**RM**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Dogra

**Respondent:** Acetrip Limited

**Heard at:** East London Hearing Centre

**On:** 11 May 2018

**Before:** Employment Judge G Tobin

**Members:** Mr G Tomey<br>Mr J Quinlan

**Representation**

**Claimant:** Mr O Lawrence (Counsel – FRU)<br>**Respondent:** Mr A Famutimi (Lay representative)

# RESERVED JUDGMENT

**The respondent is ordered to pay the claimant compensation in the sum of £124,658.82 for unfairly dismissing the claimant for making a protected disclosure and for asserting his statutory rights, in breach of s103A and s104 Employment Rights Act 1996 (respectively).**

# REASONS

## Background

1. Following the previous Judgment, the claimant succeeded in his complaints of: dismissal for making a protected disclosure – in breach of s104 Employment Rights Act 1996 ("ERA") – and asserting a statutory right – in breach of s104 ERA. The claimant also succeeded in his claims for unauthorised deductions from his wages – in breach of s13 ERA. Judgment was given in our previous determination for the latter claims as these were readily quantifiable.

## Preliminary application

2. On behalf of the respondent, Mr Famutini renewed his application for an adjournment on the basis that Mr Kumar would like to give evidence in person but that he was prevented from returning to the UK from India because of his wife's illness. This application was contested by the claimant and the respondent withdrew the application before we made a determination.

## Evidence

3. As preparation for this hearing, we (i.e. the tribunal) re-read the witness statements and certain documents from the original hearing bundle.

4. At the commencement of the hearing, the parties helpfully provided a schedule of loss and a counter-schedule of loss. The claimant provided a further witness statement, dated 14 December 2017. Mr Raj Kumar provided an addendum to his witness statement, with which was signed and dated 10 May 2018. Mr Kumar's statement exhibited three documents. The parties proffered additional documents, which we inserted into our hearing bundle as pages 348 to 450. We retired to read both of the remedy statements, together with the additional remedy documents, before hearing "live" evidence.

5. The claimant gave evidence, during which he confirmed his statement. He was cross-examined by Mr Famutini. We asked a number of questions to clarify matters and Mr Lawrence asked some supplemental questions.

## Our findings and determination

6. At the outset of the hearing the claimant made it clear that he did not wish to pursue possible reinstatement or re-engagement with the respondent (under s114 & s115 ERA respectively). Given the circumstances of this claim and our previous findings of fact, it would have been unusual – and probably inconsistent – if the claimant requested his job back. So, we confined our consideration to compensation. We award as follows.

7. For the purposes of our determination, the parties had not presented figures, or the calculations, in respect of "grossing-up" of any possible award to take into account any tax or national insurance liability. Therefore, as with our previous determination respect of unlawful deduction of wages, we decided to award figures based on the gross amount to save any further application to gross-up our award.

8. We accept the claimant's "key figures" in his schedule of loss because this is consistent with our calculations on pay in our previous determination. We note that the claimant commenced work with the respondent on 10 August 2015. His effective date of termination was 20 February 2016.

<u>Damages for wrongful dismissal and compensation for the claimant's notice period</u>

9. Following *Stewart Peters Ltd v Bell 2009 ICR 1556 CA* a tribunal calculating compensation for unfair dismissal should take full account of any sums earned during the notice period and set these off against the sums in respect of notice pay to which the claimant is entitled. As determined previously, the claimant did not agree a contract

of employment, so he is entitled to the statutory notice equivalent, pursuant to s86 ERA. The claimant was employed for more than one month but less than two-years' service, so he was entitled to a minimum notice period of one week. Accordingly, we award **£442.31 (gross)** under this head of compensation.

Unfair dismissal basic award

10. The basic award is intended to compensate an employee for the loss of their employment. This award is normally calculated in the same way as a redundancy payment. However, the claimant is not entitled to a basic award under s118(1)(a) ERA as he did not achieve the qualifying two-years' service.

