EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Braithwaite	**-v-**	**Refresco Drinks UK Ltd**

Heard at: Nottingham

On: 28,29,30,31 May and 3,4,5,6 June 2024
7 June 2024 (In chambers), and on the 27 and 28 October 2024, and the 24 January 2025 (in chambers)

Before: Employment Judge L Brown

Members Mr Tansley

Mr Edmondson

Appearances

For the Claimant: In person.
For the Respondent: Mr Paul Gilroy KC, Counsel.

RESERVED REMEDY JUDGMENT

1. In the reserved liability judgment this Tribunal upheld the Claimant's claim for unfair dismissal. It also upheld the Claimant's claim for age discrimination on one allegation as set out.

2. During the remedy hearing we had before us a remedy bundle prepared by the Respondent running to 269 pages. We also had a bundle from the Claimant running to 176 pages supplemented by further documents sent during the hearing.

3. The Claimant gave evidence. We had a statement from his wife Mrs Braithwaite, but in the event the Claimant decided not to call her to give evidence.

4. Following that hearing, and due to the fact that there was no time to hear oral submissions the following directions were issued:-

   4.1 By the 4 November 2024 the Respondent will file and serve their closing submissions with the Tribunal and on the Claimant by email.

   4.2 By the 11 November 2024 the Claimant will file and serve his closing submissions with the Tribunal and on the Claimant by email.

   4.3 Neither party is permitted to file any new evidence on the other with their submissions, save that it was ordered the Claimant may serve evidence relating to a trip abroad that he made following his dismissal relating to the travel arrangements.

5. Feelings between the parties have run very high in this litigation. The Claimant at times failed to control himself during the remedy hearing and had to be told not to shout. We also noted that the Claimant said he felt harassed by the tone of correspondence from the other side. We pass no judgment on that allegation.

6. However given the clear order by this Tribunal that neither party was permitted to file new evidence with their submissions, save for the specific documents we said the Claimant could file, which was evidence of his travel to Ireland, and the letter from Watling Vale Medical Centre confirming that he attended an appointment at the surgery in August 2022 with anxiety and depression, we were disappointed to note that the Respondent did file further evidence by asking this Tribunal to have regard to further accounts for MSB Automation Ltd which were filed at Companies House since the conclusion of the remedy hearing.

7. We were also disappointed by the Claimants earlier and clear failure to comply with the order to file evidence of his personal bank accounts before the remedy hearing, and in particular that he failed to disclose his joint personal bank account statements, which he sought to justify on the basis that it was a joint account with his wife and contained personal information. However he could have blocked out any parts that were not relevant, as made clear in the order, and could and should still have complied with the Tribunal order.

8. A failure by both parties to respect the orders of this Tribunal is particularly disappointing given that the overriding objective requires both parties to co-operate and to assist the Tribunal. We find both parties are at fault in failing to comply with orders of this Tribunal and this has led to heated correspondence, prior to and following the remedy hearing which is regrettable.

9. The lengthy submissions of both parties have been taken into account, save that we have had no regard to the latest company accounts filed since the remedy hearing and they were not looked at by this Tribunal.

10. We do not repeat the submissions from both parties here but reference them where applicable in our findings below, and both were fully considered.

Findings of Fact on issues of remedy

Unfair Dismissal

11. The Claimant had a company, MSB Automation Ltd, that he had already set up prior to his dismissal which was dormant. He had set it up some time before his dismissal, and when the Respondent was taken over, and at a time when he was uncertain about his future with the company. We found in our liability Judgment that this company lay dormant up until the date he was dismissed. Following his dismissal he gave evidence that the effect on him of the dismissal meant he did not want to work for large companies again in the future based on his generalised assertion that large companies treated individuals poorly. He therefore decided to earn an income on a self-employed basis through MSB Automation.

12. We therefore had to decide on the basis of his filed accounts of MSB Automation, what his actual likely earnings were up to the date of the hearing, and we based this on the company accounts and what it showed as income into the company, and also having regard to what he drew out of the company, and what we find he could have drawn out of the company. We also made some allowance for the fact that it is not always the case that all income received by the company is drawn down in any one year, due to the fact that future expenses will be incurred and some money must be left in the company for any necessary expenses to be met for the company in order to carry on trading, and to allow for corporation tax which is payable after the end of trading years, and upon submission of accounts to companies house, and to HMRC.

