EMPLOYMENT TRIBUNALS

Claimant: **Mr C Robinson**

Respondent: **On Air Dining Ltd**

Heard at: **East London Hearing Centre**

Before: **Employment Judge Jones**
Members: **Mr P Quinn**
Mr P Pendle

Representation **Written correspondence from both parties**

AMENDED REMEDY JUDGMENT

The judgment of the Tribunal is that: -

The Claimant is entitled to the following as his remedy for his successful complaints of automatic constructive unfair dismissal with a 25% uplift, whistleblowing detriment and breach of contract.

Basic Award - £1467

Grossed up Compensatory Award - £58,889.25

Non-Financial Award - £30,184.01

Total Award due to the Claimant = £90,540.26

The Respondent is ordered to pay the Claimant the sum of £90,540.26.

The Claimant has already been paid some of his remedy and the Respondent is ordered to pay him the balance so that he has a total of £90,540.26 plus any interest that has accrued.

REASONS

1 The Tribunal apologises to the parties for the delay in responding to your recent correspondence and finalising this judgment. The disruption to the Tribunal

service in the Covid-19 pandemic has affected the conduct of this case. The parties' correspondence in April and June only came to Tribunal's attention at the end of July. The judge prepared this amended judgment in July, after consultation with members. The Claimant's letter of 7 August was only drawn to the Judge's attention on Monday 10 November 2020. This amended judgment takes both parties' points into consideration. Even though the Respondent pointed out that the error in the calculation of the ACAS uplift in their submissions on grossing up, it is still appropriate and the Tribunal has adjusted that calculation accordingly. The remedy for breach of contract should not have been included in the sum that the ACAS uplift was applied to. Those changes have now been incorporated into the final remedy judgment.

2 In the remedy judgment sent to the parties, the total net sum due to the Claimant was stated as £82,607.84. That sum has had to be revised and the revision and the reasons for it are set out below. However, the Tribunal understands that the Respondent paid the Claimant the sum of £82,607.84 with interest following the Claimant taking enforcement proceedings. A further notice under Article 12 of the Tribunals (Interest) Order 1990 will be included with this Amended Judgment and will apply in respect of the remainder of the remedy due to the Claimant.

3 The Respondent's application for a stay of proceedings under Rule 66 of the Employment Tribunal Rules of Procedure 2013 until the issue of the grossing up is settled, is refused. That would mean that the Claimant would be denied his remedy for his successful complaints for an extended period. The Claimant was successful in his complaints and any further delay in receipt of his remedy would be unfair and due to no fault of his. The parties have had access to the decision in *PA Finlay & Co Ltd v H A Finlay EAT* 2017 WL 02061110 and should have been able to come to an agreement with the Claimant's solicitors in April on the grossing up issue. The Claimant's solicitors have informed the Tribunal that they tried to engage in discussion with the Respondent as the Tribunal suggested in the judgment, but the Respondent failed to respond. The parties had been directed to engage with each other to try to resolve this matter in keeping with their duty to assist the Tribunal in furthering the overriding objective. The Respondent failed to do so and the delay in finalising this matter is mostly due to that failure.

4 The Tribunal accepts the Respondent's submissions that the *Simmons v Castle* uplift were incorporated into the Vento bands issued in September 2017. We therefore reduce the amount due to the Claimant for his successful whistleblowing claims by £3,000.

5 The applicable Presidential Guidance was issued on 5 September 2017 and was titled 'Presidential Guidance: Employment Tribunals awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879' and the Vento bands stated in that guidance were as follows: a lower band of £800 to £8,400 (less serious cases), a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band) and an upper band of £25,200 to £42,000 for the most serious cases; with the most exceptional cases capable of exceeding £42,000. The Tribunal make no

change to the sums for injury to feelings awarded to the Claimant as the amount we awarded still falls within the correct band.

6 The Claimant has informed the Tribunal that his income to the end of April 2020 was £45,291. The Tribunal has calculated the grossing up figures using this figure as the Claimant's income for this financial year, 2020 – 2021. The Tribunal understands that the Claimant's tax band means that he has a tax-free allowance of £7,580.

Grossing Up

7 The general principle is simply that the claimant is to be awarded the sum of money that will put him in the same position he would have been in had the tort not been committed. This is referred to as the *Gourley* principle from the case of *British Transport Commission v Gourley* [1956] AC 185, in which the House of Lords held that *'the broad general principle which should govern the assessment of damage…..is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries….to ignore the tax element at the present day would be to act in a manner which is out of touch with reality'.*

8 When the claimant will have to pay tax on the award, or where the employer will have to deduct tax and national insurance, the tribunal must 'gross up' the award to ensure that the claimant's net loss is compensated for by an equivalent net sum.

9 The issues in this case are whether the awards to the Claimant for injury to feelings and aggravated damages, as they relate to the detriments he suffered; come under the ambit of section 401 ITEPA (Income Tax (Earnings and Pensions) Act) 2003 or whether any exemption within the Act applies.

