Case number: 2602227/2019

# EMPLOYMENT TRIBUNALS

**BETWEEN:**

| | | |
|---|---|---|
| Mr D Jackson | | Alter Rock Limited |
| **Claimant** | and | **Respondent** |

## Application for Reconsideration

Held at: In Chambers On: 15 January 2021

Before: **Employment Judge R Clark**

# VARIED JUDGMENT

Upon the Respondent's application for reconsideration of the judgment dated 5 November 2020 succeeding in part, judgment is varied as follows:-

1. The Claimant's claim of unfair dismissal **succeeds**.

2. The respondent shall pay to the claimant total compensation of **£2,538** made up of a basic award of £1938 and a compensatory award of £600.

3. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply as follows.

    a. The monetary award is £2,538.
    b. The amount of the prescribed element is £0.
    c. The dates of the period to which the prescribed element applies are 15 May 2019 to 1 October 2020.
    d. The amount by which the monetary award exceeds the prescribed element is £2,538.

# REASONS

1. In a reserved judgment sent to the parties on 11 November 2020, judgment was given for the claimant including remedy by way of basic and compensatory awards. This followed a remote hearing at which the issues of remedy were live issues and on which the parties were free to adduce evidence and make submissions as appropriate.

2. Various challenges were made to the revised schedule of loss which, save for the way in which it accounted for universal credit, appeared to all but mitigate the claimant's loss. Indeed, that was his position. The basic award was agreed.

3. By email to the tribunal dated 25 November 2020 and copied to the claimant's legal advisers the respondent applied for a reconsideration of the judgment in two aspects of the remedy.

4. The first is an assertion that the claimant actually continued to receive pay on four further pay dates after the date of dismissal of 14 June 2019, continuing into June 2019 with the effect that he received net payments totalling £950.58. This is broadly consistent with what was said to be the appeal process concluding. The findings of fact certainly record the payment of 4 weeks' pay and there was no associated claim of breach of contract relating to deficient notice. I can see payslips were produced dealing with this period. The respondent says, if this is factored into the schedule of loss, there is no financial loss flowing from the dismissal even taking into account the correct treatment of the universal credit.

5. The second challenge is that it is asserted that the claimant's evidence as to his knowledge of the contract of employment found in the bundle were accepted and were such as to lead to the respondent's witness's credibility being undermined. The respondent says the claimant's position was wrong and demonstrably so because it was him that disclosed that contract in advance of the hearing. The effect of this is that I am now invited to reconsider the basic award and reduce it to nil. No legal basis for this is advanced other than it would be just and equitable to do so. For the same reasons I am invited to disallow the notional compensatory award of £500 made in respect of loss of statutory rights.

6. Such an application falls to be considered under rules 70-72 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. By rule 71, an application for reconsideration must be made in writing within 14 days of the decision being sent setting out why reconsideration of the original decision is necessary. The claimant's email application was submitted in time.

7. By rule 70, the tribunal may reconsider any judgment where it is necessary in the interests of justice to do so and, if it decides to do so, may vary, revoke or confirm the original decision. Since the introduction of the present rules there has been a single threshold for making an application. That is that reconsideration is necessary in the interests of justice. There must therefore be something about the nature of how the decision was reached, either substantively or procedurally, from which the interests of justice would be offended if the original decision was allowed to stand.

8. By rule 72(1) I am to give initial consideration to the prospects of the application which determines whether it is necessary to seek the views of the respondent and whether the matter can be dealt with on paper or at a further hearing before the same tribunal. Where the application can be said to carry no reasonable prospects of being varied or revoked, the rules dictate that I shall refuse the application without being required to consider the matter further.

9. The two challenges raised by the respondent raise different issues. In respect of the first, there is potentially an issue of arithmetic in not properly accounting for the payment of 4 weeks wages that was in evidence before the tribunal at the time the schedule of loss was considered. There is no response to the application from the claimant. That may not be such a surprise or concern for two reasons. First, he started from a belief that he had fully mitigated his financial loss and so was not expecting to recover any in any event. Secondly, even to the extent that I found there was still a small amount of financial loss to account for, the effect of the recoupment provisions meant that was a sum of money he would never see as all of it would be consumed within the recoupment procedure and be paid by the respondent to the state.

10. It seems to me on reviewing the matters that were before me at the time, together with the general position of the claimant that he had in fact mitigated his loss and his only claim was in respect of the basic award, that this is a matter that I should look at again. There is more than a real prospect of the judgement being varied and it would be in the interests of justice to do so. It is a clear cut issues to the extent that it is not proportionate to list a further hearing for this purpose as the issue is narrow and the claimant was aware of the application such that any representations could have been made. I am able to give effect to the application and vary the judgment in this regard. The actual variation to the reasons is explained below. The judgment as varied is set out above.

