EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: B

Heard at: Manchester **On:** 16 August 2024
28 August 2024
(in Chambers)

Before: Employment Judge McDonald
Ms C Linney
Mr D Lancaster

REPRESENTATION:

Claimant: In person
Respondent: Mr L Fakunle, Senior Litigation Consultant

JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

Compensation for unfair dismissal

1. In relation to the claimant's successful claim that she was unfairly dismissed in breach of section 103A of the Employment Rights Act 1996 for making protected disclosures, the claimant is entitled to compensation and the respondent must pay her a compensatory award of £11,903.53 claimant was employed for less than one year and so there is no basic award payable. That means the total compensation payable for unfair dismissal before any uplift is £11,903.53.

Compensation for protected disclosure detriments

2. In relation to the claimant's successful claim that she was subjected to detriments for making protected disclosures, the claimant is entitled to compensation and the respondent must pay her the following:

    (1) Financial Loss arising from D1: £500 (gross) being the amount deducted from her pay.

(2) Financial Loss arising from D2: We do not award compensation for financial loss arising from this detriment as there was none arising.

(3) We award the claimant compensation of £4,000 for injury to feelings arising from detriments D1 and D2. We award interest on that compensation for injury to feelings of £1197.12.

(4) That means the total award of compensation in relation to the protected disclosure detriments D1 and D2 before any uplift is £5,697.12.

Holiday Pay

3. In relation to the claimant's successful claim that the respondent owed her holiday pay for holiday accrued but untaken, the respondent is ordered to pay the claimant the gross sum of £864 representing 1.8 weeks' holiday.

Non compliance with the ACAS Code

4. The respondent unreasonably failed to comply with the ACAS Cide of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the awards payable to the claimant to which that Code applies by 15% in accordance with section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

5. That uplift applies to the compensation for unfair dismissal and for the protected disclosure detriments.

6. Applying the ACAS uplift of 15% means that the total amount payable to the claimant by way of compensation for unfair dismissal is £13689.05.

7. Applying the ACAS uplift of 15% means that the total amount payable to the claimant by way of compensation for subjecting her to detriments for making protected disclosures is £6551.69.

Failure to provide particulars of employment

8. When the proceedings were begun the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is not just and equitable to make an award of an amount equal to four weeks' gross pay in accordance with section 38 of the Employment Act 2002. The respondent shall therefore pay the claimant an amount qual to two weeks gross pay which is £960.

Total amounts of award

9. The total amount awarded to the claimant which the respondent is ordered to pay her is **£22064.74.**

Recoupment

10. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to this award.

REASONS

Introduction

1. In our Liability Judgment dated 18 January 2024 we found that the claimant was unfairly dismissed for making protected disclosures, that she was subjected to detriments for making protected disclosures, that the respondent had failed to pay her holiday pay for holiday accrued but untaken and had made unauthorised deductions from her wages.

2. The remedy hearing took place on 16 August 2024, having been postponed from the original date of 29 January 2024 for various reasons. The format for the remedy hearing was the same as that for the liability hearing. All parties apart from the respondent attended in person at Manchester Employment Tribunal. The respondent attended by CVP video link.

3. At the remedy hearing we heard evidence from the claimant. We also heard oral evidence from three witnesses on behalf of the claimant. Because we had made an anonymisation order we do not name those witnesses. They were Witness D from the liability hearing, the claimant's sister (Witness H) and from a friend of the claimant (Witness I). There was also a further written statement from Witness E from the liability hearing. Witness E did not attend to give evidence at the hearing. We also heard evidence from the respondent. The witnesses were cross examined and answered questions from the Tribunal.

4. Because of the number of witnesses, we were not able to hear oral submissions on all the matters which we needed to decide at our remedy hearing. We directed that the parties provide written submissions on the outstanding points. The Employment Judge wrote to the parties to provide guidance on the points on which submissions were required.

