



EMPLOYMENT TRIBUNALS

Claimant: Mr Lee Pursey

Respondent: Billington Structures Limited

Heard at: Bristol **On:** 19 – 22 August 2024

Before: Employment Judge D Gray-Jones

And members: Mr H Adam and Ms J Cusack

Representation

Claimant: Mr G Price-Rowlands, Counsel (on 19 and 20 August 2024) and thereafter the Claimant in person.

Respondent: Ms Claire Upperdine, Associate Director of HR

RESERVED JUDGMENT ON REMEDY

The Claimant's claims for unfair dismissal and disability discrimination having succeeded, judgment on liability having been given orally to the parties on 22 August 2024, the compensation payable to the Claimant shall be: **£101,685.01**.

REASONS

Background

1. The Claimant, Mr Pursey, was successful in his claims for unfair dismissal and disability discrimination. Having given an oral judgment on liability on day four, 22 August 2024, we proceeded to conduct a hearing as to remedy. Unfortunately, the Tribunal had insufficient time to deliberate and give a reasoned oral judgment on remedy and so the decision on remedy was reserved.
2. Although the four day hearing was clearly listed to determine both liability and remedy it is unfortunate that both parties appear to have given little thought to this or done anything in the way of preparation for this. Both

parties confirmed that they wished to proceed. They had time over the lunchtime adjournment to prepare and Ms Upperdine produced a further witness statement, directed principally in relation to mitigation, which we decided to admit.

3. We had as evidence the Claimant's Schedule of Loss at page 206 of the hearing bundle together with explanatory notes to that Schedule which the Claimant had drafted with the assistance of his partner. Both the Claimant and Ms Upperdine gave evidence in relation to remedy under oath and were cross-examined and asked questions by the Tribunal. Ultimately the Tribunal did the best that it could with the material that was before it.

The Law

4. When a claim has succeeded before an Employment Tribunal under the Equality Act 2010, s.124 provides that the Tribunal may order the Respondent to pay to the Claimant such compensation as it might have been ordered to pay by a county court. Such compensation can include damages for injury to feelings: s.119(4). Compensation for discrimination arises from a statutory tort on the part of the Respondent and the measure of damages in respect of which is to place the Claimant, so far as is possible, in the position that he would have been in but for the discrimination.
5. Placing a Claimant in the position he would have been in but for the discrimination will entail an assessment of what might have happened but for the discrimination: see **Chagger v Abbey National Plc [2010] ICR 397**.
6. Damages are assessed under two heads: general damages for pain, suffering, loss of amenity or injury to feelings and special damages in respect of financial loss flowing directly from the discrimination.
7. Where a Claimant has succeeded in complaints of unfair dismissal and discrimination the elements of the compensation inevitably overlap. In such cases, the Tribunal should award compensation under the discrimination legislation: **D'Souza v London Borough of Lambeth [1997] IRLR 677**.
8. Guidance on the appropriate level of awards for injury to feelings is given in the cases of **1) Armitage 2) Marsden and 3) HM Prison Service v Johnson [1997] IRLR 162** and **Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318**. When assessing injury to feelings awards Tribunals should bear in mind that:
 - 1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
 - 2) Awards should not be too low as this would diminish respect for the policy of the 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.

- 3) Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than any particular type of award.
 - 4) In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
 - 5) Tribunals should bear in mind the need for public respect for the level of awards made.
9. Guidance on the range of awards for injury to feelings is given in **Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318**. **Vento** identifies three bands of injury to feelings awards, these being:
- 1) The top band is for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of a protected characteristic.
 - 2) The middle band should be used for serious cases, which do not merit an award in the highest band.
 - 3) Awards in the lower band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.
10. The ranges of the bands are amended each year by Practice Directions issued by the Presidents for the Employment Tribunals of England and Wales and Scotland. The amendments reflect the effect of inflation and apply from 06 April each year. For claims commencing on or after 06 April 2022 the bands are:
- 1) Lower band: £990 - £9900;
 - 2) Middle band: £9900 - £29,600;
 - 3) Upper band: £29,600 - £49,300.
11. Special damages, that is, the award for financial loss, falls into two categories, these being firstly loss to the date of the hearing and future loss, if there is financial loss after the remedy hearing. The latter category involves an element of speculation.
12. In relation to financial loss the Claimant is under a duty to mitigate his loss. The burden of proof is on the Respondent to show that the Claimant has failed in that duty. The question is not whether the Claimant has acted reasonably but whether he has taken reasonable steps to mitigate. It is not enough for a Respondent to show that there are reasonable steps which the Claimant has not taken; the Respondent must show that it was unreasonable for the Claimant not to have taken them. See **Wilding v British Telecommunications Plc [2002] ICR 1079**.