Compensatory award under ERA

11. S118(1)(b) provides that the claimant is entitled to a compensatory award for the financial loss he suffered as a result of his unfair dismissal. This award is subject to a limit or cap under s124 ERA, which is not applicable where the claimant made a protected disclosure (under s103A ERA) pursuant to s124(1A) ERA. Notwithstanding the fact that we determined the claimant had been automatically unfairly dismissed for making a protected disclosure and also for asserting a statutory right, the claimant is not entitled to double recovery.

12. The compensatory award is intended to reflect the actual loss that the claimant suffered as a consequence of being unfairly dismissed. So far as the claimant's unfair dismissal is concerned we should award "such amounts as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer": s123(1) ERA.

13. We remind ourselves that the compensatory award is limited to making good the employee's financial loss. We should not bring into our calculation any consideration of what might be "just" in order to reflect any disapproval of the employer's behaviour. Nor should the award reflect any feelings of sympathy for the claimant or our view of what a fair severance payment would be: *Lifeguard Assurance Ltd v Zandrozny & Another 1977 IRLR 56 EAT*. The purpose of the compensatory award is confined to compensating financial loss and is not in any sense to be used to penalise the employer: see *Morgans v Alpha Plus Security Ltd 2005 IRLR 234 EAT*.

14. The claimant was under a duty to mitigate his losses. Compensation may be decreased if the claimant had reduced, or could reasonably have been expected to reduce, his financial losses. It is for the respondent to demonstrate that the claimant had failed to mitigate his loss and adduce appropriate evidence in respect of this purported failure: *Ministry of Defence v Hunt & Others 1996 ICR 554*. A key question for us to ask is whether the claimant had taken reasonable steps to mitigate his loss.

Loss of earnings until the hearing and future loss of earnings

15. The claimant explained in evidence (which we accept) that it was his intention to work only for the respondent in the UK, indeed, that was a limitation on his Tier 2 Visa. The claimant explained that it was his intention to stay in the UK for five years (with the respondent) and then return to India to further his career.

16. The claimant said in evidence that, following the incident of 31 December 2015, he had been ill and diagnosed with depression from his GP prior to be referred for cognitive behavioural therapy ("CBT"). Although we did not have a medical report. We did have sick notes from the claimant's GP, which were consistent and confirmed that the claimant's contentions that he was too ill to attend work in early 2016. The claimant was dismissed whilst he was on sick leave, his effective date of termination being 20 December 2016 (which we previously determined). The claimant did not submit further sicknotes following his dismissal because, he said, he knew that he was no longer employed by the respondent from that point. We accept the claimant evidence about the onset of his depressive illness and the fact that his depression continued following his dismissal. We reject the respondent's contention that an absence of sicknotes following dismissal means that the claimant was no longer suffering from depression and available to look for work. We previously found that Mr Kumar and Mr Kapur exploited a vulnerable migrant worker, extorting around half of his wages and compelled him to work long hours. This treatment made the claimant ill. The claimant's evidence of his ill-health is consistent with this exploitation and we have previously determined that he was a truthful witness. Nothing in his evidence at the remedy hearing undermined his integrity.

17. Furthermore, we saw correspondence which confirmed the claimant's depression from Dr Helena Belgrave, Counselling Psychologist at the East London NHS Foundation Trust, who referred him for CBT for 12 sessions from February 2016. The claimant said that these sessions lasted until the end of April 2016 and that thereafter he participated in group therapy at his GP surgery. The claimant said that he was depressed and continued with therapy until October or November 2016. However, such was his illness, that he was only able to look for alternative work from the end of May to early June 2016 at the earliest. However, the day after his dismissal (i.e. 21 February 2016) the respondent wrote to the Home Office informing the immigration authorities that the claimant's employment had been terminated. This implemented Mr Kumar's threat to remove the claimant's ability to earn a living in the UK by orchestrating the cancellation of his Tier 2 Visa. The Home Office wrote to the claimant on 16 May 2016 advising him that a decision had been made to curtail his Leave to Remain in the UK (in this instance pursuant to his Tier 2 Visa) and that he was required to either leave the UK or submit a fresh application for Leave to Remain by 18 July 2016.

