Case Number: 3200438/2015

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EMPLOYMENT TRIBUNALS

Claimant: **Mr I Burgin**

Respondent: **First Essex Buses Ltd**

Heard at: **East London Hearing Centre** **On: 25 October 2016**
21 December 2016
(in chambers)

Before: **Employment Judge Jones** **Members: Mr D Kendall**
Mr D Ross

Representation

Claimant: Ms E Banton (Counsel)

Respondent: Mr I Maccabe (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that the Claimant is entitled to the following remedy for his successful complaints of unfair dismissal and race discrimination:-

1	**Basic Award:**			**£5,104.00**
2	**Compensatory Award:**			
		£21,916.31		
	(uplift)	**£3,287.44**		
	(interest)	**£1,346.55**		**£26,550.30**
3	**Injury to feelings award of £20,000 + interest of £1,600 =**			**£21,600.00**
4	**The total award due to him is**			**£53,254.30**

REASONS

1 The liability Hearing in this matter took place between 9 February and 29 April 2016. In the judgment promulgated on 4 August 2016 the Claimant was successful in his complaint of race discrimination in relation to three points: 2.1, 8.22 and 8.24. The Claimant was also successful in his complaint of unfair dismissal.

2 The Tribunal had a bundle of documents prepared for the remedy hearing and we heard evidence from the Claimant. The Tribunal also had detailed submissions from both parties on the law, the Claimant's updated schedule of loss and the Respondent's counter-schedule of loss.

3 The Tribunal considered the following law in dealing with this matter.

Law

4 The Claimant sought the following remedy:

- a Basic Award
- loss of earnings
- future loss and incidentals such as childcare costs and pension losses
- loss of statutory rights, and
- an ACAS uplift
- loss of earnings
- compensation for injury to feelings
- aggravated damages, and
- interest

Unfair Dismissal - Remedy

5 In a successful unfair dismissal claim where it is agreed by all parties that neither reinstatement nor re-engagement would be an appropriate remedy for the Claimant, any award by the Tribunal will be monetary. A remedy award in an unfair dismissal case is made up of two main elements: a basic award and a compensatory award.

Basic award

6 This is set out in ***Section 119 of the Employment Rights Act (ERA)*** and is calculated using a formula that relates to the age and length of service of the successful claimant. It is calculated in units of a week's pay up to a ceiling. If the amount of a claimant's week's pay exceeded that ceiling then the amount of the award is restricted to it. The Tribunal can reduce the basic award in certain circumstances where it is expressly permitted by statute. None of which were submitted as being appropriate in this case.

Compensatory award

7 The parameters of the compensatory award are set out in ***Section 123 of the ERA***. It is intended to compensate the Claimant for losses arising out of the dismissal, so far as that loss is attributable to action taken by the Respondent. It is not to be used to punish the Respondent. Such losses as can be compensated would include not just wages lost due to being unfairly dismissed but also any additional benefits attached to the employment that had been lost. The compensatory award can take into account losses extending into the future. The Tribunal has to rely on its relevant findings of fact in order to determine how much and for how long it would be just and equitable to award to the Claimant compensation for such future losses.

8 In an unfair dismissal case the Claimant is under a duty to mitigate his loss. In this case the Claimant has found alternative employment. He did claim continuing losses as it was his case that he had suffered losses in relation to his pension and in having to travel further for work.

Discrimination – Remedy

9 Section 124 of the Equality Act 2010 refers. The remedies a Tribunal can award in a successful race discrimination complaint are as follows:

i) To give a declaration on the rights of the complainant and the Respondent regarding matters to which the complaint relates;

ii) An order for compensation to the complainant - which can include payments under the headings of injury to feelings, aggravated damages and for pain, suffering and loss of amenity (personal injury) and interest;

iii) Make an appropriate recommendation – of steps that the employer must take within specified period to obviate or reduce the effect on the complainant or any other person of any matter to which the proceedings relate.

10 In this case the Tribunal's judgment was that the Claimant had been discriminated against on the grounds of his race and that those acts had also contributed to the breakdown of trust and confidence leading to his dismissal. It was our judgment that the well founded allegations of race discrimination were also fundamental breaches of contract. Also the final straw for the Claimant was the Respondent's failure to address his appeals against his final written warning and against Mr Berry's decision on his grievances. That caused the Claimant's constructive dismissal.

