Case No: 2201874/2018

EMPLOYMENT TRIBUNALS

Claimant: **S**

Respondent: **A**

RECONSIDERATION OF REMEDY JUDGMENT

Both the claimant and the respondent submitted applications for reconsideration of the remedy judgment issued following the conclusion of the remedy hearing held on 8 December 2020**.** That judgment has been reconsidered without a hearing. It is varied as set out below:

(1) The tribunal makes the following award of compensation. The figures in the table below supersede the table contained in the original judgment:

	£
Basic award*	**2,445.00**
Financial loss to date of hearing	
Loss of Earnings (16 May 2018 – 8 December 2020)	119,332.14
Bonus payments (2019, 2020)	8,580.00
Pension loss (2% of loss of earnings plus bonus)	2,636.24
Private medical cover (16 December 2018 to 8 December 2020)	2,773.68
Loss of statutory rights	500.00
Less past mitigation	(18,477.34)
Subtotal	115,344.72
Apply 75% reduction	28,836.18
Bonus 2017 (not subject to the 75% reduction)	3,900
Total Past Financial Loss to date of hearing*	**32,736.18**
Interest on Past Financial Loss*	**3,583.94**
Financial loss (future)	
Loss of Earnings (8 December 2020 – 13 October 2021)	41,723.76
Bonus payments (2021)	5,050.66
Pension loss (2% of loss of earnings plus bonus)	935.49

Private medical cover (8 December 2020 to 13 October 2021)	1,173.48
Less future mitigation	(8,398.00)
Subtotal	40,485.39
Apply the 75% reduction	10,121.35
Total Financial Loss (future)*	**10,121.35**
Personal Injury General Damages	**5,000.00**
Interest on General Damages	**547.40**
Personal Injury Special Damages	**2,478.00**
Injury to feelings*	**17,000.00**
Interest on injury to feelings*	**3,722.30**
Total of Taxable Payments (marked with a *)	**69,608.77**
Grossing Up Amount	**6777.19**
Total (after grossing up)	**84,411.36**

(2) The time limit for a further reconsideration of:

(a) our decision on the inclusion of the claimant's Canadian Disability Benefit as a decision for future mitigation; and

(b) our decision to gross up the award for tax purposes

is extended to 6 months from the date this judgment is sent to the parties.

Reasons

Background

1. Upon the applications from the parties, the original tribunal panel decided that it was in the interests of justice that for us to reconsider our judgment on remedy. We did consider that it was not necessary, in the interests of justice, to conduct a hearing for this purpose because he respective positions of the parties were very clearly understood from the written applications and replies.

Interest Calculations

2. In the original judgment, interest had been calculated on future losses. This was incorrect. In addition, the interest calculations used were based on an incorrect number of days between the date of dismissal and 8 December 2020, the date of calculation. The correct number of days should have been 999.

3. The table above splits out the past and future losses and shows the amount of interest calculated using the correct number of days. These figures were agreed with the parties in correspondence before this judgment has been promulgated.

Mitigation

4. The benefits received by the claimant while he was still in the UK had been incorrectly excluded from the past mitigation total. This has been remedied in the revised table. The figures were agreed with the parties in correspondence before this judgment has been promulgated.

5. The claimant invited the tribunal to reconsider its decision regarding the deduction of his future Canadian Disability Benefit. He had argued at the remedy hearing that if his overall award exceeded $100,000 CAD he would cease to be entitled to the Canadian Disability Benefit, because he would have in excess of $100,000 CAD in savings.

6. The tribunal were not satisfied that the evidence provided to them at the remedy hearing demonstrated that this was the correct position. Our attention was drawn to some documents that suggested that there were exemptions to this basic rule. In addition, even if the savings threshold operated as the claimant suggested, we agreed with the submissions made by respondent that, as a result of spending the compensation, the claimant would requalify to receive the benefit within a short space of time. The tribunal panel considered that the claimant had not discharged the burden on him to prove, on the balance of probabilities, that the Canadian Disability Benefit would be lost and should be discounted.