5. At the hearing, the parties relied on the documents bundle used at the liability hearing. We had at that hearing also been provided with the claimant's bank statements. At the start of the remedy hearing the claimant provided further documents. There was a measure of dispute between the parties as to whose fault it was that the papers were not in order and prepared for the hearing. Mr Fakunle indicated he had not seen all the documentation provided by the claimant at the start of the hearing. They included a bundle of bank statements covering the period from the liability to the remedy hearings and 17 pages of medical evidence relating to therapy and other treatments received by the claimant.

6. After taking a break to allow Mr Fakunle to consider those documents, he confirmed that he was in a position to continue with the hearing. All parties agreed that it was not in accordance with the overriding objective or in any of the parties' interests to postpone the hearing. The Tribunal was satisfied that the respondent was not disadvantaged by the late production of the additional bundle. In the event, those documents had little relevance to the decisions that we ended up making.

Relevant Law on Remedy

Compensation for unfair dismissal

7. If a Tribunal finds that an employee has been unfairly dismissed, s.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of —**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**
>
> **(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).**"

8. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

9. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

10. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction).

11. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

12. Where the Tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

13. If an employment tribunal decides to award compensation for unlawful discrimination, s.124(6) of the Equality Act 2010 provides that it must be calculated in the same way as damages in tort. The aim, is that 'as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct' (**Ministry of Defence v Cannock and ors 1994 ICR 918, EAT**).

Compensation for protected disclosure detriment

14. S.49 of the Employment Rights Act 1996 provides that where a Tribunal finds a complaint of detriment for making protected disclosures well-founded, it

> **(1)(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.**

15. In **Virgo Fidelis Senior School v Boyle 2004 ICR 1210, EAT**, the EAT held that it was appropriate to adopt the same approach to compensation in whistleblowing detriment claims as has been taken in discrimination cases. In contrast, injury to feelings compensation cannot be awarded for an automatic unfair dismissal under s.103A of the Employment Rights Act even where the principal reason is making protected disclosures.

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

17. There are three bands of award for injury to feelings following **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA** and uprated in **Da'Bell v NSPCC [2010] IRLR 19 EAT:**

i) The top band: sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment

ii) The middle band: this should be used for serious cases, which do not merit an award in the highest band.

iii) the lower band: where the act of discrimination is an isolated or one-off occurrence.

There is within each band considerable flexibility, allowing a Tribunal to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

18. Presidential Guidance was issued on the **Vento** bands on 5 September 2017. The fourth addendum to that guidance applies in respect of claims presented on or after 6 April 2021, which applies to the claimant's claim. It says the Vento bands shall be as follows: a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

19. In making an award for injury to feelings the task of a Tribunal is to consider what degree of hurt feelings has been sustained and to award damages accordingly, **Murray v Powertech (Scotland) Ltd [1992] IRLR 257 EAT.** In **Ministry of Defence v Cannock [1994] I.C.R. 918** the EAT said that an award for injury to feelings is not automatically to be made whenever unlawful discrimination (or in our case protected disclosure detriment) is proved or admitted. Injury must be proved. However, it went on to say that it will often be easy to prove, in the sense that no tribunal will take much persuasion that the anger, distress and affront caused by the act of has injured the applicant's feelings. But it is not invariably so.

Mitigation

20. Employees are under a duty to mitigate loss. The general approach to mitigation is summarised by Langstaff P in **Cooper Contracting Ltd. v Lindsay UKEAT/0184/15** at paragraph 16. In summary, the burden of proving a failure to mitigate lies with the respondent. If evidence as to mitigation is not put before the Tribunal by the respondent, the Tribunal has no obligation to find it. What has to be proved is that the claimant acted unreasonably; she does not have to show that what she did was reasonable. There is a difference between acting reasonably and not acting unreasonably. The Tribunal is not to apply too demanding a standard to the claimant; after all, she is the victim of a wrong. She is not to be put on trial as if the

losses were her fault when the central cause is the act of the wrongdoer. In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

Compensation for failure to provide written particulars of employment

21. The material provisions of section 38 of the Employment Act 2002 state:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.**
>
> **…**
>
> **(3) If in the case of proceedings to which this section applies—**
>
> > **(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and**
> >
> > **(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,**
>
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.**
>
> **(4) In subsections (2) and (3)—**
>
> > **(a) references to the minimum amount are to an amount equal to two weeks' pay, and**
> >
> > **(b) references to the higher amount are to an amount equal to four weeks' pay.**
>
> **(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."**

22. By virtue of schedule 5 to the 2002 Act, section 38 applies to complaints of unfair dismissal, unauthorised deductions under section 23 of the ERA 1996 and to unlawful detriments in employment under section 48.