11 The law in the case of *D'Souza v London Borough of Lambeth* [1997] IRLR 677 confirms that where a tribunal is faced with an unfair dismissal that is also an act of discrimination it should award compensation for loss on the principles applying to discrimination cases. In this case the Claimant did not claim that his dismissal was an act of discrimination but our findings and judgment are that discriminatory acts were part of the reasons why he lost trust and confidence in the Respondent and later

resigned. There were also other matters, such as the failure to arrange appeal and grievance meetings which were not discriminatory but which constituted the last straw which led to the Claimant feeling that he was being ignored and led to his resignation. In determining the compensation due to the Claimant in such circumstances we were guided by the case of *Chagger v Abbey National and Hopkins* [2009] EWCA Civ. 1202 in which the Court of Appeal confirmed that it was necessary in such a case to ask what would have occurred had there been no unlawful discrimination. If there was a chance that the dismissal would have occurred in any event even if there had been no discrimination, then that must be factored into the calculation of loss in the normal way.

12 Generally, in relation to monetary compensation, the Tribunal was aware that there is no upper limit on the amount of compensation that can be awarded in relation to a successful discrimination complaint. The complainant is to be put into the financial position they would have been but for the unlawful conduct of the employer. The Court of Appeal has given guidance on the assessment of compensation for injury to feelings (ITF). In the case of *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ. 1871 it set bands within which it held that most tribunals should be able to place their awards. Awards for injury to feelings of the most serious kind should normally lie between £15,000-£25,000; for less serious cases between £5,000-£15,000 and for one off acts of discrimination or otherwise, between £500-£5,000. Those figures were revisited and increased to reflect inflation in the case of *Da'Bell* to £6,000 for the lower band, £18,000 for the middle band and £30,000 for the upper band. In the later case of *AA Solicitors Ltd Trading v Majid* UKEAT/0217/15 (23 June 2016, unreported) the EAT stated that it was open to tribunals to take inflation into account without waiting for specific up-rating to be done by higher courts.

13 Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand as stated in *Harvey*, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct (*Essa v Laing* [2004] IRLR 313).

14 In making an award for ITF a tribunal needs to be aware of the leading cases as quoted above. Much will depend on the particular facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.

15 *Harvey* reminds us that awards under this head should not be minimal because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect while on the other hand, awards should be restrained as excessive awards could also do similar harm to the policy (*Alexander v Home Office* [1988] IRLR 190).

16 In respect of aggravated damages the law is the same in that the award must still be compensatory and not punitive in nature. In the case of *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291 Underhill P observed that aggravated damages are an aspect of injury to feelings and tribunals should have regard to the

total aware made to ensure that the overall sum is properly compensatory and not excessive. The EAT guidance is that tribunals should formulate any award of aggravated damages as a subhead of ITF. The Tribunal were aware of the case of *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162 in which it was held that aggravated damages may be awarded because of the lenient or favourable way in which an employer has treated the perpetrator of discrimination, for example promoting him before knowing the result of an inquiry into his conduct. In *HM Prison Service v Salmon* [2001] IRLR 425 aggravated damages were awarded and the EAT upheld it, in circumstances where the employer had treated a complaint about harassment in a trivial way.

17 A tribunal has the power to award interest on awards made in discrimination cases both in respect of pecuniary and non-pecuniary losses. We refer to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. We can consider it whether or not a party has asked us to do so although in this case both parties did refer to it in their submissions. The interest is calculated as simple interest which accrues daily. For past pecuniary losses interest is awarded from the half-way point between the date of the discriminatory act and the date of calculation. For non-pecuniary losses interest is calculated across the entire period from the act complained of to the date of calculation. The Tribunal retains discretion to make no award of interest if it deems that a serious injustice would be caused if it were to be awarded but in such a case it would need to set out its reasons for not doing so.

18 Ms Banton submitted that the Claimant should have an award of injury to feelings in the higher band of Vento. She submitted that the Claimant had suffered egregious acts of discrimination from the Respondent which had a serious effect on his health and his quality of life. It had also affected his family life. She referred to the case of *Simmons v Castle* which further updated the figures set in the case of *Vento*. She referred also to the way that the Claimant was treated as a part of his disciplinary matter in that he was treated more seriously than Mr Cross who had done something much more serious as his actions had resulted in a colleague being injured but that the Respondent had not seen it fit to investigate his acts whereas the Claimant was treated quite seriously for something that everyone agreed started off as a bit of horse play.