10 Section 401 ITEPA applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of a person's employment.

11 The Respondent referred the Tribunal to the HMRC Employment Income Manual 12965. The manual confirmed that in cases involving action by an individual against an employer for discrimination, Section 401 ITEPA 2003 will apply to payments and other benefits which are received directly or indirectly, in consideration or in consequence of, or otherwise in connection with the termination of their employment.

12 If a payment for injury to feelings can reasonably be attributed solely to discrimination occurring before the termination of employment, it should be accepted as not connected with the termination and outside of the scope of section 401 ITEPA 2003.

13 In the cases of *Orthet Limited v Vince-Cain* [2005] ICR 374 and *Timothy James Consulting Ltd v Wilton* [2015 ICR 764, the EAT held that payments for injury to feelings relating to the discriminatory termination of employment were not taxable.

14 However, in the case of *Moorthy v HMRC*, the Upper Tribunal (Tax and Chancery Chamber) ([2016] IRLR 258), held that the whole of the payment made to Mr Moorthy by his former employers was directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of his employment. Termination payments do come under section 401 and the wording of section 401 does not exclude non-pecuniary awards, such as damages for injury to feelings, from its scope. At that stage, it was held that Mr Moorthy could not benefit from the exemption in section 406 because the word '*injury'* in the section was held not to include injury to feelings. The Upper Tribunal also held that where payments made are a combination of payments for discrimination before termination and other payments in connection with termination; there would need to be an apportionment between events that occurred before and after termination so that the payments can be treated differently for tax purposes.

15 When the case arrived at the Court of Appeal ([2018] IRLR 860), it agreed that as the whole payment was connected with the termination of his employment, it came within the ambit of section 401 ITEPA 2003. However, the Court of Appeal overturned the second part of the previous court's judgment as it related to injury to feelings. It held that where an employee has suffered injury to feelings, that is '*injury'* as referred to in section 406 and therefore, such payments are exempt from tax. Section 406 states that *"This Chapter does not apply to a payment or other benefit provided – (a) in connection with the termination of employment by the death of an employee, or (b) on account of injury to, or disability of, an employee";*

16 As pointed out by the Respondent in this case, the amendment to section 406(b) made by the Finance Act (No.2) 2017 provides that injury to feelings falling short of psychiatric injury does not attract the exemption. That change takes effect from the tax year 2018-2019 onwards, which does not apply to the Claimant as his dismissal was on 5 September 2017.

17 Section 403(3) and 404 state that before the £30,000 threshold is applied, it is necessary to add together all the payments and benefits within section 401 ITEPA 2003 (excluding any amount of post-employment notice pay) that are made to, or in respect of, the same person in connection with the same office or employment.

18 As the Claimant's employment ended 5 September 2017, the subsequent changes to the ITEPA 2003 (from 2018), which removed the £30,000 tax-exempt threshold and took injury to feelings and aggravated damages out of the scope of section 406 of the Act do not apply in this case.

19 The Tribunal's judgment was that the Claimant had been subjected to 5 detriments because he made protected disclosures. The dates on which they occurred are as follows: (a) 10 August 2017; (b) 10 August 2017; (c) 17 August 2017; (d) 4 September 2017 and (e) 4 September 2017. These detriments were meted out to him because he made public interest disclosures. They were also part of the reasons why the Claimant resigned with immediate effect on 5 September 2017.

20 In the liability and remedy judgments the Tribunal has been clear that the detriments were not isolated events and had a cumulative effect so that when the Claimant resigned on 5 September, although the tipping point was the decision to withhold holiday pay and inform him that the holiday was unauthorised, those were not the only reasons. It is our judgment that the other detriments, the earliest of which had only happened approximately 3.5 weeks earlier, contributed towards his decision to resign, formed part of the breaches of contract which led him to resign and were part of the automatic unfair dismissal.

21 It is this Tribunal's judgment that all 5 detriments were directly or indirectly connected to or leading to the Claimant's decision to resign from his job and therefore to the automatic unfair dismissal. In his letter of resignation, the Claimant referred to the abysmal treatment he had been subjected to by the Respondent in the preceding months including his suspension, making baseless accusations of fraud against him and inviting him to a disciplinary meeting at absurdly short notice. He stated that he believed that his suspension was a direct reaction to his emails to the investors, which it was likely that they had shared with Mr Hulme. The Tribunal's judgment is that the matters the Claimant cited in his letter of resignation were a combination of the detriments he suffered as a result of making disclosures and some of the elements of the fundamental breaches of contract that led him to resign. Paragraph 259 of the liability judgment refers to the letter of 4 September being the last in a series of incidents that occurred between the parties between January and September 2017 in which the Respondent conducted itself in a manner likely to destroy or seriously damage the implied term of trust and confidence that the Claimant was entitled to have in his employer. Paragraph 323 of the liability judgment confirmed that it was because of the Claimant's protected disclosures that the Respondent wrote the letter of 4 September, which was the final straw that caused the Claimant to resign.