23. A question which arose in this case was whether an award could be made under s.38 where the claimant had not raised it in her claim form. In **Levy v 34 & Co Ltd [2021] UKEAT 0033_20_1202** there was an appeal to the EAT because Tribunal did not make an award under s.38 in a case in which the claimant's unauthorised deduction of wages claim had succeeded. There was no claim for a s.38 award in the claim form in that case - it was first raised in the Schedule of Loss sent to the Tribunal. The respondent in that case did not appear and was not represented at the Tribunal hearing in the case. The EAT rejected the submission that the Tribunal was bound to order a s.38 uplift whether or not it is asked to do so because s.38(3) is in mandatory terms. It said that it was primarily for the claimant to make known to the Tribunal what they are claiming because "that ensures that the

nature of the claim will be made known to the respondent and only then can there be a fair hearing" (para 38).

24. In reaching its decision in **Levy** the EAT referred to and drew support from the EAT case of **Stanbridge v Brookes (UKEAT/0032/14/BA)** in which the Tribunal **had** made a s.38 award when one had not been claimed in the claim form. The Tribunal in **Stanbridge** raised the s.38 matter of its own motion. In that case, the requirement in s.1 of the ERA had not in fact been breached so no s.38 award should have been made. The respondent in **Stanbridge** did not take part in the Tribunal hearing. The EAT in that case described it as "unfortunate" that there had been no proper notice of the s.38 issue to the respondent and rules that a Tribunal in such circumstances must be "astute" to any possible defences. The EAT in **Levy** noted that the common feature of the two cases was that the respondent had no notice of the uplift claim. It said that the Tribunal in **Levy** could not have fairly decided the s.38 issue without giving notice to the respondent. At most, it said, rather than deciding the issue at the hearing (which would have been an error of law) the Tribunal should have given notice of the issue to the respondent and subsequently investigated further).

Uplift in compensation for failure to comply with the ACAS Code

25. S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A"), states at subsection (2):

> **'If, in the case of proceedings to which this section applies, it appears to the employment tribunal that**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'**

26. The disciplinary part of the ACAS Code '…is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee' (**Holmes v Qinetiq Ltd [2016] IRLR 664**).

27. In **SPI Spirits (UK) Limited , Yuri Shefler v Vladislav Zabelin [2023] EAT 147**, HHJ Auerbach in the EAT observed that the ACAS Code is intended to be applied and followed as and when disputes or concerns arise in the workplace, on either side, with a view to assisting their resolution by fair internal process. The employer ought to follow a fair disciplinary procedure, conforming to the Code, where it is alleged that the employee has behaved unsatisfactorily in some respect. The focus is on what the employer alleged, not on what the outcome of the process turned out to be, or whether the allegation was, in fact, well founded.

28. In **Spirit** the EAT held that where the employer dismisses or takes other action against an employee because, in substance, of what it regards as, or potentially as, culpable conduct, the discipline provisions of the Code will apply. They will not cease to do so by virtue of the tribunal finding that such conduct in fact amounted to a protected disclosure.

29. In **Acetrip v Dogra UKEAT/0016/20/VP (18 March 2019)** HHJ Auerbach in the EAT said at para 103:

"There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part."

30. In **Slade and anor v Biggs and ors 2022 IRLR 216, the EAT** confirmed that the discretion given to a Tribunal by s.207A is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. While the top of the range of 25% should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional.

31. In **Slade**, the EAT suggested that a Tribunal in applying s.207A "might choose to apply a four-stage test:

a. Is the case such as to make it just and equitable to award any ACAS uplift?

b. If so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

c. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

d. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?"