18. According to the Home Office decision then the claimant had up to around 8 weeks to find a sponsor before he had to leave the UK..

19. The claimant said in his witness statement:

> I would have liked to earn a living here since my dismissal but my immigration status has prevented me from doing so. I have been taken advice from my immigration solicitor… I have no right to work for anyone else unless I am granted another Visa permitted me to do so.
>
> There are four main reasons why I have not sought a sponsor for another Tier 2 Visa:
>
> a. It would have cost around £4500 to get another Tear 2 Visa and neither I nor my father could afford that fee. Mr Kumar's extortion had left me with little or no money and my entire savings have been spent on my previous Visa application and the £5,800 "travel agent training" fee that Acetrip had required me to pay before working here.
>
> b. My Tier 2 Visa had been cancelled on the request of my former employer for reasons such as incompetence and aggressive behaviour. These were lies, of course, but no sponsor would have offered me a Tier 2 Visa sponsorship with such a reference.

c. The Home Office caps the number of Tier 2 Visas every year. This makes it extremely difficult to successfully apply for one, even with a willing sponsor.

d. My experience with Acetrip broke me mentally. I could not bring myself to consider applying for another Tier 2 sponsor during my consequent mental breakdown and depression. Even when I had recovered, I could not bear the thought of putting myself in the same position again.

It is also been my understanding that one cannot apply for a Tier 2 Visa from inside the UK unless you are extending an existing Tier 2 Visa, or switching to a Tier 2 Visa from another Visa. Given that my previous Tier 2 Visa had been terminated, applying for another Tier 2 was not possible while I was in the UK. I accept that it would have been possible for me to leave the country and apply for another Tier 2 Visa from outside the UK, but as stated above, I want to see these proceedings through and had no idea how long it would take.

20. We scrutinised this response carefully. In respect of point (a), we accept the claimant's evidence that the Visa application fees to extend or switch his Tier 2 Visa in the UK were either £677.02 or £1,267 with the documentary verification service. The documentary verification service would speed up the application process by 2 to 4 months. The claimant would also need to pay a compulsory healthcare surcharge of approximately £600 per annum to cover NHS treatment. The claimant described the application process as extremely complicated requiring the submission of various documentation. If any aspect of the application process was not correct or if the documents submitted was not correct, then the application would be rejected, and any applicant would need to start the application process over again. Consequently, the vast bulk of applications were made through solicitors as they have the appropriate expertise in the application process and, if anything went wrong, then the claimant said the solicitors should pick up the tab for any reapplication. Indeed, the claimant said that he did not understand the original Visa application process, which is why he instructed solicitors for his original application. We accepted this evidence, and the appellant's estimate of £4,500 that he needed to find to obtain another Tier 2 Visa (which would include fees, surcharge, solicitor's charges and vat).

21. As for point (b), Mr Famutimi contended that the respondent (presumably Mr Kumar) would have provided a positive reference for the claimant so the claimant should have been able to obtain another sponsor within the short window of late-May to mid-July 2016 (and thereafter). We accept that the Tier 2 sponsorship application was long and costly. If an employer is found to abuse the system, then there were significant fines [up to £20,000 for illegal workers]. So finding a new sponsor did not directly equate to finding a new employer. It would have been considerably more difficult.

22. The claimant said he could not rely upon a fair reference from Mr Kumar because he was responsible for his extortion and also he fabricated previous disciplinary warnings and the claimant's dismissal. We accept this contention. The respondent's position that the claimant could rely upon a positive reference was wholly untenable. The claimant said that he did not know anyone else who he could apply to as a new sponsor so, we accept, it would be essential in such circumstances that he had a positive reference or introduction and that could not be relied upon from Mr Kumar or anyone else respondent.