22 It is also this Tribunal's judgment that the discriminatory treatment in its entirety was the cause of or was connected to, whether directly or indirectly, the Claimant's automatically unfair constructive dismissal. Given the sequence of events outlined above and in the liability judgment, it is likely that HMRC will view the discriminatory treatment which gives rise to an award for injury to feelings was connected to and led to his dismissal or that his dismissal was a consequence of the treatment. Similar to the case of *Moorthy*, those payments are related to the termination of the Claimant's employment

23 It is our judgment that the awards for injury to feelings and aggravated damages would come within the ambit of section 401 but will be exempt from tax as compensation for 'injury' because of the interpretation of section 406(b) as stated by the Court of Appeal in the case of *Moorthy.*

24 It is therefore our judgment that all the payments due to the Claimant in this case come within the ambit of section 401 IETPA but that the application of section 406(b) to the sums awarded to compensate him for injury to feelings and aggravated damages will be exempt from tax along with the compensation for personal injury. Those sums can be left out of this calculation.

25 The balance of the Claimant's remedy judgment, which are the sums awarded to him related to his successful complaints of automatic constructive unfair dismissal and breach of contract will be within the ambit of section 401 ITEPA and should therefore be grossed up to ensure that after paying tax liability, the Claimant will be left with the remedy awarded to him for his successful complaints.

26 The EAT in the case of *PA Finlay & Co Ltd v HA Finlay* [2017] WL 02061110 confirmed that the relevant tax year that applies for calculation purposes is the tax year in which the award is received by the claimant.

27 Different tax rates may apply to different elements of the award and therefore different elements of the award may need to be grossed up by different percentages to reflect that.

28 The amount now due to the Claimant is as follows:

Basic Award **£1,467.00**

Compensatory Award = (£26,208 + £300 + £2997 + £654 + £117 + £526 + £369) =£31,171.00

Add 25% uplift on compensatory award for failure to comply with ACAS Code = £7,792.75

£31,171.00 + £7,792.75 =	£38,963.75
Breach of Contract	£7,783.00

Total **£46,746.75**

Whistleblowing claims

Injury to feelings	£20,000.00	
Interest at 8% for 218 days	£955.62	
Aggravated damages	£4,000.00	
Interest at 8% for 109 days	£95.56	
Personal injury	£6,000.00	
Interest at 7% for 218 days	£286.68	
Total	£31,337.86	
Less sum already paid	£1,153.85	
Total	£30,184.01	

The total amount due to the Claimant before tax is
£1,467 + £46,746.75 + £30,184.01 = £78,397.76

Grossing up

29 To avoid disadvantage to the Claimant the employment tribunal should 'gross up' any award it makes over £30,000. This is to ensure that after meeting any liability to the HMRC, the Claimant receives the amount due to him as compensation for his unfair dismissal and the detriments he suffered because he made protected disclosures.

30 The process of grossing up requires the employment tribunal to estimate the tax that the Claimant will have to pay on receipt of the award and add it to the award thereby cancelling out the tax burden to the Claimant. The relevant tax year for grossing up is the year in which the award is paid to the Claimant. The Tribunal has to add up all the payments and benefits within section 401 of the Income Tax (Earnings and Pensions) Act 2003 that are made to the Claimant in connection with the same officer or employment and do the calculations on the total amount.

31 In correspondence from the Claimant's solicitor, the Tribunal were told that he had earned £45,291 net by the end of April 2020. His tax code is 785L which means that he can earn £7,850 as his personal allowance. The payment is being made within the tax year of 2020/2021 and so the tax rates and bands for this financial year are the applicable ones.

32 Grossing up calculation:

33 To find out the amount to be grossed up the Tribunal must deduct the Basic Award from the £30,000 (tax free threshold) - £1,467 = £28,533 left.

Compensatory Award of £46,746.75 - £28,533 = 18,213.75

The sum to be grossed up is therefore £18,213.75
The Claimant has already used up the 20% tax band as his net wage to the end of April was £45,291.00.

34 The amount of £18,213.75 must be grossed up by 40% (£18,213.75 divided by 0.6) = £33,356.25

35 The total Compensatory Award to the Claimant = £33,356.25 + £28,533 = £58,889.25

36 The total due to the Claimant is as follows:

Basic Award - £1,467
Compensatory Award grossed up = £58,889.25
Non-financial loss which is not grossed up = 30,184.01
Total = £90,540.26

37 As the Claimant is being compensated for an automatic unfair dismissal, the cap does not apply. He is therefore entitled to the total amount of £90,540.26.

He has already been paid £80, 607.84. The Respondent is ordered to pay him the balance forthwith.

Employment Judge Jones
Date: 16 November 2020