13. The accounts of the company showed as follows:-

12.1. We had before us the accounts for, MSB Automation Limited (incorporated 12 March 2020), for the financial year ending 31 March 2023 (pp.185-192).

12.2 The disclosed accounts showed that between 9 August 2022 (the effective date of termination of the Claimant's employment) and 31 March 2023 (circa 7.5 months) the income/turnover received by MSB was £26,821 (p.187). The profit was said to be £18,662.00. MSB was dormant during the course of the Claimant's employment with the Respondent. The period of time therefore that the 2023 accounts related to was that from the 9 August 2022 when the Claimant was dismissed to the 31 March 2023 and as he was travelling for over a month in August (as set out in the Claimant's statement dated 24 October 2024 p.271 at paragraph 4), we have treated his period of time in which the £18,662.00 net profit was made

over a period of 6.5 months. There were retained earnings of £15,116.00 £ [P.191]. The income paid to the Company of £26,821 was therefore earned in a period of around six and a half months, or, as submitted by the Respondent, approximately £4,500 per month, i.e., annual turnover of £54,000. However the Claimant said, as set out below in paragraph 16, that the income received by MSB Automation over twelve months was in fact the sum on average of £28437.00 per annum over the period from dismissal to the date of the hearing.

14. The Claimant asserted that the retained earnings of £15,116.00, which he was cross-examined about and it being put he could have drawn more out of the company, was in part retained as tax reserves, and that one didn't simply draw everything out of the bank account. We found that the nature of a business is that as you pay tax at the end of each financial year and do not know how much you will earn in each trading year, that you cannot drain the bank account dry, and you must also leave money in reserve for professional expenses and the running of the business going forward.

15. The figure on which we must judge the Claimants income is we find by way of what sum he could reasonably have paid himself as he was a company director.

16. The Claimant contended that his income should be judged by the dividend payments he paid to himself as opposed to the actual income received by his personal services company MSB Automation. He sent on the 27 October 2024 to the Tribunal at the end of the first day of the remedy hearing the following information in a pdf document:-

''Income into the standalone public limited company MSB Automation (from statements)

Date of dismissal 09/08/2022

1 year on 09/08/2023

2 years on 09/08/2024

Note: all payments into the standalone company MSB Automation are Gross Namely pre corporation tax and pre deduction of legitimate business expenses as detailed in the Company accounts

Date Company Amount

15/11/2022 Inteck 3000
24/01/2023 Inteck 2890
09/02/2023 Inteck 4794
22/02/2023 Inteck 5348
23/02/2023 Inteck 2754
27/03/2023 Inteck 8034

28/04/2023 Quantum Tuning 800 27620
30/05/2023 Quantum Tuning 1000
11/07/2023 Quantum Tuning 600
01/08/2023 Circle Select 1200 Annual rate 31980 **(our emphasis added)**
04/08/2023 Circle Select 1560 1 year on 09/08/2023
11/08/2023 Circle Select 1920
18/08/2023 Circle Select 1280
23/08/2023 Quantum Tuning 200
25/08/2023 Circle Select 1600
25/08/2023 Circle Select 1600
25/08/2023 Circle Select 1600
20/10/2023 Circle Select 1360
27/10/2023 Circle Select 2160
03/11/2023 Circle Select 1480
20/11/2023 MK Engineering 800
02/12/2023 MK Engineering 1600
08/12/2023 Circle Select 1520
19/01/2024 MK Engineering 1200
02/02/2024 MK Engineering 1000
28/06/2024 Link - Whittan 5574 2 years on 09/08/2024
09/08/2024 24894 Annual rate
Includes payment for 3rd party Brendan Rigby for courier delivery and waiting on repair
24894 31980
Average annual rate of incoming funds into MSB Automation = 28437
Gross annual basic pay 44100
Average annual loss 15663
Total loss over 2 years * 31326
Claimant contends it is the dividend payments that should be consider for the loss calculation
Income into Sole Cheque account (from statements)
Date Company Amount
16/08/2024 Umbrella 1179 27-Jul
16/08/2024 Umbrella 2361 04-Aug
06/09/2024 Umbrella 1274 01-Sep
06/09/2024 Umbrella 1707 18-Aug
13/09/2024 Umbrella 1636 13-Oct

Total 8157 that should be consider for the loss calculation.''

