EMPLOYMENT TRIBUNALS

Claimant: Mr J U Ahmed

Respondent: Randomlight Limited

Heard at: Manchester **On:** 26 March 2019

Before: Employment Judge Batten
Mrs P J Byrne
Mrs J Newsham

REPRESENTATION:

Claimant: In person
Respondent: Mr Cater, Advocate

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that:

1. There shall be no compensatory award;

2. The award for injury to feelings shall be reduced to £5,000.00; and

3. The award of aggravated damages shall remain at £10,000.00.

REASONS

1. The final hearing of this case took place on 13, 14 and 15 August and 10 October 2018 when an oral Judgment was given on liability and, thereafter, the Tribunal dealt with remedy and made a compensatory award of £5,932.55, an award for injury to feelings of £15,000 and an award of aggravated damages of £10,000. The Judgment was sent to the parties on 26 October 2018. The respondent requested written reasons which were produced and sent to the parties on 30 November 2018.

The respondent's application

2. On 14 December 2018, the respondent made an application for reconsideration of the Judgment because it had obtained evidence of the claimant's employment and earnings in the period immediately following his dismissal. The respondent asked the Tribunal to consider the evidence which had come to light about the claimant's earnings. The respondent contended that the evidence had an impact on the awards made by the Tribunal and also raised issues about the claimant's credibility.

3. The claimant responded to the respondent's application by a letter to the Tribunal from his solicitors, dated 21 December 2018. This confirmed that the claimant had achieved earnings from occasional work in the period following his dismissal and that he had misunderstood the questions put to him at the remedy stage.

4. The application and response were referred to Employment Judge Batten, who gave directions to set the matter down for a one day hearing in light of the allegations made by the respondent in its application. In all the circumstances, the Tribunal accepted that it was appropriate to look at the evidence and reconsider the Judgment at a hearing for that purpose.

The reconsideration hearing

5. The Tribunal was provided with a bundle of documents compiled by the respondent which included both parties' documents in relation to the application. The Tribunal was referred to documents in the reconsideration hearing bundle and the evidence given previously in this case.

6. The Tribunal was given 2 witness statements: of Mr Jordan Cassidy who is the Company Secretary of an employment agency, 24 Hour Healthcare Limited, which had employed the claimant and which has provided healthcare professionals to the respondent from time to time; and a witness statement from the claimant. The Tribunal heard evidence from the 2 witnesses, by reading their witness statements, and each witness was subject to cross examination.

7. In addition, the claimant produced an updated Schedule of Loss incorporating his earnings in the period immediately after his dismissal and until he got a permanent job in December 2017.

Issues

8. The issues which the Tribunal was asked to consider by the respondent, in light of the new evidence, were:

    7.1 whether the whole Judgment should stand or be dismissed;

    7.2 whether the remedy awards, each or all of them, should stand or be varied or dismissed.

Findings of Fact

9. Having heard from the parties and considered the evidence, the Tribunal made findings of fact to inform its deliberations, as follows.

10. The effective date of termination of the claimant's employment was 10 September 2017. However, the respondent dismissed the claimant by sending him a letter, dated 4 September 2017, in which the respondent gave the claimant a week's notice to end on 10 September 2017. The claimant was on holiday at the time so he did not return to work for the respondent.

11. Having been given notice that his job would end, the claimant contacted an agency, 24 Hour Healthcare Limited, to enquire about work. The claimant had worked for the agency before he came to work for the respondent. 24 Hour Healthcare Limited is an agency which supplies healthcare professionals to the care industry including to the respondent. The claimant was given 2 days' work, being a shift working in Rochdale on 10 September 2017 and a shift in Manchester on 11 September 2017.

12. Thereafter, the claimant gained further shift work with 24 Hour Healthcare Limited, or through them, from 23 September 2017 when he worked fairly regularly in the Rochdale area and in parts of Manchester until 3 December 2017. During this period, on 24, 25 and 26 November 2017, the claimant worked 3 shifts in Fleetwood which involved a 90 mile round trip and so the claimant had to stay over in the Fleetwood area for the duration. That was the only long distance work that the claimant did. The claimant's shift work for 24 Hour Healthcare Limited finished on 3 December 2017.

13. On 11 December 2017, the claimant started a permanent job.

14. The Tribunal noted that the net figure for the claimant's earnings from shift work for 24 Hour Healthcare Limited, in the period between September and December 2017, roughly equates to the net figure previously given to the Tribunal at the remedy hearing for loss of earnings for the period from the termination of the claimant's employment on 10 September 2017 until he commenced a permanent job in December 2017.

The applicable law

15. Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, contains the Employment Tribunal rules. Rule 72(2) empowers the Tribunal to reconsider its Judgment at a reconsideration hearing unless the Employment Judge considers, having regard to any response to the application, that there is no reasonable prospect of the original decision being varied or revoked.

