] SI 1996/2803

Grossing up

21. Recoupment does not apply to compensation for discrimination.

22. All sums awarded by the Tribunal should be grossed up to offset any liability the Claimants will have for tax on the award. Awards for injury to feelings unrelated to termination of employment are tax-free (*Moorthy v HMRC* [2018] EWCA Civ. 847). Awards up to £30,000 relating to termination of employment are tax-free.

Costs

23. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows (as relevant):

> **(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;**
> >
> > **[…]**

24. Orders for costs in employment Tribunals are the exception, not the rule (*Gee v Shell UK Ltd* [2003] IRLR 82 CA *per* Sedley LJ at [35]). However, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

25. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (*per* Simler J at [25]):

> **'The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78.'**

26. 'Unreasonable' has its ordinary meaning. It is not equivalent to 'vexatious' (*Dyer v Secretary of State for Employment* UKEAT/183/83).

27. The question of whether lies amount to unreasonable conduct was discussed in *Arrowsmith v Nottingham Trent University* [2012] ICR 159 at [32-33] *per* Rimer LJ:

> **'[…] In the recent decision of the EAT in *HCA International Ltd v May-Bheemul* UKEAT/0477/10/ZT, 23 March 2011, Cox J, who delivered the judgment of the EAT, made the same point. She said:**
>
> > **"39. Thus a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and affect of the lie in determining the unreasonableness of the alleged conduct. 40. As this last case makes abundantly clear, no point of principle of general application is established in any of the cases being relied upon by Mr Beyzade [and they included Daleside]. In our judgment the Employment Tribunal's reasoning in the present case, at para 12 of their judgment, is unimpeachable. Where, in some cases, a central allegation is found to be a lie, that may support an application for costs, but it does not mean that, on every occasion that a claimant fails to establish a central plank of the claim, an award of costs must follow."**
>
> **33. I would respectfully endorse that approach. The question for the ET when considering whether or not the making of an order for costs is justified will always be whether, on the particular facts of the case, any of the circumstances referred to in rule 40(3) of the 2004 Regulations have been satisfied. It will therefore be a fact-sensitive exercise and a decision in another case, in what might superficially appear to be circumstances similar to those of the instant case, will not dictate the decision in it.'**

28. Costs awards are intended to be compensatory, not punitive. The costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (*Barnsley Metropolitan Council v Yerrakalva* [2012] IRLR 78). However, unlike the wasted costs jurisdiction, in exercising its discretion to order costs, the Employment Tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. Mummery LJ gave the following guidance at [41]:

> **'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.'**

Findings and conclusions on each issue

<u>Injury to feelings: findings and conclusions</u>

29. We make the following findings of fact as to the injury to feelings suffered by the Claimant.

30. In relation the Respondents' conduct on 18 July 2020, excluding the incident relating to Ms Munson, we had regard to the Claimant's statement on remedy, which we found compelling; there was no challenge to it in cross-examination. We find as follows:

30.1. the conduct of Mrs Walker and Ms Daley came as a terrible shock to the Claimant, it came out of the blue;

30.2. he was subjected to racial profiling and was stereotyped as an aggressive black man, when his conduct was not aggressive; he felt unsafe and vulnerable and was afraid of the consequences;

30.3. he was subjected to vitriolic comments, as a result of which he felt distressed and humiliated;

30.4. he was undermined in front of a customer, which was embarrassing;

30.5. he was ordered out of the shop by a junior member of staff; it was a reversal of the normal power balance, which he considered Mrs Walker felt entitled to do because of their respective races; this was humiliating;

30.6. Mrs Walker then threatened to call the police; he took this threat very seriously; he knew what could happen if the police attended and were told by two white women that a black man was being threatening and aggressive towards them; he feared he might be arrested and taken into custody.

31. Ms Leonard contends that an award in the lower *Vento* band would be appropriate as, in her submission, it related to an incident on one day only. We think an award at that level would not adequately recognise the impact of the discrimination on the Claimant.