<u>Interest</u>

32. In discrimination cases, legislation requires the to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations [1996] SI 2803 (as amended). For injury to feelings awards interest is awarded for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated. For other awards interest commences at a midpoint. There are no equivalent regulations applying to awards of compensation for protected disclosure detriment.

<u>Taxation</u>

33. In relation to taxation, the Court of Appeal in **Moorthy v HMRC [2018] EWCA Civ 847** held that awards for injury to feelings were to be treated as tax free whether or not related to the termination of employment. This position changed from 6 April 2018 by an amendment to section 406 of the Income Tax (Earnings and Pensions) Act 2003 so that although "injury" in subsection (1) includes psychiatric injury it does not include injured feelings. This amendment has effect for the tax year 2018-19 and subsequent tax years. Section 406 which deals with the tax exemption provides:

> "(1) This chapter does not apply to a payment or other benefit provided –
>
> (a) in connection with the termination of employment by the death of an employee, or
>
> (b) on account of injury to, or disability of, an employee.
>
> (2) Although 'injury' in subsection (1) includes psychiatric injury, it does not include injured feelings."

34. This means that an award of compensation for psychiatric injury falls within the tax exemption but an award compensating for injury to feelings does not if it is "in connection with termination of employment". Therefore, an award for injury to feelings is taxable to the extent that it exceeds £30,000 if made in connection with termination of employment. If not made in contention with termination of employment, it is not taxable.

35. To avoid any disadvantage to a claimant, a Tribunal should gross up any sums which would be subject to tax on receipt (**British Transport Commission v Gourley [1955] UKHL 4**). That requires the Tribunal to estimate the tax the claimant will have to pay on receipt of the Tribunal award and add that sum back into the award to cancel out the tax burden on them. The purpose is to place in the claimant's hand the amount they would have received had they not been treated unlawfully.

Findings and conclusions

36. We have found it more convenient to set out our findings of fact relevant to each element of the compensation claimed rather than setting out the findings of fact in one block at the start.

Compensation for the claimant's automatic unfair dismissal

Basic Award

37. In our Liability Judgment we found that the claimant's gross pay was £480 per week. That was based on her working 2 x 24 hour days payable at £10 per hour. The claimant was employed for less than one year. That means that she is not entitled to a basic award. There is no provision in the Employment Rights Act for a minimum basic award in cases of whistleblowing dismissals.

Compensatory Award

38. The claimant was dismissed with effect from 10 December 2020 but received two weeks notice. We have calculated her loss of earnings from 24 December 2020.

There was a dispute between the parties about what would have happened had the claimant continued to be employed by the respondent. That turned on two particular issues. The first was whether the claimant would have continued working as a personal assistant for the respondent after the respondent moved to Yorkshire with effect from 25 June 2021. The second was whether the relationship between the respondent and the claimant would have broken down to such an extent that the respondent would have terminated the employment in any event.

39. When it comes to whether the claimant would have continued to be employed by the respondent after the move to Yorkshire, the parties gave diametrically opposed evidence. The respondent's evidence was that it was always intended that she would only take two of her personal assistants (namely D and G) with her when she moved to Yorkshire. At the remedy hearing the respondent said (for the first time) that that was because the claimant did not share her religion and it would have been inappropriate for her to move with her to Yorkshire.

40. The claimant's case was that it had always been intended that she would continue working for the respondent after the move to Yorkshire. We prefer the claimant's evidence on that point. We find that at the point where the claimant was employed, she and the respondent were friends and there was no indication that the claimant's religious beliefs meant that the respondent considered it inappropriate for her to continue working for her after the move to Yorkshire.

41. Whatever the intention, however, we find that in reality the claimant would have ceased being employed by the respondent shortly after the respondent moved to Yorkshire. We find that the claimant's journey to work before the move was around 0.9 miles each way. In contrast, the journey to and from Yorkshire would have involved journey of 60 Miles (between 1.5 and 2 hours) each way.