17. The Claimant's final case therefore was that comparing income into MSB Automation Ltd with his annual salary of £44,100.00 that this showed an average differential of £15,663.00, and based on these figures this was a lost source of income into the company account of £31,326.00 over the two years up to the date of this hearing. In support of this he gave evidence of the income received into his 'Sole Cheque account' in August and September 2024 but still did not disclose his joint personal bank statements.

18. The Claimant's loss of earnings claim was by way of reference to his "remedyV8" document (at p.21 Supplementary Remedy Bundle, section 1): "Loss to the hearing date (28th May 2024) a) Loss of wages" in addition to the information he sent to the Tribunal referred to at paragraph 11 above.

19. The Claimant also asserted that his only actual earnings from the date of dismissal until the date of the remedy hearing amounted to £9,000 in terms of dividends and £8,157.00 via his umbrella company as per his schedule of loss. This amounted to £17,157.00 from the date of his dismissal on the 9 August 2022 to the hearing date of the 28 October 2024 this being a period of time of 26 months, 19 days i.e., 115 weeks. His earnings at the Respondent amounted to £44,100.00. He claimed loss of earnings to the date of the hearing of £58,053.00. We compared that figure however to the other analysis he provided at paragraph 16 above of a total loss figure into the company bank account of £31,326.00. The difference in the two however was due to the fact comparison in his schedule of loss compared his earnings at the Respondent with that of sums he drew from MSB Automation whereas the figure of £31,326.00 was derived from the income received by the company.

20. Counsel contended as follows:-

Unfair Dismissal: Compensatory Award - Loss of earnings calculation 1

At the remedy hearing, the Claimant introduced a two page document in "landscape" format, the second page of which set out the "Income into the standalone public limited company MSB Automation (from statements)" (p.177 Supp Rem Bundle). In this document, the Claimant indicated that the sum of £31,980 had been received by his personal service company, MSB Automation, in the 12-month period following his dismissal by the Respondent, albeit the first payment was not received until the middle of November 2022 following his dismissal in August. That was a gross figure. In addition, the Respondent made a payment of £11,025 gross to the Claimant on 26 August 2022 (p.27 Main Rem Bundle; first column of top left box at line 4). The Respondent also made a discretionary payment into the Claimant's pension fund in the sum of £799.81 on or around 23 September 2024 (p.148 Main Rem Bundle). This calculation supports the proposition that the Claimant sustained virtually no loss:

Annual salary with the Respondent	£44,100.00	
MSB Income		£31,980.00
PILON		£11,025.00
Pension payment		£799.81
(Sub-total)		(£43,804.81)
Shortfall		£295.19

21. As to the MSB income figure of £31,980.00 which Counsel treated as notional actual income of the Claimant in the first year following his dismissal we found that the Claimant could not simply draw all of the income from the company,

and whilst we do not consider we must carry out a detailed accounting exercise on a hypothetical basis of how much he should have left in the company bank account to allow for taxation in following years, and to allow for the uncertainties of being self-employed and company expenses, doing the best we can with the evidence before us we find that he could have drawn down more than the sum he did. We find that he could have drawn the gross sum equivalent to an annual salary of £27,000.00 in the first year of dismissal.

22. This would have amounted in the first year of dismissal to gross income of £27,000.00, plus payments from the Respondent of £11,025.00 and £799.81 resulting in total gross income in the first year of £38,824.81 producing a shortfall of £5,275.19 in gross income compared to his gross salary of £44,100 with the Respondent. Net losses after reducing this by 20% this to allow for tax he would pay on this would amount to net loss of earnings by the Claimant in the sum of £4,396.00 for the first year for lost income.

23. However, we also found he lost the value of his employers pension contributions which we found equated to the sum of £2,652.00 per annum for pension loss in the first year following dismssal.

24. Adding £2652.00 for pension loss to the sum of £4,395.99 totals the sum of **£7,048.00 of net losses** in the first year of dismissal up until the 9 August 2023.

Second Year of Dismissal

25. From the 10 August 2023 to the date of the remedy hearing on the 28 October 2024 we had a period of 14 months and 19 days. We assumed that the profits of the company would be bound to increase in this second year following his dismissal and him trading through his service company, and so whilst his losses for the first year incorporated a payment of £11,025.00 plus £799.81 from the Respondent for this period in the second year of dismissal to the date of this hearing we also awarded the sum of net losses of **£8,000.00** to allow for increased income into the company, and increased drawings by the Claimant, which we found was inevitable due to what we found was the obvious talent and skill of the Claimant in the work he did for other companies.