32. Mr Toms argues that this merits an award of £18,000, which is in the middle of the middle *Vento* band. We regarded that as a realistic submission for the following reasons.

33. This was not a one-off act. The Claimant was subjected to a series of discriminatory acts over one working day, some of them very serious; it amounted, in our view, to a course of harassing conduct. The fact that it occurred in a concentrated period of time contributed to its impact on the Claimant.

34. We remind ourselves that we have already found in our judgment on liability that this conduct created a hostile, humiliating and offensive environment for the Claimant and violated his dignity; we recorded that we regarded those terms, which are strong and should not be used lightly, as appropriate in these circumstances.

35. We also reminded ourselves of our finding at para 174 of the judgment on liability: 'the Claimant is an experienced professional of many years' standing; he is a dignified, sensitive and courteous man. It was clear to us that the events of that day had a very grave effect on him'. Although these events might have had a lesser impact on another person, in which case it might have merited an award towards the bottom of the middle band, we are satisfied that it had a serious impact on this Claimant. However, it was not so serious as to merit an award at the top of the middle band. We consider that the figure argued for by Mr Toms is the right figure.

36. R1 and R2 will be jointly and severally liable for this element of the compensation awarded.

Injury to feelings in relation to the incident relating to Ms Munson

37. We then considered the single act of harassment related to race, which was done by Ms Munson, who was the store manager: Issue 5(a)(vi). She was not present in the store, but immediately believed the allegations made by the Second Respondent on the telephone about the Claimant, shouting at him down the telephone that he was an utter disgrace and asking him to leave the store without hearing his side of the story. We find that this was a further affront to his dignity. It contributed significantly to his feeling that he could not continue to work in the pharmacy on that day.

38. We must identify a specific sum for injury to feelings in relation to this act alone, for which R2 will not be liable. To be clear: it is an additional award.

39. We think that an award in the bottom Vento band is appropriate to reflect the fact that it was a one-off act. On the other hand, the language used ('you're an utter disgrace') was very strong. We do not consider an award at the very bottom of the band is appropriate.

40. We conclude that £2,500 is the right figure.

Aggravated damages

41. Ms Leonard argued that an award for aggravated damages is not available to the Claimant in the circumstances. We do not accept that submissions. It is clear from the *Shaw* case that aggravated damages may be award in respect of the manner in which the discriminatory conduct was done, as well as in respect of things which happened/did not happen after the conduct.

42. Mr Toms identifies a number of specific matters which, he says, justify an award of aggravated damages.

43. We agree that the treatment by Mrs Walker, Ms Daley and Ms Munson was insulting, and that the threat to call the police was oppressive, but we consider that we have already taken that into account in our award for injury to feelings.

44. We find that the following matters are relevant and are distinct from the matters for which we have already compensated the Claimant.

    44.1. We have found that Mrs Walker and Ms Daley lied about the events, both in the internal grievance and at the hearing before the Tribunal. They did not apologise to the Claimant, but collaborated on an account which we have found was false in several material respects. We accept the Claimant's evidence that he perceived this as an attack on his professional reputation, and that this compounded his hurt.

    44.2. Mrs Walker and Ms Daley repeatedly and falsely accused the Claimant of being aggressive, in their oral evidence at the Tribunal hearing. This perpetuated the stereotype of him as an aggressive black man and was oppressive; we accept that this caused further distress to the Claimant.

44.3. Mr Barnes' failure to secure a timely apology from Ms Munson, and Ms Munson's eventual 'non-apology apology', both rubbed salt in the Claimant's wounds.

45. Because we are satisfied that these matters caused additional hurt and distress to the Claimant, we have concluded that an award of aggravated damages is merited. We accept Ms Leonard's submission that £18,000 (for which Mr Toms argued) is excessive, having regard to the guidance of Underhill P in the case of *Shaw*. We have concluded that an award in the amount of £7,500 is appropriate, in light of the fact that we have identified three separate categories of aggravating conduct by the Respondent. Because one of those three matters did not relate to Mrs Walker, we split the award as follows: £5,000 against R1 and R2; £2,500 against R1 only.