19 She submitted that the Claimant should be entitled to aggravated damages as the act of vandalism against his toolbox was treated with disregard. She referred to the case of *Armitage* as quoted above and that the Written Reasons for the liability judgment in this case had referred to one of the matters that concerned the Tribunal as the Respondent's failure to investigate how the vandalism occurred. This issue had not been dealt with properly. She stated that the way in which the damage to the toolbox matter was treated together with the failed investigation around the Brewster incident both give rise to a need for aggravated damages.

20 The Claimant submitted that there should be an uplift of 25% for the Respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). That Code provides practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. The Code advises employers on the steps to take to resolve disciplinary situations and grievances. It gives guidance on the

appropriate steps that both the employer and employee should take and expect from each other.

21 Under Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992, the Tribunal has the power to, if it considers it just and equitable in the circumstances, increase any award made to the Claimant by no more than 25% if it considers that the Respondent had failed to comply with a relevant Code of Practice. Section 124A of the Employment Rights Act 1996 also refers.

22 The Claimant submitted that there had been serious complaints of discrimination that had not been dealt with appropriately or properly investigated by Respondent.

23 Both the toolbox investigation issue and the Brewster incidents were not properly investigated and there was a complete failure by the Respondent to set up an appeal to discuss the Claimant's latest grievance and his grievance appeal.

24 The Claimant's case was that he felt he had been ignored by the Respondent after 10 years of service. It was submitted that the Tribunal should award the maximum ACAS uplift of 25%.

25 In response Mr Maccabe for the Respondent submitted that the uplift was for breach of the ACAS codes in relation to the grievance and disciplinary procedures. The Respondent submitted that although the judgment had been that it amounted to a breach of contract to enable the Claimant to make it a constructive dismissal, he contended that there had been no breach of the ACAS code as the Claimant had been given a grievance hearing. The Respondent failed to convene a grievance appeal hearing in time but that was a separate matter.

26 He conceded that the Tribunal had found that the grievance appeal and the disciplinary appeal had not been heard before the Claimant was dismissed and they both should have been.

27 As far as the dismissal in April 2014 is concerned, the Respondent submitted this was not relevant to today's matter as he had been properly dismissed and reinstated. That allegation has been held to be out of time and cannot now be included in any remedy awarded to the Claimant.

28 The Respondent submitted that the Claimant's grievance had been dealt with by the Respondent and had been rejected. That could not be said to be ignoring it and therefore it will not be appropriate to award him 25% uplift under the ACAS procedures. He submitted that if there had to be an ACAS uplift, it would be more appropriate for it to be in the region of 10%.

29 Mr Maccabe submitted that the Claimant had pursued a grievance in relation to the way the damage to the toolbox had been handled. He submitted that it had been addressed by the Respondent and resolved in his favour and so he should not be awarded remedy for it.

30 In relation to injury to feelings, Mr Maccabe submitted that the Tribunal should assess this as a middle band of *Vento* case.

31 He referred to the Claimant's assessment of his case when he issued his ET1 when he was at that time pursuing 23 allegations over a two year period as being worth £15,000. Ms Banton had submitted that the Claimant had drafted his ET1 without legal assistance and therefore should not be held to that estimate.

32 Mr Maccabe submitted that the Claimant had drafted his ET1 after consulting Stewart Law Solicitors but that also, in this exercise the Tribunal is assessing his injury to feelings and therefore it is important that the Tribunal take note of his assessments of how his feelings were hurt by what had happened.

33 He also submitted that the Claimant had not been subjected to a racial motivated campaign and therefore aggravated damages were not appropriate. Mr Maccabe pointed out that there needed to be exceptional or contumelious conduct to warrant an award of aggravated damages.

34 After hearing evidence the Tribunal adjourned so that the parties could discuss the details of the Claimant's compensatory award and the additional benefits claimed as there details that needed to be confirmed. In the interim the Tribunal discussed the injury to feelings award. During that discussion, the parties were able to agree some elements of the Claimant's compensatory award. It was agreed that the Claimant was not entitled to losses for the first dismissal period – between 25 March 2015 and 27 April 2014 – set out as Part A in his Schedule of Loss - as the Claimant was reinstated and all payments were brought up to date at that time.

35 The Tribunal was aware and both parties made submissions on the award of interest on the final award made to the Claimant. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 confirms that a tribunal can include interest in sums awarded in successful discrimination cases and shall consider whether to do so without the need for any application by a party in the proceedings. The rate of interest currently prescribed to all awards is 8%. In relation to awards which are arrears of remuneration, interest is calculated for the period beginning on the mid-point date and ending on the day of calculation which is the date of the remedy hearing. In relation to a sum awarded to reflect injury to feelings, interest shall be calculated for the period beginning on the day of the contravention or act of discrimination complained of and ending on the day of calculation. The tribunal's written reasons should set out how the interest is calculated and if the decision is not to award interest, then the decision should include reasons for that decision.