26. Total net losses from dismissal to the date of this hearing was therefore we found in the sum of loss of **£15,048.00.**

Expenses Incurred in Seeking Employment

27. The Claimant claimed the sum of **£160.00** in expenses incurred looking for alternative employment as per his schedule of loss and we award that sum.

Future Losses

28. We found that in the year following the remedy hearing the Claimant would replace his lost income on a self-employed basis entirely and so award nothing for future losses.

29. We also noted that on this point of future earnings the Claimant said as follows in his submissions:-

13. P3 4.4 Due to my experience at the hands of Refresco, I will not take a full time job like that again, ever. Therefore it is perfectly reasonable and sensible to claim for loss of pension rights and benefits up until my retirement age which is now around 6 years away.

30. We do not find that the Claimant henceforth refusing to work for a company in a similar role due to his unfair dismissal from the Respondent, and the discrimination he suffered there is something for which the Respondent should be held responsible and this is the Claimants own choice to make this decision.

Bonus

31. The Claimant also contended that he should receive compensation for loss of an annual bonus (see paragraph b) "Loss of benefits that came with employment" in the remedyV8 document at p.22 Supplementary Remedy Bundle).

32. We found that the evidence produced by the Respondent on this established that as per the proforma letter issued to employees in June 2023, stating that for the reasons stated in that letter, there was no bonus payable for the year in which the Claimant was dismissed, and therefore we therefore found that he suffered no losses in that regard on the alleged loss of the bonus in that year as a loss flowing from his dismissal. In particular the letter said as follows:

"… there is no bonus payable relating to 2022 performance".

Mitigation of Loss

33. The evidence presented by the Respondents on the alleged failure of the Claimant to mitigate his loss as set out by reference to potential jobs on a spreadsheet was not put to the Claimant. This Tribunal did make clear that the hearing would end promptly at the end of Day 2 by which time the failure to apply for the roles in the spreadsheet produced by the Respondent had not been put to him. In any event we found that the Claimant did mitigate his loss by setting up his own company and we find the Respondents failed to prove that he did not mitigate his loss.

34. We found that during the time the Claimant travelled around Europe that he was unwell and unable to mitigate his loss. Being well enough to take a holiday does not mean he was well enough to look for work and we find that he was not. The distress flowing from the dismissal in effect hampered his ability to mitigate his loss for that time period until he returned on the 22 October 2022, and from when he then began to trade and work through MSB Automation.

ACAS Uplift

35. The Respondents case on the ACAS uplift was that the Claimant declined the invitation to appeal his dismissal. As set out in our liability Judgment [para 163] despite initially submitting an appeal the Claimant was informed that the Respondent was in the process of identifying the correct person to hear his appeal (p.23 Main Rem Bundle). The relevant email stated as follows:

    "To ensure that this (is) done fairly we must identify someone who has not been part of the process up to date. The individual also needs to be of sufficient stature within the organisation. You should also note that we are in the middle of holiday season. At this time I would ask you to try and be patient while we make the necessary arrangements for you to have a fair and appropriate appeal hearing".

36. In the event the Respondent was unable to source someone to handle the appeal internally and proposed appointing Margaret Renshaw from MakeUK who was from a legal/HR background. The Claimant was not happy to have his appeal dealt with by an independent third party and so advised the Respondent he was no longer pursuing his appeal.

37. The Respondent contended for a 25% reduction to any award of compensation.

38. The Claimant claimed an uplift of 25%, and the reasons for this are set out in his submissions which we do not repeat here, however his points submitted on the unfairness of the procedure as he sees it have been fully considered.

39. We found on the issue of the ACAS uplift that this was an unfair procedure for reasons set out in our liability judgment. There was pre-determination at the investigation stage, and also we found that the investigation meeting with the Claimant was outside the band of reasonable responses as it investigated matters the Claimant had not realised would be raised at the meeting which was the incident when a visit was made to his home address to collect the laptop and the altercation that then ensued. When he complained that he had no idea the incident was going to be discussed during the investigation meeting the investigator stated that there would not be another meeting to discuss the incident she was questioning him about, something we found to be unreasonable and unfair to the Claimant and not in compliance with the ACAS code.

40. We also found that during the disciplinary hearing itself, for the reasons set out in our liability judgment, which we do not repeat here in full, that matters were also raised during the disciplinary hearing that he had no prior warning of, such as the questions about his limited company MSB Automation Limited.