46. Having reached these conclusions, the Tribunal then stood back and considered whether the total award was proportionate. Because of the seriousness of the impact on the Claimant, we concluded that it was.

Financial losses

The loss

47. It is for the Claimant to prove his loss.

48. The starting-point must be that in cross-examination the Claimant accepted that he had not in fact suffered a loss of earnings at all after the termination of his employment by the Respondent because he had been able fully to mitigate his loss by undertaking other locum work for different employers. His complaint was that in order to do so he had had to do more weekday work than he had previously done. We consider that that is not material: his preference may have been to do weekend work, but replacement weekday work was still proper mitigation of his losses and he must give credit for it.

49. Notwithstanding these concessions, Mr Toms continued to argue that there was an identifiable loss for a short period, comparing the Claimant's earnings between 20 March and 20 June, as compared with 21 June to 24 September. There was some suggestion that these figures were agreed; we are not satisfied that that is the case. We asked the parties to agree the figures, both at the hearing and after it, but so far as we understand the position, they were unable to do so.

50. We accept Ms Leonard's submission that the difficulty with Mr Toms' calculations is that they are, on the Claimant's own admission, based on incomplete documents. The Claimant disclosed his bank records for one of his accounts, but not for another account into which he accepted that other payments would have been made.

51. There was a speculative element to all the figures that were presented to us. Ultimately, the Tribunal did not consider that the figures which were advanced on the Claimant's behalf were supported by cogent evidence. We note that even Mr Toms, in his supplementary submissions, was obliged to assert that 'it is very likely' that a loss would have occurred; he acknowledged that calculating that loss is 'complicated'; and invited us to award a 'fair and balanced amount in all the circumstances'. In our view the quality of the evidence is so poor that we

cannot make reliable findings on the basis of it. We have concluded that the most reliable evidence was the Claimant's own concession in cross-examination that he did not suffer a loss. If anybody is well-placed to make that assessment, surely it is him.

52. Given that we are not satisfied that the Claimant has proved a loss of earnings, it must follow that he has not proved a loss in relation to pension contributions.

53. We make no awards under these heads of loss.

Unfair dismissal: additional awards

Basic award

54. There is no dispute about the basic award. the Claimant's weekly gross pay was £207.10. He had nine complete years of continuous service. He was 47 years old at the date of termination. The basic award is 12 x £207.10, which produces an award of £2,485.20.

Loss of statutory rights

55. One of the heads of loss for which a Tribunal may award compensation is the value of accrued statutory rights that have been lost: where an employee begins a new job following the termination of their employment, they will need to accrue two years' continuous service before they will have acquired the right to claim unfair dismissal or a statutory redundancy payment, and may have lost the right to a lengthy statutory notice period if they have been employed for several years.

56. In all the circumstances and given the length of the Claimant's service to the Respondent, the Tribunal considers it just to make an award of £500. No separate award is made in relation to loss of long notice.

ACAS uplift

57. We reject the Respondent submissions that there can be no ACAS uplift in the circumstances. The procedural failures referred to below relate to the grievance in which the Claimant complained about the very matters he raised in these proceedings.

58. We accept Mr Toms' submissions that there were two breaches of the ACAS Code of Practice at para 4.

59. The grievance investigation was not carried out promptly. The Claimant presented his grievance on 18 July 2020; the outcome was not provided until 15 January 2021. There was unreasonable delay.

60. Employers must carry out any necessary investigations to establish the facts of the case. We found at paras 99 to 106 of our judgment that Mr Barton failed to do this and that his investigation failed to display even 'a basic level of competence'. His failures were not cured at the appeal stage: see our judgment at para 115.

61. We have not awarded aggravated damages in relation to these matters, we consider they are better dealt with under this head of loss.