36 After discussion between the parties and the Tribunal, we agreed further amendments to the Claimant's schedule of loss.

37 The Tribunal apologises to the parties for the delay in the promulgation of this remedy judgment. The delay was caused, initially in finding a time after the remedy hearing for the Tribunal to meet in chambers to decide on the remedy; because of the complex nature of the calculations required and also because of the pressure of work on the Judge and her ill-health. This judgment and reasons are the unanimous judgment of the Tribunal in this case.

Decision on Injury to Feelings (ITF)

38 It is our judgment that the Claimant was entitled to injury to feelings in relation to the three successful complaints. In our judgment, it was not appropriate to hold the Claimant to the initial assessment he made of an injury to feelings award in his ET1 when he was not professionally represented and he had not yet heard the evidence or had disclosure. It was noted in the minutes of the preliminary hearing dated 17 July 2015 conducted by EJ Foxwell that the Claimant had received limited legal advice from the solicitor in that he had a half hour session. The solicitor did not complete the ET1 form for him and he only put the firm's name on the ET1 as someone who had given him advice. We therefore relied instead on our assessment of the Claimant in the liability and remedy hearings and we judged his injury to his feelings from the way he presented his case at the Hearing and the evidence before us.

39 Firstly, in relation to the Respondent's reaction to the vandalism of the toolbox. The Respondent's failure to react appropriately to the vandalism – in that it failed to institute an investigation into how the toolbox came to be vandalised and then took five months to properly restore the box in contrast to the time taken to repair Mr Cross's damaged toolbox - were matters that caused the Claimant to have hurt feelings.

40 The toolbox was eventually restored but it took five months and many emails and meetings to achieve that outcome. The Claimant had to involve his union representative and raise a grievance before that result occurred.

41 The Claimant had been employed by the Respondent for 10 years before this matter occurred. All the engineers we heard from agreed that a toolbox is a precious possession to an engineer. Everyone would know how much this would have hurt him. His toolbox had a one-off design which featured Lewis Hamilton, the successful black British Formula 1 driver. It is likely that the Claimant was proud of owning this toolbox. It would have been apparent that his feelings were likely to have been hurt by the damage that was done to it on the Respondent's property yet it was not taken seriously. The Respondent failed to conduct any investigation into how the damage occurred on its premises. Also, the damage was not properly addressed for five months.

42 The second matter upon which we award injury to feelings is the effect of the statement that the Claimant had a Caribbean attitude to work. This statement in our judgment was made by one of the Respondent's senior managers. We had clear evidence of that in the Hearing. This was an issue that was considered in the Tribunal and it was 2.1 on the matters that Employment Judge Foxwell added to the list of issues at a preliminary hearing. There appeared to be no foundation for that comment. In our judgment, the only reason why this comment was made was because of the Claimant's race. Although the Claimant did not overhear the comment at the time, it was reported to him and it caused him hurt feelings especially as it had been said by a manager and because there was no basis for it.

43 Thirdly, the incident with Mr Brewster. In our judgment, the Claimant was treated differently in that he was suspended before anyone had investigated what happened. This was less favourable treatment in contrast to the way Mr Brewster was treated. Mr Brewster was sent home on the day because he was upset and thereafter

he was able to continue working. That meant that any subsequent investigation was likely to be tainted and their colleagues could assume that the Claimant had been in the wrong. At the end of the investigation, where witnesses confirmed that Mr Brewster had grabbed the Claimant, and Mr Wells confirmed that the Claimant had not intended any harm; the Claimant was still given a final written warning for gross misconduct.

44 In contrast, around the same time, the Luke Cross incident was not considered serious enough to warrant investigation. This was an incident where a white engineer was alleged to have brought an air rifle onto the premises and accidentally shot a colleague, causing actual injury. By contrast, no injury had been caused to Mr Brewster. Nothing happened to Luke Cross whereas the Claimant was given a final written warning. We found the way in which the Claimant was treated against that background, was an act of race discrimination which hurt his feelings.

45 In our judgment, the injury to feelings award we make addresses the three successful complaints in all their elements. The element that could be aggravating was the comment made by a manager that the Claimant demonstrated a Caribbean attitude to work. In our judgment, that is compensated in the award for injury to feelings.