41. We did not find in our liability judgment that that there were circumstances that mitigated the blameworthiness of the Respondent to comply with the ACAS code and in particular the failure to give the Claimant forewarning prior to both

the investigation and disciplinary meeting of the matters he would be questioned about.

42. In relation to the contention by the Respondent that the 25% reduction to compensation contended for by the Respondent in not pursuing his appeal, we find that where trust has broken down due to the trespass on his property by his manager to the extent that it did, and due to the unfair procedure that was followed in the investigation and disciplinary meetings, we found that it was not surprising the Claimant doubted the independence of the third party the Respondent wished to appoint to conduct the appeal, and who the Claimant said Ms Darcy of the Respondent knew. We therefore make no deduction for the failure of the Claimant to pursue his appeal in breach of the ACAS Code as we did not consider his refusal to have his appeal heard by a third party unreasonable in all the circumstances of this case.

Injury to Feelings

43. During the remedy hearing, and upon the Claimant being advised he could not claim injury to feelings on anything other than the effect upon him of Luke Buckingham's remark, which was that the company thought he was getting too old to do the job, he filed a further short statement overnight on the 27 October 2024.

44. In essence it said that the remark had affected him greatly. He asserted that it was, in the context of the manner of his dismissal and the events that led up to it, this that led him to start cross dressing. There was no medical evidence on this before this Tribunal. We did not find that this remark caused him to start cross-dressing.

45. The Claimant asked us to take into account that the Respondent could have called either Chris Simons or Luke Beckingham to give evidence on this matter but did not do so. By the time of the hearing Luke Beckingham no longer worked for the Respondent but we heard no evidence that they had asked him to attend and that he refused to do so. However having found that Luke Beckingham did make the remark we did not consider he would be able to assist the Claimant as a witness in relation to injury to feelings to be awarded, and in any event the Claimant could have asked him to attend if he thought he had relevant evidence to give on his behalf. Chris Simons was not a witness to this remark and so we did not consider calling him would have assisted the Tribunal on this issue.

46. The Claimant gave evidence that the average age of the employees at the Respondent was much younger than him, at the time of the dismissal and at which point he was 58 years old. He said *that 'I guess my time was up,'* and that it affected his confidence to be told he was perceived in that way. However this was relevant to the actual dismissal which we did not find discriminatory in terms of the decision to dismiss him.

47. We found that the Claimant was a sensitive individual who has struggled to deal with his feelings following the dismissal. We find that his hurt feelings express

themselves as anger which was much in evidence during the remedy hearing. We found that the remark the company considered him too old to do the job will have affected him significantly.

48. In making the finding that the dismissal affected him significantly we had regard to a letter from Watling Vale Medical Centre dated the 26 July 2023, a document submitted following the hearing before us, where it said as follows:-

'This is to confirm that Mister Braithwaite was seen at the surgery with anxiety and depression in August 2022. He was prescribed Propranolol to help with his symptoms. His mental health difficulties affect his concentration and ability to focus on tasks. He has very disturbed sleep which leaves him even more anxious during the day. He was seen again with anxiety symptoms, and he was referred for talking therapies.'

49. Reminding ourselves that the Respondents must take the Claimant as they find him when damages are awarded in the Claimants favour, this rule being known as the *'thin eggshell skull'* rule, we found the Claimant to be a highly sensitive individual who reacts to any perceived threat to him with anger. Having found that he was significantly affected by the remark made to him, even though it was a one off isolated remark, we find it did affect him adversely and to a greater degree than it may have affected more resilient individuals.

50. We do not however find it caused psychiatric injury, in addition to his hurt feelings, as we had no clear medical evidence, such as a report from a medical expert, to base such a finding on, but instead he based on his evidence on the letter from his GP, referred to above, which referred to his anxiety and disturbed sleep, which of itself is evidence he was feeling upset following the events that led to his dismissal, of which the discriminatory remark was one event, and by reference to his demeanour during the hearing, which was that of a very troubled individual, we did find it had a significant effect on him, and did find it had an effect on him in that it injured his feelings.

The Law

Unfair Dismissal

51. In relation to the calculation of losses for Unfair Dismissal the upper limit of the compensatory award as of the effective date of termination of the Claimant's employment was £105,707 or a year's basic salary whichever is the lesser (s.124(1ZA) of the Employment Rights Act (ERA). The Claimant's basic annual salary was £44,100. That £44,100 figure is therefore the upper limit of the compensatory award in this case and this includes employers pension contributions made on his behalf.