7. With his application for reconsideration, the claimant has now provided some additional material for the panel to consider. We have done that and taken account of the comments made by the respondent on the material. In the tribunal's view, the additional material does not add anything further and has not led us to believe that is in the interests of justice for us to revise our original decision.

8. The tribunal panel has, however, decided to exercise our general case management powers and extend the time that the claimant can apply for a further reconsideration on this point. The new time limit will be 6 months from the date this judgment is sent to the parties. If during this period, claimant's Canadian Disability Benefit is stopped as a result of his compensation, he will be able to apply for a further reconsideration with appropriate evidence.

9. We did not invite the views of the parties on extending the time for reconsideration. We consider it a useful and proportionate mechanism to enable us to address an area of ongoing uncertainty.

Grossing Up

Our Decision on Reconsideration

10. The tribunal did not originally gross up the award to take account of tax for the reasons stated in our judgment on remedy.

11. The claimant's reconsideration application asked for the award to be grossed up. The respondent contended that the application was too late relying on the authority *Dippenarr* v *Bethnal Green and Shoreditch Education Trust* UKEAT/0064/15/JOJ & UKEAT/0114/15/JOJ. The panel have considered this carefully, but we do not agree.

12. In *Dippenarr,* the matter of grossing up had not been raised at all at the employment tribunal. The Employment Appeal Tribunal held that it was unable to consider an appeal on a point that had not been raised at first instance. We consider the position here is different as this is an application for a reconsideration by the tribunal of first instance.

13. The claimant has clarified that he is seeking grossing-up. The respondent has confirmed that it will be putting, at least part of the award through its payroll, as it is required to do under the PAYE regulations, and will therefore be deducting tax from those payments. As the payments are being made after the issue of the claimant's P45, we assume the respondent is likely to have to deduct tax based on a temporary tax code. In a normal case, any overpayment would be recoverable from HMRC following the end fo eh relevant tax year.

14. The principle established in *British Transport Commission v Gourley* [1955] 3 All ER 796, is that we should 'gross up' the award so as to ensure that a claimant is not left out of pocket when any tax required to be paid on the award has been paid.

15. The difficulty in this case is that we do not know if the claimant's status as a resident in Canada means that he will be able to recover the income tax that is deducted in full. As this is unknown, the panel have decided to include an amount for grossing-up, but to extend the time for applications for reconsiderations on this point. This will enable the respondent to apply to us to reconsider this point, if they are able to provide evidence that the claimant is able to recover the tax paid. It may well be possible for the parties to apply to HMRC for prior approval of the tax position before any tax is deducted. We expect them to cooperate on this point and to share information.

Our Calculation

16. The elements of the claimant's compensation that are subject to tax in this case are the basic award, the award for financial loss due to discrimination and the award for injury to feelings. These elements are taxable under sections 401 – 416 of the Income Tax (Earnings and Pensions) Act (ITEAP) 2003. The injury to feelings award is taxable as the award is being made for a termination of employment after 6 April 2018 and is therefore captured by section 406 ITEAP.

17. Payments subject to tax under sections 401 – 416 ITEAP are only taxable to the extent that they exceed a £30,000 tax free threshold.

18. Employee National Insurance contributions are not payable on payments taxed under section 401 – 416 ITEAP. Employer National Insurance contributions of 13.8% became payable on the amount over the £30,000 tax threshold from 6 April 2020.

19. The personal injury award is not subject to deductions for tax or national insurance contributions.

20. The claimant will have no other earnings in the tax year 2020/2021. He will therefore be entitled to his full personal allowance of £12,500 in addition to the £30,000 tax free threshold. This results in a total tax free amount of £42,500. The 20% tax band applies to the rest of the compensation.

21. The tribunal panel have therefore undertaken the following calculation follows:

Total of payments potentially subject to tax:	£69,608.77
Tax free (£30,000 + £12,500)	-42,500.00
Taxable part of award	27,108.77

In order to ensure that the claimant receives £27,108.77 after tax he will need to receive £27,108.77 divided by 0.8 = £33,885.96. The grossing up amount is therefore £6,777.19

Employment Judge E Burns
29 March 2021

JUDGMENT SENT TO THE PARTIES ON

30th March 2021.

FOR THE TRIBUNAL OFFICE