42. Witness D, who did continue to work as a protected act for the respondent after the move Yorkshire, confirmed that she had ended her employment with the respondent by 23 July 2021. We accept her evidence that that was partly because of the journey involved to get to the respondent's new home but primarily because the respondent had confirmed that she was not in a position to pay for petrol/mileage for the personal assistants to travel from their homes to Yorkshire.

43. The claimant's evidence was that she would have been quite happy to move to Yorkshire. She had a campervan and friends in Yorkshire and felt that it would have been an opportunity to spend time in a geographical location that she loved. We accept that there was little to tie the claimant to her home in the sense that she had no caring responsibilities at home. The claimant did have her lodger, E, but he was a longstanding lodger and we do not find that that would have prevented the claimant from continuing to work for the respondent in Yorkshire. The claimant's evidence, however, was that financial considerations were important to her. She did not have a lot of money. On balance we find that the claimant would have initially continued to work for the respondent after the move to Yorkshire but that she would not have continued to do so once the respondent confirmed that she was not in a position to pay mileage/petrol. We say that because the costs of driving back and forth to Yorkshire would have been significant relative to the amount the claimant was paid. It would, in short, not have been worth her while to continue doing so, however pleasant the opportunity to see her friends in Yorkshire might have been.

44. On balance, therefore, we have decided that the claimant's employment would have come to an end at the same time as Witness D i.e. on 23 July 2021, after it became apparent that the respondent would not be paying mileage. That would have been apparent at the time when the claimant received her first pay, i.e. at the same time as witness D was told that was the position.

45. As to the second point, there was evidence that the respondent was unhappy with the claimant aside from the protected disclosures. Witness D gave evidence that the respondent had raised with her concerns about the claimant's performance. We accept that the respondent had not raised those matters with the claimant. Because the claimant had not been employed for two years, however, the respondent could, absent any protected disclosures, have fairly dismissed the claimant at any time before the date of 23 July 2021 when we have decided the claimant's employment would have come to an end. The question is whether the respondent's unhappiness with the claimant was such as to mean that she would have terminated her employment prior to 23 July 2021. We have decided that she would not have. We accept the evidence that the respondent had a tendency to "hire and fire" personal assistants. However, the claimant had been working for the respondent as a personal assistant for over nine months.

46. This was not a case where the respondent had taken on a new personal assistant and found them to be incompatible with her demands. We also think that realistically the respondent would have preferred to take the personal assistants that she had with her when she moved to Yorkshire, at least until she was settled in in Yorkshire and could find more locally based personal assistants to replace those that she was unhappy with. We accept that the respondent was not entirely happy with the claimant. That, we find, was not solely down to the protected disclosures – the respondent was unhappy about other matters which the claimant had challenged her about, such as walking her dog and the car insurance which we found in the Liability Judgment did not amount to protected disclosures. We find, however, that this was a case of "better the devil you know" and that the respondent would have put up with the claimant until she was settled in Yorkshire.

47. We do not, therefore, find that there are grounds for reducing the compensatory award further to reflect a chance that the claimant would have been dismissed by the respondent prior to the move to Yorkshire.

48. In terms of the amount the claimant would have earned during the period to 23 July 2021, our starting point is that the claimant's basic pay was £480 gross per week and £384 net. We find she would have earned that for the 30 weeks up to 23 July 2021, giving a total of £11,520.00.

49. We accept the claimant's evidence and submission that she would (in addition to her normal working days) have provided cover for personal assistants D and G when they took annual leave. Witness D worked one day a week. On balance, we find that the claimant would have been likely to cover all of D's annual leave. We find that D's annual leave entitlement of 5.6 weeks equated to 5.6 days. At the claimant's standard rate of £240 per day gross or £192 net that would amount to £1,075.20 if the claimant covered all of D's holidays for a year. For the 30 week period to 23 July 2021 that equates to 30/52 of that annual total which is £620.31.