62. We accept Mr Toms' submission that an uplift of 15% is appropriate. This is not a case where there was a wholesale failure to investigate (which might merit a higher uplift), but the failures were very serious.

63. The uplifts in relation to the awards are as follows:

    63.1. the awards of injury to feeling: £3,075 (£18,000 + £2,500 x 15%);

    63.2. the awards of aggravated damage: £1,125 (£7,500 x 15%).

64. We consider that these uplifts should be awarded against R1 only, as the conduct of the grievance was a matter for it, not for R2.

Interest

65. The Tribunal has decided to award interest in accordance with the usual principles. We have considered whether a serious injustice would be done to the Respondent by our calculation of interest including the delay in the case coming to trial and listing the remedy hearing and/or because the Judgment Act rate of 8% does not reflect financial reality for part at least of the relevant period. The Respondents did not submit that we should alter our approach from the normal calculation of interest in this case. We have concluded that the delay has been one of the uncertainties of litigation, for which the Claimant should not be penalised. For these reasons we award interest at the rate of 8% for the period set out in the Regulations.

66. In relation to the award for injury to feelings against R1 and R2:

    66.1. the award is £18,000

    66.2. the discriminatory acts took place on 18 July 2020;

    66.3. the calculation date is 14 June 2024;

    66.4. number of days = 1428 days;

    66.5. the interest rate is 8%;

    66.6. interest is 1428 x 0.08 x 1/365 x 18,000 = £5,633.75.

67. In relation to the award for injury to feelings against R1 only:

    67.1. the award is £2,500;

    67.2. the discriminatory acts took place on 18 July 2020;

    67.3. the calculation date is 14 June 2024;

    67.4. number of days = 1428 days;

    67.5. the interest rate is 8%;

    67.6. interest is 1428 x 0.08 x 1/365 x 2,500 = £782.47.

68. In relation to the ACAS uplifts on both awards for injury to feelings:

    68.1. the award is £3,075;

68.2. the discriminatory acts took place on 18 July 2020;

68.3. the calculation date is 14 June 2024;

68.4. number of days = 1428 days;

68.5. the interest rate is 8%;

68.6. interest is 1428 x 0.08 x 1/365 x 3,075 = £962.43.

69. In relation to the award for aggravated damages against R1 and R2:

69.1. the award is £5,000;

69.2. the first act which merited aggravated damages took place on 20 July 2020;

69.3. the calculation date is 14 June 2024;

69.4. number of days = 1428 days;

69.5. the interest rate is 8%;

69.6. interest is 1428 x 0.08 x 1/365 x £5,000 = £1,564.93.

70. In relation to the award for aggravated damages against R1 only:

70.1. the award is £2,500;

70.2. the first act which merited aggravated damages took place on 20 July 2020;

70.3. the calculation date is 14 June 2024;

70.4. number of days = 1428 days;

70.5. the interest rate is 8%;

70.6. interest is 1428 x 0.08 x 1/365 x £2,500 = £782.47.

71. In relation to the ACAS uplifts on both awards for aggravated damages:

71.1. the award is £1,125;

71.2. interest should run from 19 July 2020 (the mid-point between 18 and 20 July);

71.3. the calculation date is 14 June 2024;

71.4. number of days = 1427 days;

71.5. the interest rate is 8%;

71.6. interest is 1427 x 0.08 x 1/365 x 1,125 = £351.86.

Total

72. The total amount of interest payable is £10,077.91.

73. This produces a global award of £45,263.11. We do not consider that to be disproportionate in absolute terms; in our judgment, no further adjustment is required.

Costs

74. Mr Toms seeks costs in relation to the Respondent's defence of the claim of constructive dismissal on the basis that it had no reasonable prosects of success. We do not accept that submission. The defence was weak, and it failed, but that does not mean it was misconceived. Moreover, the Claimant also claimed that the handling of his grievance (which was central to our finding that he was constructively dismissed) was discriminatory; we found it was not. In order to reach that conclusion we had to cover the same ground as we covered in relation to the constructive dismissal case. We are not satisfied that any additional costs were incurred because of the defence of the constructive dismissal claim.