46 It is also our judgment that the existence of a racially motivated campaign is an example of one of the factors that could make an award in the higher band of Vento appropriate but it is not the only factor that could warrant such an award. The Claimant's well founded complaints involved managers. Also, there were examples of white staff in the workplace such as Mr Brewster and Mr Cross who were treated more favourably than he was at the same time and so those managers would have been aware of the difference in treatment but that did not deter them. The Claimant did not have to rely on hypothetical comparators for any of his claims.

47 It is also our judgment that the stress and hurt feelings caused by the Respondent's treatment affected the Claimant's health. His unchallenged evidence was that he was prescribed sleeping tablets and that prior to these matters with the Respondent, the Claimant had hardly visited his GP.

48 In those circumstances and taking into account the awards made in other cases, it is our judgment that the Claimant should be awarded **£20,000** for injury to feelings.

49 We make no separate award for aggravated damages.

In relation to the Claimant's claim for an ACAS uplift

50 We consider that the appropriate level is 15%. The Respondent did consider the Claimant's first grievance but failed to arrange an appeal meeting to hear his appeal. The Claimant should have been given an appeal hearing.

51 The second grievance raised on 27 November was never actually addressed by the Respondent. Mr Adrian Jones read it and considered that the Claimant was simply rehashing matters already addressed at a forum. That was not true as this was the first time the Claimant had referred to discrimination. Mr Jones failed to pick up on his reading of the grievance that the Claimant was now alleging discrimination.

52 That was a grievance that was never addressed. The Respondent also did not set up a meeting to deal with the Claimant's appeals against the grievance and disciplinary hearings conducted by Mr Berry.

53 In those circumstances, it is our judgment that the Respondent did not comply with the guidance in the ACAS Code of Practice. The Claimant was denied access to the grievance process to have his grievance that his treatment had been racially motivated – heard and considered by the Respondent. Also, he did not have his appeal hearings. Even though he had initial hearings, the Code does advise employers to offer employees the opportunity to appeal if they are unhappy with the decision made at a grievance meeting. The same is true in relation to disciplinary appeals. The Claimant did not have a grievance meeting at all in relation to the second grievance. In those circumstances, it is appropriate to make an uplift of the award.

54 It is our judgment that the Claimant's awards should be uplifted by 15%.

Factors taken into account when calculating the Claimant's compensatory award:

55 The Claimant was born on 2 July 1971. At the date of his dismissal he was 43 years old. The Claimant worked for the Respondent from 19 July 2004 to 27 December 2014 giving him 10 years of continuous employment. While employed by the Respondent the Claimant's net weekly wage was £469.45 giving him a net annual wage of £24, 411.40.

56 Following his resignation from the Respondent the Claimant had two periods of employment. Initially, between 5 January 2015 and 2 February 2016 he was earning £332.76 net per week at Regal Bus Ways Ltd. The Claimant had to work 45 hours per week to earn that amount. That affected his childcare arrangements. When he worked for the Respondent he had been responsible for taking his son to school before work. Since leaving the Respondent the Claimant can no longer do this and his son has had to be enrolled into the breakfast club run at the school as well as an after school club. The Claimant pays £5 towards the after school club and £2 for the breakfast club.

57 Working at Regal Busways required the Claimant to travel a further distance to get to work than his travel to the Respondent. We had a lot of evidence about this at the remedy hearing. There was a pack of documents showing the distances that the Claimant had to travel from various addresses to his jobs at Regal and subsequently to Ensign who are his present employers. We find that he has had to travel more to go to both jobs. In relation to the increased travel costs the Respondent submitted that this was part of the cost of earning more in that sometimes an employee has to travel further in order to earn more.

58 The Claimant left Regal to join Ensign Bus Co Ltd. His second period of employment was with Ensign Bus Company from 22 February 2016. The Claimant was still working there by the time of the remedy Hearing. His hourly rate of pay at Ensign is £16 per hour whereas at Regal it was £10.50 per hour. At Ensign he earns £575.63 per week (it was agreed that he earns approximately £33,000) in contrast to the sum of £472.97 that he would have been earning had he remained with the

Respondent. He earns approximately £102.65 more per week. The Claimant was also in receipt of a life assurance and dental plan with the Respondent.