50. When it comes to personal assistant G, he worked four days a week. Covering his holiday for the whole year at 5.6 weeks x 4 days at the claimant's net rate of £192 per day would mean the claimant would have earned an additional £4,300.80. For the 30 week period to 23 July 2021 that would amount to £2481.23. Doing our best with the evidence before us, we find the claimant would have covered half of G's holiday during that period with Witness D doing the other half. In reaching that conclusion we take into account the fact that Witness D did not work weekends and would have been unlikely to cover G's weekend absences. That gives a figure of £1,240.62 which the claimant would have earned for covering G's holiday up to 23 July 2021.

51. Adding those figures together we find the claimant's net loss of earnings up to 23 July 2021 would total £11,520.00 + £620.31 + £1,240.62 giving a total loss of earnings resulting from the dismissal of £13,380.93.

Mitigation and earnings for which the claimant needs to give credit

52. The respondent submitted that the claimant had acted unreasonably by failing to mitigate her loss. We do not accept that submission. We accept the claimant's evidence that the dismissal had a profound effect on her. We find that it triggered PTSD which the claimant had previously suffered and had a significant impact on her confidence and stress and anxiety levels. Despite that, we find the claimant did seek and obtain an offer of work but that that was not forthcoming because of the inability to obtain a reference. We find that the claimant further took steps to mitigate her loss by taking on an additional lodger from April 2021. On that basis we do not accept that the claimant has unreasonably failed to mitigate her loss.

53. The claimant, we find, would not have taken on an additional lodged had it not been for her dismissal. The income earned from that additional lodger in the period up to 23 July 2021 has to be deducted from the compensatory award because that is income the claimant would not otherwise have had. Based on the claimant's bank statements we find that from April to July 2021 the claimant's tenant (JN) paid rent of £369.35 per month. That amounts to a total of £1,477.40. Deducting that from the compensatory award gives a figure of £11,903.53. That is the compensatory award prior to any uplift or reduction.

<u>Compensation for detriment arising from protected disclosures</u>

54. We have found that the respondent subjected the claimant to two detriments. The first was reducing the claimant's pay by £100 per week. Those deductions were evidenced on the payslips. £100 was deducted from the payslip dated 27 November 2020; £300 from the payslip for 11 December 2020 and £100 deducted from the payslip for 18 December 2020. We find that the total deductions amounted to £500. We award the claimant compensation of that amount.

55. We do not award financial compensation for Detriment 2. That was the refusal to allow the claimant to take annual leave. Had we awarded compensation it would have been one day's holiday pay. However, we are already awarding the claimant 1.8 days' holiday pay for holiday untaken. Had the claimant been allowed to take holiday when requested (i.e. in Detriment 2), the unpaid holiday pay would have been reduced by one day. If we were to award a holiday day's pay for Detriment 2 in addition to 1.8 days' pay for the holiday pay claim, that would amount to double counting.

56. Compensation for being subject to a detriment for making protected disclosures can also lead to an award of compensation for injury to feelings. At the hearing we explained to the claimant that the injury to feelings we were concerned with was that arising from the detriments not from the unfair dismissal. A Tribunal cannot award compensation for injury to feelings arising from an automatically unfair dismissal. Much of the evidence at the hearing was in relation to the impact on the claimant of the dismissal. We accept that that dismissal did have a profound effect on the claimant. However, we are concerned with the impact of the two detriments which we found occurred.

57. We accept the claimant's evidence that being subjected to those detriments by somebody who she regarded as a friend was upsetting. We find (particularly in relation to the unlawful deduction) that this was something which did cause the claimant upset meriting an award of injury to feelings. The claimant, however, continued to work for the respondent despite the deductions and the evidence did not suggest that there was such a breakdown in their relationship as a result of the detriments such as to merit an award in the higher Vento band, which is what the claimant had originally suggested in her Schedule of Loss. We accept that that may have been because she misunderstood the extent to which a Tribunal can award compensation for injury to feelings as a result of an automatically unfair dismissal.

58. The claimant in her evidence, in support of her contention that the employment would have continued, made it clear that the relationship was not one that she viewed as at an end or irreparably damaged by the detriments. Given that her evidence was that she would have continued to work for the respondent, we do find that an award at that level is appropriate. On balance, we find that find that in this case the injury to feelings falls mid-way into the lower Vento band. At the relevant time the lower Vento band was from £900 to £9,100. In this case we find that the appropriate award is £4,000. That reflects the upsetting nature of the detriments but also the fact that it did not fundamentally destroy the relationship between the claimant and the respondent.