52. In **Digital Equipment Co Ltd v Clements (No.2) [1997] IRLR 140 (EAT)**, the following was set out:-

29.1 The first task is to calculate the loss the Claimant has sustained in consequence of the dismissal in so far as the loss is attributable to action taken by the Respondent.

29.2 In assessing that loss, full credit should be given by the Claimant for all sums paid by the Respondent as compensation for the dismissal including ex- gratia payments and payments in lieu of notice.

29.3 Sums earned by way of mitigation should be deducted at this stage.

53. There should be an increase or such reduction as is just and equitable by up to 25% for failure by the Respondent or the Claimant to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Loss of Pension Contributions

54. The **University of Sunderland v Drossou UK EAT/0341/16/RN** held that a week's pay for the purposes of calculating the compensatory award can include pension contributions paid by the employer to a pension fund.

55. We note the authority referred to by Counsel for the Respondent **of Port of London Authority v Payne [1992]IRLR 447** which is an older case, and which he contended conflicted with **Drossou.**

56. However the ratio of the **Drossou** case was clear which was that the pension contributions by an employer count towards the calculation of a weeks pay for the purposes of assessing compensation and which said that the Court of Appeal's decision in *Port of London Authority v Payne [1994] I.C.R. 555, [1993] 11 WLUK 35* relied on by the employer had not addressed whether pension contributions should be included in a week's pay, Payne considered. It was said that construing s.222 it was material to look at other provisions in the same Act as an aid. The use of the words "sums paid to the worker" in the s.27 definition of wages for the purposes of Part II of the Act, and their absence from s.221(2) in referring to week's pay in Part X for the purposes of the upper limit on a compensatory award, was conclusive against construing a week's pay as requiring payment to the employee (our emphasis added) (see paras 16, 19 of the judgment).

57. The effect of Drossou therefore is that the loss of pension contribution paid by an employer may be included in the calculation of net losses sustained by a Claimant following dismissal.

ACAS Uplift

58. In **Slade and anor v Biggs and ors 2022 IRLR 216, EAT**, the EAT set out a four-stage test to assist employment tribunals in assessing the appropriate percentage uplift for failure to comply with the Acas Code:

51.1 is the case such as to make it just and equitable to award any Acas uplift?

52.1 if so, what does the tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25 per cent?

52.2 does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings in discrimination claims? 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?

Discrimination – Injury to Feelings

59. In **Essa v Laing Ltd, [2004] EWCA Civ 2** the principles in losses flowing from direct discrimination were set out. It was held that it was not necessary for the claimant who had been discriminated against to show that the particular type of loss was reasonably foreseeable. In that case, E who was black and worked as a labourer brought a claim to the tribunal about a racial remark made to him by his foreman on site in front of his colleagues. The tribunal found that L was only liable for such reasonably foreseeable loss as was directly caused by the discriminating act. Dismissing the appeal it was held that the tribunal was wrong to find in favour of L on the basis that L could not have reasonably foreseen the extent of E's reaction to the incident and that the correct test was the kind of damage and not its extent.

60. It was held that the compensation to the victim was to be assessed by reference to the loss that arose naturally and directly from the wrong, and that the statutory tort could not be committed by accident. It was not necessary to impose a requirement of reasonable foreseeability as well as causation. All that needed to be established was a causal link between the racial abuse and the psychiatric illness, **Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] I.C.R. 1170, [1999] 6 WLUK 373** considered.

61. It was also stated that psychiatric illness and injury to feelings were not different kinds of damage and the foreseeability of injury to feelings in the instant case was obvious so that the foreseeability test would be satisfied with respect to psychiatric illness, **Page v Smith [1996] A.C. 155, [1995] 5 WLUK 174 considered.**

62. Further consideration has been given to the Judgment in **Essa.** In **Ahsan v Labour Party EAT 0211/10** it said that a test of reasonable foreseeability may still be appropriate in some factual situations. However case law suggests that in all discrimination cases some injury to feelings is foreseeable, even inevitable, as a result of discriminatory behaviour, and the employer will, in any event, be liable for the full extent of any psychological injury suffered as a consequence. Case law has established that foreseeability relates to the nature of the loss, not its extent. In essence therefore if it is reasonably foreseeable that an individual will suffer injury to feelings, then the fact that a particularly vulnerable individual suffers a complete breakdown does not mean the

wrongdoer can escape liability: the type of loss was foreseeable, so the wrongdoer is liable for the full extent of that loss, no matter how extreme. This is the so-called *'eggshell skull'* principle.