11. As to the second challenge, I have rejected it. Not only is there is nothing to explain why such arguments were not deployed at the time but the basic award was accepted at the time. This challenge amounts to an attempt to continue the litigation that has reached finality, at least at this level of judiciary. Moreover, had it been deployed at the time I cannot see that it would have caused me to reach the conclusion that the respondent now seeks. The respondent's credibility was diminished by a number of factors in the case. The unfairness of the dismissal was substantial. The claimant is otherwise entitled to a basic

award and the legal basis for the reduction, that it would be just and equitable to do so, does not apply as a general provision in respect of the basic award. The only general power to reduce the basic award that a claimant is otherwise entitled to under the Employment Rights Act 1996 arises in s.122(2). The argument now advanced does not appear to allege conduct before dismissal for that to apply even if I were otherwise persuaded there was force in the point. In short, the judgment in respect of basic award remains as I can see no reasonable prospect of that decision being varied or revoked.

12. The legal basis of a just and equitable adjustment in respect of the notional award for loss of statutory rights is different. This falls under the compensatory award under s.123 of the 1996 Act which is founded on the principles of that which is just and equitable. However, there is nothing in what is now before me which persuades me there is, or could realistically be, a basis for that part of the judgment being varied or revoked. It is accordingly rejected also.

13. I have decided therefore to vary the judgment to show that there was no immediate financial loss. This has implications for the recoupment provisions as whilst they are technically engaged by the payment of the relevant benefit during the prescribed period, there is now no relevant monetary award from which the recoupment could be made. I have, however, left the varied judgment in the form that it first took as I suspect that this will assist with the swift resolution of the recoupment process which will have started by now and, potentially, the service on the respondent of a nil certificate. The effect is to vary the remedy reasoning at paragraphs 6.12 onwards as follows.

> 6.12. Turning to the schedule of loss, the claimant's original schedule has been updated to reflect the fact that he has essentially mitigated his financial loss in full. There is no attack on the schedule of loss in respect of any failure to mitigate his losses, particularly on the belated realisation that his latest schedule all but completely mitigates his losses. ~~However, that mitigation of loss is only the case when the universal credit received whilst unemployed is taken into account~~. His lost earnings in the period amount to ~~£18,760~~ **£17809.42.** His actual earnings since dismissal amount to £17907.25. There is **therefore no financial loss.** ~~a shortfall of £825.75. If the further figure of £3178.20 received in universal credit was taken into account, clearly there would be no loss at all.~~ However, **Universal Credit** ~~that~~ is a benefit for which the Employment Protection (Recoupment of Benefits) Regulations 1996 **technically still** apply **although in the absence of financial loss, there will be no prescribed element to withhold and from which any recoupment can take place**. ~~That figure therefore needs to be removed from the mitigation side of the equation, for the time being, any remedy judgment will be expressed as being subject to the recoupment regulations.~~

6.13. ~~In addition to the £825.75 shortfall,~~ **However**, he is also entitled to a notional award in respect of the loss of his statutory rights. I award the sum claimed of £500 making a total of ~~£1325.75~~ **£500** immediate compensatory award.

6.14. This is a case where the employer failed to comply with the minimum standards required under the relevant ACAS code and I have power under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 to increase any compensation by up to 25% to reflect that failure. The claimant seeks 25%. The respondent says it should be nil or at most 10%. I have decided it warrants a significant uplift but short of the maximum. The maximum should be reserved for cases of complete failure and in this case there were some limited aspects of compliance with the code. I set the uplift at 20%. That increases the ~~£1325.75~~ **£500** by ~~£265.15~~ **£100** to ~~£1590.90~~ **£600** **None** ~~Part~~ of that award ~~will~~ **falls to be** held back initially pending any certificate of recoupable benefit being served on the respondent in respect of the Universal Credit **as it is not awarded in respect of financial loss**. ~~The part to be held back relates to loss of wages only and amounts to £990.90 (£825.75 + 20%).~~

6.15. The basic award is formulaic and agreed in the sum of £1938. That is 6 weeks at his actual week's wage of £323 (being under the statutory cap).

14. Consequently, I vary the judgment accordingly.

.....

Employment Judge R Clark
Date: 15 January 2021

JUDGMENT SENT TO THE PARTIES ON

.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS