Case Numbers: 3352944/2017
3330786/2018
3334442/2018

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs D Davidsen	**v**	IBM United Kingdom Limited (1) Joanne Czekalowska (2) Samantha McFarland (3) Sandra Oliveira (4) Claire Bryant (5)

Heard at: Reading **On:** 18 December 2020

Before: Employment Judge Anstis
Mr A Kapur
Ms HT Edwards

Appearances
For the Claimant: Mr J Heard (counsel)
For the Respondents: Miss D Masters (counsel)

JUDGMENT

1. The claimant's application to determine further remedy issue(s) and/or for reconsideration of the judgment of 5 June 2020 is dismissed.

2. The claimant's application for costs is dismissed.

REASONS

1. These are the written reasons requested by the claimant at the conclusion of the hearing.

REMEDY AND RECONSIDERATION

2. On 26 August 2020 the claimant made an application for the tribunal to consider a further remedy issue and (if necessary) for reconsideration of the judgment of 5 June 2020 in order to permit the remedy issue to be considered.

3. The claimant was employed by the first respondent throughout the period of loss that we are dealing with in this case. She presented a schedule of loss

showing that during this time she had been paid sick pay at first at 100% of salary and then later at 75% of salary.

4. At para 7.1 of the judgment of 5 June 2020 we awarded compensation for loss of earnings to the claimant in the following way:

> "*the* [first respondent must pay to the claimant] *the difference between what the claimant was paid by the first respondent during the period from 6 February 2018 to six weeks after the date this decision is sent to the parties and what she would have been paid during that period if she had been at work*"

5. Our judgment at 7.1 is framed in terms of the difference between what she was paid and what she would have been paid if at work – effectively that is the 25% balance of her salary for a period. This is the basis on which her schedule of loss was set out. We were not at the time able to put a figure on this for the reasons set out in the judgment. We understand the parties have now agreed the relevant figure and that it has been paid to the claimant.

6. It is now common ground between the parties that:

   a. 25 percentage points of the 75% sick pay came from a PHI policy funded by the claimant (in the sense understood under Brown v Colt Technology Services Limited (UKEAT/0024/17)),

   b. under Brown (which Miss Masters accepted we were bound by, while reserving her right later to argue it was wrongly determined) the first respondent should not have been given credit for this amount in determining compensation for loss of earnings, and

   c. the claimant's representatives had not appreciated this at any point until after the judgment was issued, by which time the claimant had uncovered it through her own research.

7. Mr Heard applies for this argument under Brown now to be taken into account in considering remedy. It is agreed that the amounts at stake are around £30,000 net or £50,000 gross.

8. The first thing we have to consider is whether this requires us to reconsider our judgment.

9. The judgment itself fully addresses all aspects of remedy, with the only outstanding point being the lack of a figure associated with the award at 7.1. Provision is made for determination of that figure at a subsequent hearing if necessary. However, 7.1 is clearly expressed as being "*the difference between what the claimant was paid … and what she would have been paid if she had been at work*". It is agreed that the insurance money was paid through the first respondent's payroll, so it must follow that 7.1 in its present form gives the first respondent credit for the insurance money that is now in dispute. If we are to adopt the approach sought by Mr Heard we must vary

7.1. This can only be done by a reconsideration, so Mr Heard must persuade us that such reconsideration is necessary in the interests of justice.

10. In reply, Miss Masters emphasised the need for finality of litigation, particularly as set out by Langstaff P at para 19 of Dundee City Council v Malcom (UKEATS/0019/15). We note there that it is said that reconsideration ought not to be used where it would involve evidence not previously put by a party and which could have been put earlier. We consider that the same considerations apply in respect of these arguments. There is a considerable public interest in finality in litigation. Mr Heard's submissions identify no exceptional circumstances. This was simply a point that was missed by the claimant's representatives. That is not a good reason for reconsideration.

11. For us to consider this argument requires reconsideration of the judgment, and we refuse the claimant's application for reconsideration of the judgment.

COSTS

12. The claimant has also made an application for costs. It is immediately apparent that we cannot award all of the costs sought, given that the respondents succeeded in their arguments on a large number of the detriments alleged by the claimant. The question is whether we can or should make any award of costs at all.

13. The claimant relies on the respondent's unreasonable conduct of proceedings and the respondents' response having no reasonable prospects of success. This involves two closely related points. The unreasonable conduct is said to be the respondents' "*false narratives around her performance*" and the no reasonable prospects of success is argued on the basis that the response was based on these false narratives and there was no evidence to support the respondents' contentions about the claimant's performance.

14. It is true that we found against the respondents in respect of the central question of whether there were any genuine performance concerns. We found that there were none. However, this was not the end of it. We had to go on and find that the respondents' actions were because of disclosures or protected acts. To find that a respondent's motivations are not what they say they are is routine in any discrimination or detriment case that a claimant succeeds in, but does not establish that there was unreasonable conduct or that there were no reasonable prospects of success.

15. To succeed in an application for costs on the basis that the defence was weak or supported only by lies the claimant must show substantially more than that, and must show it on the basis of circumstances known at the time, rather than what is now known. We accept Miss Masters' point that her opening submissions show that the respondents had what appeared to be an arguable response to the claimant's allegations.

16. We see nothing in this case to justify an award of costs beyond simply the claimant having won on various disputed elements, and that is not sufficient to justify or require an award of costs.

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Employment Judge Anstis
Date: 18 December 2020

Sent to the parties on: .....

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For the Tribunals Office

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