75. The Tribunal found that R2 and Ms Daley lied about the events of 18 July 2020; in R2's case see paras, 28, 33, 39, 52, 56, 59, 71 of the liability judgment; in Ms Daley's case see paras 18, 28, 31, 33, 37, 41, 53.

76. We reminded ourselves that untruthful evidence does not automatically mean a costs order should be made. We must consider all the circumstances.

77. We acknowledge the point made in the application by the Claimant's solicitors that the authorities on the consequences of lying in Tribunal proceedings mostly relate to Claimants. We agree that the same principles must apply to Respondents whose witnesses have been found to have lied. We accept Mr Toms' submission that there can be no difference in principle between a Claimant bringing a claim based on a series of lies and a Respondent defending a claim on the basis of a series of lies; R1 adopted the evidence of R2 and Ms Daley as the foundation of its defence and cross-examined the Claimant on that basis.

78. The lies told by R2 and Ms Daley went to the central factual dispute in the case: what happened on 18 July. Further, they falsely alleged that the Claimant was aggressive, when he was not, which was central to our conclusion that they stereotyped/racially profiled him (paras 175.6 and 176). This was not simply a case of our preferring the evidence of the Claimant over theirs, we made positive findings that both witnesses lied and exaggerated. They sought to mislead the Tribunal. In our judgment that amounted to unreasonable conduct of the proceedings.

79. We then considered whether it was appropriate to exercise our discretion to make an award of costs in the circumstances and concluded that it was. The effect of the lies was that the Claimant brought a grievance and issued proceedings. The lies tainted the grievance so that the matter could not be resolved internally. The Claimant's only recourse was to Tribunal proceedings. In our judgment, there was sufficient causal link between the lies and the incurring of legal costs.

80. The Claimant has not incurred costs personally because he has the support of his trade union. Both Counsel now agree that that is no bar to the Tribunal making an award of costs, having regard to the language of Rule 74(1) of the

ET Rules: 'costs means fees, charges, disbursements or expenses incurred by *or on behalf of* the receiving party' [emphasis added] and the decision of the EAT in *Taiwo v Olaigbe* [2013] ICR 770 at [68-69], *per* Langstaff P.

81. We then turn to the question of the appropriate level of the award of costs. Counsel's fees are claimed. These are itemised in the schedule produced by Mr Toms' clerks. We consider that the fees charged are reasonable, having regard to Mr Toms' level of call and the amount of work carried out by him.

82. In her supplementary submissions, Ms Leonard argued in relation to Counsel's fees that the vast majority of them would have been incurred in any event, given that the Claimant was always going to bring (unsuccessful) claims for harassment and discrimination in relation to the handling of the grievance. That does not follow. We remind ourselves of the guidance in *Yerrakalva*. Had Mrs Walker and Ms Daley not lied so consistently, from the outset about what happened on 18 July, the Claimant probably would not have needed to bring a grievance, let alone a claim; they would have apologised for their conduct and the matter might have been resolved without the need for Tribunal proceedings.

83. We award the full amount of Counsel's fees which is £11,281 plus VAT in the amount of £2,256.25, producing a total of £13,537.25.

84. Costs are also claimed in relation to solicitors' fees. There is no schedule of these costs, identified even in a broadbrush way by reference to work done, hours involved and rate charged; all that is given is an estimated global figure 'being the difference between the £20,000 cap and Counsel's fees'. Mr Toms argues that this sum is so modest and so obviously reasonable that it should simply be awarded as a top-up. In our view there is no reason why a professional association such as the PDA could not have produced a breakdown of costs, however basic, to enable the Tribunal to satisfy itself as to the basis of the claim; none was provided. We decline to award those costs on such obviously unsatisfactory information.

Employment Judge Massarella
Date: 24 July 2024