59. If we were awarding compensation for injury to feelings for discrimination, we would award interest on the injury to feelings. The deduction in this case took place in 2020. We do find it appropriate in those circumstances to compensate the claimant for an amount equivalent to the interest that she would have earned on that injury to feelings award had it been a discrimination award. It seems to us that the case law indicates that compensation for injury to feelings for protected disclosure detriments is analogous to compensation for discrimination. Although there are no specific regulations setting out how interest should be awarded (and when) in relation to injury to feelings compensation for detriments, we find it is appropriate to adopt the approach that would be adopted in relation to injury to feelings. That means that we award compensation equivalent to 8% interest from the date of the more serious of the detriments (i.e. the first deduction on 27 November 2020). At 8% the interest on £4,000 is £320 per annum. That gives a daily rate of £0.87. There are 1,376 days from 27 November 2020 to the date of our decision on remedy on 28 August 2024, which gives total interest of £1197.12. We include that in the figure of compensation for the detriments suffered by the claimant.

60. That means the total compensation we award by way of compensation for the injury to feelings arising from the protected disclosure detriments is £5,197.12.

61. The total award including compensation for injury to feelings and for financial loss for the protected disclosure detriments is £5697.12.

Holiday Pay

62. We find that the claimant was entitled to 1.8 days' holiday. At the basic rate of £480 per week we find that amounts to £864.

Failure to provide written statement of terms and conditions

63. The claimant included in her Schedule of Loss a claim for a payment under section 38 of the Employment Act 2002 for the respondent's failure to provide terms and conditions. For the respondent, Mr Fakunle argued that the Tribunal did not have jurisdiction to make that award because the claimant had not brought a claim for it in her claim form.

64. The first question we had to decide was whether we had jurisdiction to make the award. Section 38 appears to us to be in mandatory terms. It is not a freestanding claim. It does not seem to us on the face of section 38 that a claimant has to specifically plead in their ET1 that they are bring a claim for compensation for a failure to provide terms and conditions. We had brought the parties' attention to the **Levy** case so they could address it in their written submissions.

65. Mr Fakunle submitted that the Levy case supported the respondent's case that no s.38 award should be made in this case because the claimant had not included such a claim in her claim form. We noted that in **Levy** and **Stanbridge** the EAT was dealing with cases where a Tribunal had (or it was argued should have) made an award under section 38 when the respondent was not aware that such an award was potentially going to be made.

66. We do not understand **Levy** to say that a failure by a claimant to include a s.38 award in their claim form deprives the Tribunal of power to make such an award. Instead, it seems to us that **Levy** decided that it was not possible to have a fair hearing of the s.38 issue where the respondent had had no notice that the claim was being brought and so no opportunity to respond. That is not the case here. The claimant had included the claim for a failure to provide a statement of terms and conditions in her original Schedule of Loss which was included in the liability bundle. She had repeated it in her updated Schedule of Loss. We raised that matter with the parties at the remedy hearing so that the respondent had an opportunity to make submissions on that issue and indeed it did so. This is not, we find a case where it would be unfair to consider making a s.38 because the respondent would be denied an opportunity to make submissions about why an award should not be made.

67. We have decided that we do have the power (and indeed an obligation to consider) making a s.38 award. We then considered whether the respondent had indeed failed to provide a statement of terms and conditions. Mr Fakunle relied on the written contract of employment sent to the claimant in November 2020 at pages 72-86 of the liability hearing bundle. Our finding, however, was that that was not a genuine statement of the claimant's terms and conditions. It purported to be a zero hours' contract. We do not accept that a document which purports to be (but bears no relation to) an employee's terms and conditions can satisfy section 1 of the ERA. We find the respondent failed to comply with the obligation to provide the required statement of particulars.