13. The principles relevant to mitigation were summarized and set out in **Cooper Contracting Limited v Lindsey UKEAT/0184/15** and can be stated as follows:

- 1) The burden of proof is on the employer.
- 2) The burden of proof is not neutral. If no evidence is offered the employment tribunal does not have to find a failure to mitigate.
- 3) What has to be proved is that the Claimant acted unreasonably.
- 4) There is a difference between acting reasonably and not acting unreasonably.
- 5) What is reasonable and unreasonable is a question of fact.
- 6) The views and wishes of the claimant is one factor to be taken into account, but it is the tribunal's assessment of reasonableness that counts, not the claimant's.
- 7) The tribunal should not apply too exacting a standard on the claimant: he or she is the victim.
- 8) It may have been reasonable for the claimant to have taken a better paid job, that is important evidence but is not in itself sufficient.

14. If the Claimant is successful in a claim for unfair dismissal they are entitled to a basic award, calculated in accordance with ss.119 - 122 Employment Rights Act 1996. In this case the compensatory award for unfair dismissal will be covered by the award for financial loss in respect of the discrimination claim.

15. Tribunals have the power to uplift or reduce any award by up to 25% where there has been an unreasonable failure by a party to comply with the ACAS Code of Practice on Discipline and Grievances. See s.207A Trade Union and Labour Relations (Consolidation) Act 1992.

16. In **Slade and anor v Biggs and ors [2022] IRLR 216** the EAT set out a four stage test to assist in assessing the appropriate uplift under s.207A:

- 1) Is the case such as it makes it just and equitable to award any ACAS uplift?
- 2) If so, what does the tribunal consider a just and equitable percentage, not exceeding, although possibly equalling, 25%?
- 3) 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?

- 4) 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? If so, what further adjustment needs to be made?

Findings of Fact

17. Mr Pursey’s gross weekly pay with the Respondent was £562 per week and he earned £472.33 per week net. The period of loss begins on 03 January 2023 and the remedy hearing took place on 22 August 2024.
18. The Respondent paid pension contributions at the rate of 4.5% of gross earnings, amounting to £28.10 per week.
19. The Claimant said that he was still not back in full time employment at the date of the hearing. His evidence was that he had worked on a self-employed basis as a doorman and carrying out maintenance and cleaning work since his dismissal. His evidence on his level of earnings was not always particularly clear but he thought that he had made profits in the tax year up to 06 April 2023 of £779 and that in the last tax year had earned £5500 before tax and expenses.
20. The Claimant said that he was claiming loss of earnings for a year after the remedy hearing on the basis that it would take him this long to get back into full time work. He said that the way he had been treated by the Respondent had worsened his mental health and that this had made it difficult for him to return to employment.
21. The Respondent alleged that the Claimant had failed to mitigate his loss. It produced some evidence that roles with roughly commensurate earnings to his role with the Respondent were available within reasonable travelling distance. Various roles were identified, including barista work, work as a farm hand, work as a prison officer and work as a laundry operative. The Claimant had not been employed in these types of role before.
22. The Respondent also put forward evidence that there were roles available within reasonable travelling distance as an operative in factories carrying out similar duties to the ones the Claimant had been performing in his role with the Respondent. The Claimant said in his evidence that he felt unable to apply for local jobs of this type due to his mental health difficulties and the circumstances in which he resigned from the Respondent, which would give new employers a false impression of him.
23. We generally found the Claimant to be a credible witness and we accepted his evidence as to his level of earnings in self-employment and his reasons for not applying for operative roles in other local factories.

Conclusions

24. It was agreed that the Claimant was entitled to a basic award of £7587. The Tribunal also decided to award the sum of £500 for loss of statutory rights. The remaining awards were made in respect of the successful

claim for discrimination.

25. We concluded that it was not appropriate for us to determine that there was the possibility that the Claimant's employment would have terminated fairly and/or for a non discriminatory reason earlier than the end of the period of financial loss that he was claiming. We don't conclude that there was the possibility of a fair and non-discriminatory dismissal if the disciplinary proceedings which led to his suspension had been concluded. We note that the Claimant was signed of fit to return to work when he was suspended and don't consider that there is sufficient evidence before us to indicate that it was likely that his employment would have terminated fairly and/or for a non discriminatory reason as a result of any subsequent sickness absence.
26. When we gave our judgment on liability, we stated that we found that the Claimant was not involved in the matters which led to his suspension. On that basis, and also on the basis that it appears to us that it is only in very unusual circumstances that there could be finding of contributory fault where a dismissal has been found to be discriminatory, we did not find that the award or any part of it should be reduced to reflect contributory conduct.
27. In relation to mitigation, we consider that when dealing with a statutory tort such as discrimination the Respondent has to take the Claimant as it finds him. The Claimant was clearly a person with mental vulnerabilities and has difficulty dealing with stressful situations. We find that for much of the time he could tolerate working at the Respondent, notwithstanding the difficulties he experienced there, because it was a familiar environment where he had worked for a long time. However, we accept that he found it difficult to apply for roles in other local factories where there may have been a similar environment to the one he worked in at the Respondent. We also don't consider that the Respondent has shown that it was unreasonable for him not to apply for roles such as a barista or a farm hand or a prison officer or a laundry operative when he had no experience of the work involved and there is no evidence put before us that he would have been suitable for the type of work involved.
28. On that basis we find that it was reasonable for the Claimant to decide to work on a self-employed basis and not to apply for operative roles at other local employers.
29. As such we award loss of earnings up to the date of the hearing, less any monies received by the Claimant from self-employment. This is the £779 profit in the tax year up to April 2023 and the £5500 earned thereafter. He could not have paid tax on this sum as it is below the threshold for taxable income. The Claimant was unable to provide any information on what his expenses were so we are not able to take these into account.
30. We also decided to award six months' future loss. We concluded that by this point it was likely that the Claimant would be able to put the events at the Respondent behind him and take steps to obtain better remunerated work or increase his earnings in self-employment. The Tribunal's finding