16. The test is whether it is necessary in the interests of justice to reconsider the Judgment. Broadly, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances, such as where new evidence comes to light that could not reasonably have been

brought to the original hearing and which could have a material bearing on the outcome.

17. In dealing with the respondent's application for reconsideration, the Tribunal was referred by the parties to the following case law (including for the claimant, by his solicitors, who referred to such cases within their letter of response to the application, dated 21 December 2018 but who did not represent the claimant at the reconsideration hearing):

   - **Outasight VB Limited v Mr L Brown** UKEAT0253/14/LA
   - **The Governing Body of St Andrew Catholic Primary School v Blundell** [2011] EWCA Civ 427
   - **Qureshi v Burnley Borough Council** [1993] UKEAT916
   - **Wileman v Minilec Engineering Limited** [1988] IRLR 144

Conclusions

18. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues raised in the respondent's application in the following way.

19. First, the Tribunal considered whether the Judgment as a whole should stand. The Tribunal reminded itself that, in its Judgment, the Tribunal had concluded that the claimant had made a protected disclosure, he had suffered detriment because of making that protected disclosure and he was dismissed because of that protected disclosure. The claimant had therefore succeeded on liability.

20. The Tribunal considered that there was nothing in the respondent's evidence to the reconsideration hearing which materially affected those findings. The Tribunal reached its decision on liability because of the way the respondent had treated the claimant, in particular the way it dealt with allegations against the claimant which the respondent had contended had led to his dismissal. The Tribunal was mindful of the fact that in its Judgment, at paragraph 59, the Tribunal considered that "the respondent had sought out the negative and not conducted an impartial performance review as would be good practice." The Tribunal had noted that the role of the home's Registered Manager, Mr Henley-Adams, had been found to be one of information gatherer, and not an impartial investigator, and the Tribunal had rejected his description of his part in the purported disciplinary process. In addition, the Tribunal had concluded that Mr Henley-Adams was not only an information gatherer but also the decision maker. In doing so, the Tribunal had accepted the submission of counsel for the claimant that Mr Henley-Adams had acted as "judge, jury and executioner", seeking out information to serve a purpose, namely to discipline the claimant and ultimately to dismiss the claimant.

21. The Tribunal also noted that, at the liability hearing, there was evidence of a stark contrast between the respondent's treatment of the claimant, who was dismissed on vague and unsubstantiated allegations about his conduct in

general terms, in comparison with that of another employee of the respondent, TY, which is discussed in the Judgment at paragraph 63. TY was the employee whom the claimant had reported for trying to trap a vulnerable service user's hands within a door jamb – a very serious safeguarding matter - who had been found guilty of gross misconduct but was then given the significantly lesser penalty of a warning.

22. Further, the Tribunal took into account its findings in relation to detriment at paragraph 62 of the Judgment. Whilst such detriment did not form part of the dismissal process, a number of the detriment allegations were proven, for example: (a) that the claimant had been 'blanked' by colleagues - there was no evidence, either in the investigatory process or presented to the Tribunal, to rebut that allegation, which was part of the claimant's case; (b) the gathering of negative information on the claimant for the purported probationary review meeting; and (c) the fact that the staff were effectively encouraged to complain about the claimant by Mr Henley-Adams. All of these findings had led the Tribunal to conclude that the claimant's protected disclosure had materially influenced the respondent's actions towards the claimant and contributed to the respondent failing to address the claimant's concerns. The probationary review led ultimately to the claimant's dismissal. In light of all those findings, which are not disturbed by the evidence of the claimant's earnings post dismissal, the Tribunal considered that there was no justification for overturning the Judgment as a whole.

23. Nevertheless, the Tribunal did consider that it was appropriate to review the remedy awards in light of the new evidence.

24. The compensatory award comprised of the claimant's loss of earnings for the period from the termination of his employment and until he commenced new permanent employment on 11 December 2017. In light of the concessions by the claimant about his earnings from temporary shift work, and in light of the misunderstanding that arose over those earnings, and by consent of the claimant, the Tribunal decided that the compensatory award shall be overturned and that there shall be no compensatory award. It is now clear to the Tribunal that the claimant earned as much in the period immediately after his dismissal, as he would have done if he had carried on working for the respondent, such that the reality is that the claimant effectively suffered very little or no loss of earnings between his dismissal and starting his permanent job on 11 December 2017. In the circumstances, the Tribunal did not consider it just and equitable to award the claimant any loss of earnings for that period.