59 The Claimant is on a defined contribution pension scheme with his present employer. At the time of his dismissal the Claimant was paying 5.5% employee pension contributions of £33.20 and the Respondent was paying 8.25% contributions in the sum of £49.80 weekly. Had the Claimant remained with the Respondent he would also have gone into a defined contributions pension scheme as of April 2018. In that new scheme the employer's contribution would be 5%. At Regal the Claimant joined the pension Scheme in April 2015. He left it when he changed jobs in February 2016. The pension statement in the remedy bundle shows that the total contributions made into the scheme was £288.94, with the employer's contributions being a total of £144.47. The statement year ran from 1 August 2015 to 31 July 2016. Neither the Claimant nor Regal made contributions into the Scheme after he left in February 2016. That meant that between 1 August 2015 and 2 February 2016 the employer had contributed (£144.47/6 months) £24.07 per month which was also approximately £5.55 per week.

60 At his present employer, Ensign, they make a 4% contribution towards his pension therefore the Claimant's loss would be 1%. The statement on page 135 of the bundle states that they pay 25.60 per week (25.60 x 12 / 52 = £110.93 per month) as 4% of his salary towards his pension. Claimant submitted that he should be awarded pension losses for 20 years as he is unlikely to ever make up the difference between the two pensions as he is unlikely to change jobs before retirement.

61 The Respondent submitted that if the Claimant was to be paid 20 years worth of loss at once, there needed to be some reduction for accelerated receipt.

62 Mr Maccabe also submitted that the Court of Appeal had stated (although a case was not referred to) that pension is part of remuneration and because the Claimant has an increased pension from Ensign as oppose to Regal, he is better off and that is a material consideration to take into account when awarding compensation for losses.

63 As far as the calculations of the awards are concerned we make the following judgment:-

Basic award

a. The basic award was agreed between the parties and is as follows:

8 years at the rate of 1 week per year and 2 years at the rate of 1.5 weeks pay per year = 11 weeks multiply by a net weekly basic pay of £464.00 **= £5,104.00**

It was also agreed that he was entitled to a payment for loss of statutory rights in the sum of **£464.00**

Compensatory award

b. After the Claimant's dismissal on 24 December 2015 he began employment at Regal Busways on 5 January 2015. The Claimant therefore had one week between his dismissal from the Respondent and starting his new job at Regal. He is therefore owed a week's salary at the rate of **£469.45** as his loss for that week.

c. It was agreed that the salary received from Regal was £409.60. The Claimant worked at Regal for 13 months or 58 weeks. The Claimant's losses therefore for that period of employment are as follows:

> Salary 58 weeks at £469.45 (that he would have earned from the Respondent) £27,228 less salary received from Regal 58 weeks multiply by £409.60 = £23,756.08. The Claimant has therefore lost **£3,471.30** for that period of time.

d. The Claimant left Regal on 2 February 2016 and did not start working for Ensign, his current employer, until 22 February 2016. There was therefore a loss of wages for three weeks. That is 469.45 x 3 = **£1,408.35.**

e. The Claimant is paid £575.63 per week at Ensign. The Claimant would have earned had he remained at the Respondent £472.97 per week as there was an increase in wages for that period of time. There is however no loss of wages after the Claimant starts at Ensign because he earns more per week than he would have earned had he remained at the Respondent.

64 However, the Tribunal finds that there were other losses that the Claimant suffered following his dismissal and those are continuing. That mainly relates to the pension losses and the additional travel that the Claimant has to undertake in order to work. He also has additional childcare expenses which were evidenced in the bundle before us at the hearing. Dealing with those separately.

Pension losses

65 Had the Claimant remained with the Respondent, he would have been receiving a contribution towards his pension. As already stated, the Claimant would have been in a defined benefits pension scheme had he remained with the Respondent as their pension arrangements have also changed. From the date of dismissal on 27 December 2014 to the start of his pension with Regal (1 April 2015) the pension loss was £49.80 x 13 weeks **= £647.40.**

66 While at Regal, (13 months or 62 weeks) the pension loss was as follows: Respondent would have paid £49.80 x 62 = £3087.60. Regal paid £24.07 per month x 13 = £312.91. The loss for that period was **£2,774.69**.

67 The Claimant left Regal because he secured a better paid job. He began his new job at Ensign Bus Company on 22 February 2016. However, page 135 of the remedy bundle says that he was not enrolled into the company pension scheme until 14 May 2016. There is a loss of contributions between 2 February when he left Regal and the start of contributions from Ensign at the beginning of June. The statement confirms that the first payment will be made in June 2016. That loss is £49.80 x 17 weeks = **£846.60.**

68 Between the dates the Claimant started to receive pension contributions from Ensign to the date that the Respondent's pension reduces to 5% is from June 2016 to April 2018. That is approximately 96 weeks. For that period the Claimant will receive from Ensign, pension contributions of £25.60 per week x 96 = £2457.60. From the Respondent he would have received £49.80 x 96 = £4780.80. The loss will be **£2,323.20**.