that he was not involved in the matters which led to his suspension means that he should no longer be at risk of a new employer gaining a false impression of his character.

31. Therefore the period of loss is 03.01.2023 to 22.02.2025. That is 111 weeks and 4 days. The total is £52,806.47 net and £62831.60 gross.
32. We award pension loss for the same period. This comes to £3141.58.
33. The total sum in respect of loss of salary and pension loss, plus the £500 awarded for loss of statutory rights in the unfair dismissal claim, is therefore £66,473.18.
34. We deduct from this the sums received by the Claimant by way of mitigation. For the tax year from April 2024 we have based these on the figure for the previous year and deduct £5000 from the period of loss from 06 April 2024 until 22 February 2025. Therefore, the total deductions to reflect sums received as mitigation amounts to £11,279. Therefore, the total award for financial loss amounts to £55,194.18.
35. In relation to the injury to feelings award, we note that the Claimant was constructively dismissed from employment which he had held for a number of years. We accept that the allegations which formed the basis of the disciplinary case against him were reached after an investigation which we have found was not reasonably conducted because of the Claimant's disability related absence. We find that the Claimant was aware that there had not been a proper investigation. We accept that the Claimant found the situation extremely distressing and we accept that his existing mental health problems were exacerbated by the decision to suspend him and his decision to leave his employment, which we have found amounted to a constructive dismissal.
36. The Claimant was seeking an award for injury to feelings in the upper Vento band. Having regard to the principles which provide guidance on the appropriate level of award for injury to feelings and in particular the need to have in mind the value of the award in every day terms we consider that an award in the middle Vento band is appropriate and award the figure of £20,000.
37. We considered whether it was appropriate to award an uplift to the award under s.207A. We find that the ACAS Code applied to the disciplinary proceedings against the Claimant and that para 5 of the Code was breached. There was no investigation before the Claimant was suspended and asked to attend a disciplinary hearing. The breach was egregious. Applying the guidance in **Slade v Biggs** we consider that the appropriate uplift to the award is 15%. We don't consider that there was an unreasonable breach on the part of the Respondent in relation to the Claimant's grievance and as such decline to make an uplift in respect of this.
38. The effect of the uplift in the injury to feelings award is that it is increased by £3000.

39. The effect of the uplift on the award for financial loss is that it is increased by £8279.12.
40. Finally, the Tribunal awards interest in respect of the discrimination award. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provide that interest is payable on awards of compensation in cases of discrimination. The rate of interest payable stands at 8%. Interest should be calculated from the “day of calculation” which in a case of injury to feelings, is the period beginning on the date of the contravention or act of discrimination complained of, through to the date of calculation. In respect of other damages, interest is calculated from the mid-point, half way through the period in question, to the date of calculation.
41. In relation to the injury to feelings award the interest is calculated from 03 January 2023 to 22 August 2024 (595 days). £20,000 plus 15% uplift of £3000 is £23,000. £23,000 x 8% = £1840 per annum or £5.04 per day. 03 January 2023 to 03 January 2024 is one year, plus 231 days, making a total of £3004.49.
42. In relation to the award for financial loss the total award (less the £500 for loss of statutory rights) was £54,694.18 plus uplift of 15% amounting to £8204.12, making a total of £62,898.30. At the rate of 8% per annum interest amounts to £5031.86, or a daily rate of £13.78. The midpoint is 28 October 2023 making a total of 299 days. At a daily rate of £13.78 this amounts to £4120.22.
43. The total award is therefore as follows:
- 1) A basic award of **£7587**.
 - 2) A compensatory award for unfair dismissal (loss of statutory rights) of **£500**.
 - 3) An award for financial loss of **£55,194.18**.
 - 4) An award for injury to feelings of **£20,000**.
 - 5) An uplift of 15% to the awards for injury to feelings and financial loss to reflect the Respondent’s unreasonable failure to comply with the ACAS Code on Discipline and Grievances. This amounts to **£3000** in respect of the award for injury to feelings and **£8279.12** in respect of the award for financial loss. Total: **£11,279.12**.
 - 6) An award of interest in respect of the injury to feelings award of **£3004.49** and the award for financial loss of **£4120.22**. Total: **£7124.71**.
6. The total award is therefore **£101,685.01**

Employment Judge Gray-Jones
Date: 23 September 2024

JUDGMENT SENT TO THE PARTIES ON
07 October 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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