68. We do not find that there are exceptional circumstances which means that it is not appropriate to award two weeks' gross pay. However, we take into account the fact that the respondent in this case is an individual employer. The situation is somewhat different from the conventional employment relationship which is an arms' length professional relationship. Although the respondent had some access to HR support, this was not a case where there was a large employer who had administrative resources or HR resources on which they could rely. In those circumstances we do not find it appropriate to award four weeks' gross pay but do award two weeks' gross pay. That amounts to £960.

ACAS Uplift

69. The respondent submitted that the ACAS Code of Practice on Discipline and Grievance did not apply to the claimant because she did not have two years' service and so could not claim "ordinary" unfair dismissal. There is nothing in the Code of Practice which suggests that it is not applicable to those who have fewer than two years' service. In this case we find that the compliance with the Code was minimal. There was no kind of disciplinary process prior to the application of the sanction of deduction of wages (D1). There was no attempt to engage with the claimant prior to her being sent the letter of dismissal (at page 106 in the liability bundle) on 10 December 2020. We accept that the claimant was given an opportunity to appeal and that the respondent did respond to her appeal letter. The appeal was dealt with in writing only and was dealt with peremptorily.

70. We accept that the respondent is an individual employing personal assistants rather than a business employing employees. We find she did have access to HR support (it was they who drafted the letter for her) but accept that this was not a case of an employer with large administrative resources or an internal HR department. Notwithstanding that, the extent of the failure to comply with the Code was unreasonable and we do find it just and equitable to make an uplift award in this case of 15%.

71. When it comes to the elements of our award to which that uplift applies, we find it clearly applies to the compensatory award which related to a dismissal which the respondent alleged arose from the claimant's conduct.

72. We considered whether it also applies to the award we have made in relation to the protected disclosure detriments. There was no disciplinary process followed before imposing the sanction of a deduction from pay. We find, however that the sanctions imposed in detriments D1 and D2 were because of conduct on the claimant's part, namely PD2 and PD4. **Spirit** confirms that the fact that the sanctions were imposed because of conduct which is subsequently found to be protected disclosures does not prevent the Code from applying. We find that the Code did apply to this aspect of the case. The respondent imposed what was in effect a disciplinary sanction (though not labelled as such) because of conduct on the claimant's part. The Code applied to that – if the respondent wanted to take action because of the claimant's conduct she should have followed the process laid out in the Code.

73. That means we apply that uplift to the compensatory award and to the award in relation to the protected disclosure determinants. The uplift does not apply to the award for failure to provide particulars of employment nor to the holiday pay claim.

74. Applying that uplift of 15% to the compensatory award increases it from £11,903.53 to £13689.05.

75. Applying that uplift of 15% to the award relating to protected disclosure detriments increases it from £5697.12 to £6551.69.

76. Applying the "sense check" referred to in Slade we do not find that increase renders the compensation disproportionate so no further adjustment is required.

Notice Pay

77. The claimant suggested that she should have been entitled to six months' notice pay. We did not find that that was the case. Her breach of contract complaint failed.

Taxation

78. We have not grossed up any of the amounts awarded to take into account of tax being deducted from the moneys received by the claimant. That is because:

a. We have awarded the holiday pay and the award for deductions from pay in **D1** on a gross basis.

b. We have assumed that the award of compensation for injury to feelings for the protected disclosure detriments will not be taxable because it was not in connection with termination of employment.

c. We have assumed that the compensatory award for unfair dismissal will be free from deduction of tax because it falls within the £30,000 tax-free amount in connection with termination of employment.

79. If any of those assumptions are incorrect, resulting in the claimant being required to pay tax on amounts we have assumed will not be taxable, she should apply for a reconsideration of our decision so we can undertake the appropriate grossing up exercise.

Total amount awarded

80. The total amount awarded to the claimant which must be paid by the respondent is £13689.05 + £6551.69 + £864 + £960 = **£22064.74**.

Recoupment

81. The claimant had not received any state benefit (other than pension) and so the recoupment regulations do not apply.

Employment Judge McDonald
Date: 9 October 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
14 October 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2407213/2021**

Name of case: **A** v **B**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 14 October 2024

the calculation day in this case is: 15 October 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.