69 Thereafter, the Claimant's loss of pension is 1% as Ensign makes a contribution of 4% and the Respondent's contributions would have reduced to 5%. The parties agreed that the difference would be £19.53 per week. £19.53 x 52 x 20 = £20,311.20. However, it is out judgment that as the Claimant is better paid at Ensign he has the option of making additional contributions to his pension to make up the continuing loss of £20.00 that he would continue to incur. We do not award any further pension losses beyond April 2018**.**

Travel and Childcare costs

70 The Claimant claimed the difference between the travel expenses he paid when working at the Respondent as against the costs of driving to Basildon and then to Regal and later to Ensign. When he worked for the Respondent, it was quite near to home and because his partner also worked for the Respondent, they would travel into work together or would split the cost of that travel. The Claimant's travel costs are about £40 per week.

71 It was not the Tribunal's judgment that the act of sending the Claimant to Basildon was an act of discrimination or breach of contract leading him to resign. It was never alleged that this was an unlawful act so there is no award made to him in this remedy as compensation for him having to go to Hadley. It was our judgment that he had to go to Basildon but even though it was not his choice it was also not part of the Claimant's case that this was an act of race discrimination.

72 The Tribunal is therefore not going to award the additional mileage from his home to Basildon for eight months as set out at g(ii) of his revised schedule of loss.

73 The Tribunal is going to award the Claimant his additional mileage in relation to his jobs at Regal and at Ensign as compared to travelling to Hadleigh. Those are set out at subparagraphs (iii) – (vi) in the final version of the schedule of loss. The Respondent queried the amounts claimed. However the Claimant produced the AA printouts with mileage information as part of his evidence. We award the Claimant (£2106.00 + £1767.15 + £1143.45 + £3827.25) = **£8,843.85** to reflect the extra expenses incurred in travelling to the new jobs following his dismissal from the Respondent. That represents the additional expense from 5 January 2015 to the date of the remedy hearing on 25 October 2016.

74 The Tribunal is also going to award the Claimant the additional childcare costs incurred to the date of the remedy hearing of **£445.00.**

75 Future loss. There is no continuing loss of salary as the Claimant is in a better paid job. He earns £575.63 per month at Ensign and would have earned £472.97 had he remained at the Respondent once the annual increase is applied. He is £102.66 per week better off. It is our judgment that the Claimant will be able to make additional payments into his pension to make up for the 1% lost from not being in the Respondent's scheme from 2019. We are going to award the Claimant 52 weeks worth of additional childcare costs of **£222.50**.

76 It is our judgment that the acts of discrimination were also breaches of contract. The last straw matters were not judged to be acts of race discrimination. The Claimant resigned when the Respondent failed to set up meetings to consider the grievance in which he alleged discrimination as well as the grievance and disciplinary appeal hearings. But for the acts of discrimination it is our judgment that the Claimant would not have been in the position to consider those to form the final straw. It is unlikely that the Claimant would have resigned simply for not having an appeal or grievance hearing scheduled. It is also unlikely that the Claimant would have lost all trust and confidence in the Respondent without the incidents which we have judged were acts of less favourable treatment on the grounds of race.

77 It is this Tribunal's judgment that for those reasons the statutory cap would not apply to the Claimant's compensatory award as they are made as part of his compensation for discrimination.

78 The total award due to the Claimant is therefore as follows:

79 Injury to feelings of £20,000. Basic Award of £5,104.00.

80 Compensatory Award: from the figures quoted above are: loss of wages, pension contributions, increased travel and childcare costs - £464.00 + £469.45 + £3,471.30 + £1,408.35 + £647.40 + £2,774.69 + £846.60 + £2,323.20 + £8,843.85 + £445.00 + £222.50 = £21,916.31.

81 The 15% increase to be applied under section 124A Employment Rights Act 1996 for the Respondent's failure to comply with the ACAS Code of Practice has to be applied here. £21,916.31 x 15% = £3,287.44 + 21,916.31 = **£25,203.75.**

82 In accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 we increase the award by 8%. In accordance with Regulation 6, we start to calculate interest from the mid-point date between the dates of discrimination and the date of the remedy hearing. In this case that is mid-point between April 2014 which was the period when the Respondent failed to investigate or treat seriously the vandalism to the toolbox and the remedy hearing in October 2016. That is 30 months. The mid-point is July 2015. We do not award interest on the future losses i.e. the pension losses between October 2016 and 2018 and the increased travel and childcare costs from 2016 to 2018. We are therefore awarding interest on losses accumulated between July 2015 and October 2016.