23. So far as point (c), if this was the only reason that the claimant relied upon then we would have approached this explanation with caution. However, given the claimant's predicament, this explanation adds weight to the more substantive points.

24. In respect point (d), the claimant explained that he was living on handouts from his father and barely surviving. He said that he could not ask friends to contribute and

his experience in coming to the UK and being exploited by Mr Kumar and Mr Kapur led to a breakdown in his marriage, so it is entirely understandable that the claimant initially wanted to avoid putting himself in the same position.

25. The claimant applied for Further Leave to Remain on 17 July 2016. It was a condition of his temporary immigration status that he was not permitted to work in the UK. The claimant's application for Further Leave to Remain was refused in August 2017 as the Home Office contended there were no exceptional circumstances to warrant the grant of such immigration status. The claimant appealed against this decision and his appeal is outstanding. It is a term of his on-going immigration status that he is not able to work in the UK. Once he had applied for Further Leave to Remain (in July 2016) he could not make an in-country application for a Tier 2 work Visa.

26. The claimant advised – and we accept – that it was a condition of his Further Leave to Remain that has not been permitted to work in the UK since 17 July 2016 (as he would need a work-related Visa). He accepted that he could apply for a further Tier 2 Visa but – as he is in the UK under a different immigration status (Further Leave to Remain) – he would need to leave the UK and apply out-of-country. The claimant said that the Home Office would take into account the circumstances of his original Visa and because, as a matter of fact, this was cancelled following his dismissal after working for a short period, he anticipated that, even if he were able to find a sponsor (which we accept is unlikely), the Home Office would be sceptical about his working intention. This is wholly the consequence of the respondent's actions in dismissing the claimant.

27. We accept Mr Lawrence contention that the claimant would have needed extraordinary fortitude to "get back into the saddle" and not only find other work but also find someone else willing and able to sponsor his immigration status in the short window available between his dismissal and the Home Office's curtailment of his immigration status.

28. Following, the claimant's immigration application of 17 July 2016, he was then prevented from working unless he left the UK and applied to re-enter on a work-related Visa. We do not find that this was unreasonable that the claimant did not pursue this course.

29. The claimant was very clear that he originally applied for a Visa to last until August 2020 and, but for his dismissal, he would have remained in the UK until the expiry of his Tier 2 Visa (in August 2020). On the balance of probabilities, we find that the claimant would not have returned to India until the expiry of his Visa, i.e. after August 2020.

30. We accept that it was reasonable for the claimant to remain in the UK after July 2016. The claimant pursued his case diligently. We note there had been a number of delays and postponements during proceedings. The claimant attributed to delays in the employment tribunal process to the respondent and said that had this case concluded sooner, then he could have gone back to India much sooner. He said that he only stayed in the UK, without any income, in order to see through his case.

31. The respondent has not convinced us that the claimant has failed to mitigate his losses. Accordingly, we award the claimant his loss of earnings in full up to the date of this hearing. Ordinarily, we would make an award based on net figures. However, as stated above, our award may be subject to tax and national insurance and neither party

has provided grossed-up figures, nor have they set out the appropriate calculation. We determine that it would not be just and equitable to award the claimant compensation without making a provision that should HM Customs & Excise claim the appropriate deductions then the claimant should be put in the position that he would have been had the respondent made appropriate tax and national insurance deductions (which it should have had the claimant been paid in the normal way). If any party is dissatisfied with our calculations of the loss of earnings award based on gross figures, then we will consider ordering a review hearing to enable the appropriate grossing-up calculations to be advanced and scrutinised.

32. In all of our considerations we have had consideration to the overarching objective of, so far as possible, putting the claimant into the position that we assess he would have been but for the respondent's unfair dismissal.

33. Allowing for the claimant's notice period, for which we have made a separate award, we therefore calculate that the claimant has suffered a loss of earnings of 116 weeks until the remedy hearing. Therefore, we award 116 x £442.31 = **£51,307.96 (gross)** in compensation for the claimant's loss of earnings until the date of the employment tribunal remedy hearing.