25. An injury to feelings award had been made in the sum of £15,000. The Tribunal reviewed its Judgment, paragraph 68(3), in which the Tribunal took account of the claimant's remedy statement about injury to feelings and the case law provided. The Tribunal now had knowledge that the claimant in fact obtained shift work since his dismissal and worked fairly regularly, albeit that there was one period of a week and a period of three weeks in which the claimant had no work. The respondent therefore submitted that the claimant's feelings were not injured, as he was able to find and carry out alternative work within days. The Tribunal considered that, despite the fact that the claimant

had found a short period of work immediately after his dismissal, that did not mean that he was not still hurt and distressed by the detrimental treatment he had suffered. The claimant was certainly upset and also embarrassed. He told the Tribunal that he felt isolated. The Tribunal accepted that those are valid feelings that an employee can have when they are treated as the claimant was by the respondent, in the circumstances of this case.

26. The Tribunal accepted the claimant's evidence that he was upset by the detrimental treatment he received and embarrassed by his situation - finding himself out of secure work did not help matters. In this regard, although the claimant found work for the first 2 days, he was then out of work for over a week and he was out of work periodically during the 3 months with consequent feelings of uncertainty and insecurity over his employment and finances. The claimant's evidence, which the Tribunal accepted, was that he had not gone out much because of how he felt, although he had been compelled to work and had managed in the long term to replace almost completely the loss of earnings that he suffered.

27. In those circumstances, the Tribunal decided that an award for injury to feelings for detriment was appropriate, but that the original award shall be reduced from the £15,000 originally awarded to a figure of £5,000, which is in the low band of Vento. This level of award was made to reflect the fact of the hurt and distress the claimant had suffered as a result of his treatment by the respondent prior to the purported probationary review, and because of the reason for such treatment, which the Tribunal had found was a protected disclosure which, of itself, is a serious matter.

28. Further, the Tribunal looked at the aggravated damages award. In light of the Tribunal's findings of fact on liability, the Tribunal could see no reason to change that award at all and it therefore remains at the figure of £10,000. In reaching this conclusion, the Tribunal took account of the reasons why it had decided to make an aggravated damages award in that sum at the last hearing. The reasons are set out in the Judgment at paragraph 68(4). The Tribunal had then taken note of the very strong indications from the EAT in the case of **Virgo Fidelis Senior Schools v Boyle** [2004] IRLR 268 and the comments of Judge Ansell in that case, to the effect that detriment suffered by whistleblowers should normally be regarded by Tribunals as a very serious breach of discrimination legislation. In that case, in 2004, the Tribunal awarded £10,000 for aggravated damages, an award which was not disturbed by the EAT.

29. The Tribunal reminded itself of its findings about the actions of the respondent against the claimant, in this case, amounting to detriments. It was the respondent's actions that were in issue: the efforts of the respondent to encourage staff to complain about the claimant amounting to a campaign to find fault; the respondent's failure to address any of the matters raised by the claimant in his defence; and without providing the claimant with any of the evidence which the respondent had gathered at the time. In those circumstances, the Tribunal considered that this award shall remain at £10,000, because the aggravated damages award was made in light of the

aggravating effect of the respondent's detrimental conduct, which was high-handed and oppressive, and which caused the claimant additional distress. The new evidence brought to the reconsideration hearing did not impact the Tribunal's findings on that aspect and so the Tribunal considered that it would not be in the interests of justice to disturb the aggravated damages award.

30. Lastly, the Tribunal considered that that much had been said by the respondent, in its application and at the reconsideration hearing, about whether the claimant committed perjury in this case. The Tribunal heard evidence from the claimant that he did not appreciate the significance of earnings from casual and occasional shifts in contrast to earnings from a permanent job. The Tribunal also noted the respondent's submissions that the claimant's evidence at the remedy hearing had been, in places, misleading. The claimant has apologised for that. However, on a balance of probabilities, the Tribunal did not find that there was a deliberate intention to mislead and did not find any evidence to support that contention. The Tribunal accepted that, in reconsideration, it is looking at matters with the benefit of hindsight but was not able to conclude that the claimant had committed perjury.

31. The Tribunal considered that it has been unfortunate that this case has had to come back for reconsideration and that, as a result, the Tribunal has decided to reduce the awards upon reconsideration. Nevertheless, the Tribunal has concluded upon reconsideration that it is just and equitable to make awards in all the circumstances of this case The awards, which have been reconsidered, now reflect what the Tribunal has determined to be an appropriate level for injury to feelings for detriment in this case, and also to compensate the claimant for the additional distress caused by the aggravating features of the conduct of the respondent which amounted to detrimental treatment of the claimant.

Employment Judge Batten
Date: 16 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
22 May 2019

Miss E Heeks
FOR THE TRIBUNAL OFFICE

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

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2424032/2017**

Name of case(s): **Mr JU Ahmed** v **Randomlight Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **22 May 2019**

"the calculation day" is: **23 May 2019**

"the stipulated rate of interest" is: **8%**

MISS E HEEKS
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.