83 In our judgment, interest is to be added to the loss of wages that the Claimant had from his employment at Regal, pension losses incurred in that period of time and the increased childcare costs and petrol. As the Claimant started at Ensign in February 2016 there is no continuing loss of wages for that period.

84 We calculate the interest due to the Claimant by first of all working out the figures upon which interest will be added: £3,471.30/2 = £1,735.65 (half of loss of wages at Regal) + £1,408.35 (loss of wages between Regal and Ensign) = £3,144.00.

85 Pension loss at Regal from July 2015 = £49.80 x 46 = £2,290.80 + £846.60 (loss between Regal and Ensign) + £2,774.69 (pension loss at Regal) + £846.60 (loss between Regal and Ensign). From June to October 2016 the loss is 26 weeks. £25.60 x 26 = £665.60 (he received). £49.80 x 26 (he lost from the Respondent) = £1,294.80. £1,294.80 less £665.60 = £629.20. The total loss for the relevant period is £629.20.

86 The amount to calculate interest on is: £3,144.00 + £2,290.80 + £846.60 + £2,774.69 + £846.60 + £629.20 + £300 (approximate childcare costs for the period July 2015 to October 2016) + £6,000 (increased travel costs for the same period) = £16,831.89.

87 The Claimant is entitled to an interest payment calculated at 8% on the total of £16,831.89 = £1,346.55.

88 The Claimant is also entitled to interest on the remedy for injury to feelings. £20,000 x 8% = £1,600.00. The total interest payment is £1,600 + £1,346.55 = **£2,946.55**

89 Grossing up. Payments to the Claimant must be grossed up so that after paying tax on any amounts paid to him, the Claimant is in receipt of the total award made by the Tribunal which would ensure that he is put in the position that he would have been in had these acts not occurred. The payments have to be 'grossed up' so that the Claimant is not in a worse position by having to pay tax on net sums thereby paying tax twice on his award.

90 Payments for injury to feelings related to the Respondent's conduct during the Claimant's employment are not termination payments, even though it is paid on termination, and is therefore not taxable or subject to grossing up. This means that the payment for injury to feelings related to the three successful discrimination complaints will not be subject to tax.

91 This follows the law as set out in the case of *Moorthy v Revenue and Customs Commissioners* [2016] UKUT 13 (TCC) in which it was held that payments for injury to feelings were not exempted from income tax under s406(b) of the Income Tax (Earnings and Pensions) Act 2003. Although the section takes payments made in respect of injury to an employee outside the charge to tax, 'injury' in this context does not include injury to feelings. As both parties agreed, the principle stated in this case overruled the decisions in the cases of *Orthet Ltd v Vince-Cain* [2005] ICR 374 and *Timothy James Consulting Ltd v Wilson* [2015] ICR 764.

92 In *Yorkshire Housing v Cuerden* UKEAT/0397/09 the EAT stated that an award of compensation for loss of pension rights on termination of employment is not a payment to a beneficiary out of a pension scheme falling under section 407 ITEPA 2003 and therefore should not be grossed up.

93 The total amount due to the Claimant that will be subject to tax is as follows: Basic Award: £5,104.00 + Compensatory Award of (loss of statutory rights) £464.00 + £469.45 + £3,471.30 + £1,408.35 + £8,843.85 + £445.00 + £222.50 + (interest) £2,946.55 + (ACAS uplift) £3,357.05 = £26,732.05.

94 *Cuerden* also advised the Tribunal when grossing up to take account of the employee's personal allowance and the standard rate for the year the employee receives the compensation award, which would mean for example, that an assessment of 40% on the whole award would not be correct.

95 Applying those principles to this case means that we would not gross up the payment for injury to feelings or for the loss of pension contributions. That leaves a balance of £26,732.05. As this is less than the £30,000 which represents the exemption under Section 403 of the ITEPA it is not necessary to gross up the Claimant's award.

96 The Claimant is entitled to the following:

97 Basic Award of **£5,104.00**

98 Compensatory Award of £21,916.31 + uplift of £3,287.44 + interest of £1,346.55. = **£26,550.30**

99 Injury to feelings award of £20,000 + interest of £1,600 = **£21,600**

100 The total award due to him is **£53,254.30.**

……
Employment Judge Jones

21 March 2017