34. We accept the claimant's evidence that he would have remained in the UK until August 2020. However, following the termination of his employment, the claimant has remained in the UK in order to pursue his claim. That is entirely reasonable in the circumstances. We understand that the respondent has appealed our decision on liability (which it is entitled to do), but the claimant's evidence was that he needed to remain in the UK to participate in any appeal and also to undertake any possible enforcement proceedings for his compensation. This is also reasonable in the circumstances. It is clear that the claimant cannot work lawfully while he is in the UK and we regard it as reasonable for him to remain in the UK.

35. So far as predicting the future, we do not know if the claimant will return to India before August 2020 and, although we are a UK industrial jury, we are not familiar with the labour market in India. Under the circumstances, we cannot speculate when the claimant may find other work in India. We have heard no credible evidence as to the circumstances that might give rise to the claimant looking for work in India before August 2020. We cannot foresee what work the claimant would undertake in India or what the relevant rate of pay might be. Any speculation would not do justice to this situation. So therefore, we rely on our factual determination that, but for the claimant's dismissal, he would have continued to work in the UK until August 2020. We have considered whether it would be proportionate to award the claimant his loss of earnings for a period of over two more years and we determine that rather than impose an arbitrary cut-off period without any factual basis whatsoever. It would be appropriate to award the claimant his losses in full for the entirety of his original Visa placement with the respondent.

36. We are conscious that this award may appear to be punitive towards the respondent. It is not our intention to penalise the respondent although, we note, the totality of this award may well have a punitive effect. We have thought carefully about our figures and we regard the totality of this award to be proportionate in the circumstances and just and equitable. Therefore, we award compensation for future loss of earnings: 117 weeks x £442.31 per week = **£51,750.27 (gross)**.

Expenses in looking for alternative employment

37. The claimant has not claimed any expenses in looking for replacement work so we make no award under this head of compensation.

Loss of pension rights

38. The claimant did not have a pension with the respondent therefore there is no loss under this head of compensation.

Loss of statutory rights

39. The claimant had not worked the requisite period to qualify for statutory rights in respect of unfair dismissal. Although the claimant schedule of loss claims £350, we make no award in the circumstances.

ACAS uplift

40. S207A(2) Trade Union and Labour Relations (Consolidation) Act 1992 provides:

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

41. ACAS has issued Code of Practice 1: Disciplinary and grievance procedures (2015). Although the Code of Practice is not legally binding in itself employment tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

- Deal with the issues promptly and consistently;
- Established the facts before taking action;
- Make sure the employee was informed clearly of the allegation;
- Allow the employee to be accompanied and to state their case;
- Make sure that the disciplinary action is appropriate to the misconduct alleged;
- Provide the employee with an opportunity to appeal.

42. The respondent did not adhere to any of the aforementioned responsibilities when they supposedly disciplined and subsequently dismissed the claimant. Mr Kumar and Mr Kapur made up previous disciplinary warnings and then manufactured the claimant's dismissal under false pretences. So far as the Code of Practice, the respondent's failures were manifest and profound. Under the circumstances, we can see little alternative but to award the claimant the full 25% uplift. Any figure short of this would not do justice to our previous determination.

43. The ACAS uplift should be based on net figures; therefore, we have worked out the uplift as follows: 234 weeks x £361.68 = £84,633.12 (net loss of earnings) @ 25% = **£21,158.28**.

**Summary**

44. To recap, we have awarded as follows:

| | |
|---|---|
| Notice period (gross) - | £442.31 |
| Loss of earnings to remedies hearing (gross) - | £51,307.96 |
| Future loss of earnings (gross) - | £51,750.27 |
| ACAS uplift (on compensatory award) @ 20% - | £21,158.28 |
| Total = | £124,658.82 |

45. We award the claimant in the sum of **£124,658.82**.

46. The claimant has not been paid any relevant social security benefits in the UK so we do not provide a Statement of Recoupment.

Employment Judge Tobin

31 May 2018