63. The *'eggshell skull'* principle applies which means in effect that the discriminator must take the victim as he or she finds him or her. Even if the victim is unusually sensitive or susceptible, and the level of injury to feelings sustained is therefore worse than it would have been for another individual, the Respondent will still be liable for the full resulting injury to feelings, so long as it can be shown that this flowed from the act of discrimination.

64. In the case of **Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA,** the Court of Appeal gave specific guidance on how tribunals should approach the issue.

65. In particular it said that in relation to the bands as they were valued at that time as follows where Lord Justice Mummery's identification of three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury were set out. These comprised:

- a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000.

- a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and

- a lower band of between £500-5,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The Court said that, in general, awards of less than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

66. The date of the discriminatory remark made was on the 15 June 2022 and therefore the Vento bands in force at that time were as follows:-

https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-April-2022-addendum.pdf

''In respect of claims presented on or after 6 April 2022, the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300''

Applying the Law to the Findings of Fact

Injury To Feelings

67. On the basis of the facts as found above, and finding that the discriminatory remark affected him significantly as evidenced by the medical evidence from his GP we award the Claimant the top of the lower band of Vento as it then was and award him **£5000.00** for injury to feelings. This reflects the effect on him and his injured feelings, and that the Claimant was in our judgment a particularly sensitive individual and the remark had a significant effect on him, in that it contributed to his disturbed sleep and anxiety.

Recommendation

68. We accepted the submissions of the Respondent on the issue of any recommendation by this Tribunal regarding the discrimination that occurred and concluded that no recommendation should be made for the reasons set out in the Respondents submissions.

Compensation for Unfair Dismissal

69. On the basis of our findings of fact above on losses incurred we therefore award the following:-

    19.1 Basic Award - **£1713.00** (this figure was agreed between the parties)

    19.2 Compensatory Award

        19.2.2 Net losses to date of the hearing- **£15,048.00.**

        19.2.3 Future losses – Nil**.**

70. Applying the case of **Drossou** we included in the award for compensation at 19.2.2 above the sum for loss of pension contributions for a two year period. Whilst this did not exactly reflect the period up to the date of the hearing from the date of dismissal (which was roughly 26 months and 19 days), as the Claimant was trading through a limited company we found that by the third year of his losses flowing from dismissal that MSB Automation would have been able to start making employer pension contributions on his behalf equal to the amount he received from the Respondent.

ACAS Uplift

71. Having found that the procedure followed in dismissing the Claimant was unfair and unreasonable, for this reason we found it was just and equitable in the all circumstances to make an uplift for breach of the ACAS code and we award the sum of a 10% uplift on compensation awarded for Unfair Dismissal. We did not

consider it just and equitable to award more than 10% as this was not a case where there was a wholesale failure to comply with the ACAS code.

72. A 10% uplift on the compensation for unfair dismissal amounts to the sum of **£1,504.80.**

73. Interest on the injury to feelings award from 15 June 2022 to the date of remedy hearing on the 27-28 October 2024, (a period of 859 days. 8% interest on **£5000.00** (£5000/100 x 8 = £400.00/365 days = £1.10 interest per day) results in an award of interest of **£944.90.**

74. Loss of statutory rights - **£350.00.**

75. Expenses - **£160.00.**

Summary of Sums Awarded

Unfair Dismissal

76. The respondent shall pay the claimant the following sums:

(a) A basic award of **£1713.00**.

(b) A compensatory award of **£15,048.00.**

(c) ACAS uplift of 10% of **£1504.80.**

(d) Expenses incurred flowing from dismissal of **£160.00.**

Note that these are actual the sums payable to the claimant after any deductions or uplifts have been applied.

77. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

Non-compliance with ACAS Code

78. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by 10 % in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

Direct Discrimination

79. The Respondent shall pay the Claimant the following sums:

a. Compensation for injury to feelings: **£5,000.00**

b. Interest on compensation for injury to feelings calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996: **£944.90**

Loss of statutory rights **£350.00**

Grand Total awarded = £24,720.70

Approved by:

Employment Judge L Brown

Date: 21 February 2025

Sent to the parties on:

.....26 February 2025.....

For the Tribunal Office

……..……..