EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100035/2018 (V) Remedy Hearing at Edinburgh by Cloud Video Platform on 5 October 2020

Employment Judge: M A Macleod
Mr S Currie
Mr R Quinn

Mr Yaya Barry	Claimant Represented by Mr R Lawson Solicitor
The Mosque of the Custodian of the Two Holy Mosques And Islamic Centre of Edinburgh Trust Limited	Respondent Represented by Mr L Lane Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Employment Tribunal is that the respondent is ordered to pay to the claimant the total sum of **Twenty Seven Thousand Four Hundred and Eighteen Pounds and Ninety Two Pence (£27,418.92)**.

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is **Twenty Four Thousand Two Hundred and Thirty Eight Pounds and Ninety Two Pence (£24,238.92)** and relates to the period from 17 September 2017 to 17 September 2018. The monetary award exceeds the prescribed element by £3,180.

REASONS

1. Following a hearing before the Employment Tribunal which took place on 30 and 31 July, 1 August, and 5, 7 and 8 November 2018, the Tribunal issued a Judgment on liability only, dated 15 February 2019, in which it was found that the claimant had been subjected to a detriment on the ground of having made protected disclosures, and that he was automatically unfairly dismissed on the ground of having made protected disclosures.

2. The case came before the same Employment Tribunal for a hearing on remedy on 5 October 2020. The intervening passage of time was longer than otherwise due to the respondent's appeal against the Tribunal Judgment, and then the restrictions imposed during the coronavirus pandemic. The hearing was, as a result of those restrictions, held by Cloud Video Platform (CVP), in order to allow parties to lead evidence and make submissions without requiring to await a hearing in person.

3. Mr Lawson appeared for the claimant in this hearing, as before, and Mr Lane appeared for the respondent, accompanied by Dr Mohamed Hashim Al-Rasheid, Assistant Director, who attended in the capacity of instructing client but did not give evidence in this hearing. In the liability hearing, Mr MacLean appeared for the respondent.

4. A joint bundle of documents was placed before the Tribunal, in sufficient time to allow each of the Tribunal members to receive a hard copy of the documents. An electronic copy of the bundle was also made available to the Tribunal and parties.

5. The claimant gave evidence on his own account. The respondent called one witness, Ms Haleemah Herkes, Secretary.

6. The hearing proceeded well, the parties conducting themselves in a straightforward, respectful and professional manner. The hearing was in no way impaired by using CVP, and all parties were able to see and be seen, and hear and be heard, at all times. There were no interruptions to the internet connections of any of the participants.

7. Based on the evidence led, and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. Following his dismissal by the respondent, the claimant was paid by the respondent a sum equivalent to two months' pay in lieu of notice. His dismissal took effect on 18 September 2017, his employment having begun with the respondent on 1 December 2015.

9. When he was employed by the respondent, the claimant received a salary of £30,000 per annum (net), as provided for in the Remuneration section of his Statement of Main Terms of Employment (116). The claimant's monthly pay was £3,274.32 (gross) and £2,477.73 (net), as at 31 July 2017 (123). Each month, the respondent deducted £22.27 from his salary by way of pension contributions.

10. The claimant's final pay, which included two months' pay in lieu of notice, was £6,543.71 (net)(125).

11. Following his dismissal, the claimant made a number of applications for posts which he found by registering with a job vacancy website. These were posts for which he considered himself suited owing to his academic qualifications, his experience and his career aspirations. The claimant has a Bachelor's Degree in Islamic Studies, two Masters Degrees in Religious Studies and graduated from the University of Edinburgh in December 2019 with a PhD.

12. The claimant's experience comprised a year and a half's experience as the Imam at the Edinburgh Central Mosque, employed by the respondent, in which he engaged in pastoral care, chaplaincy and other spiritual work; he also had experience of media work, with the BBC in particular; and he took up the study of Arabic, to the point where he was able to teach the language and act as an interpreter.

13. The claimant gave unchallenged evidence in support of the terms of his Schedule of Loss at 364 in which he explained which applications he had

made for suitable alternative positions, and the unsuccessful outcome of each application. It is appropriate to record those applications here:

- 25 September 2017 – application for the Muslim Chaplain post at Anglia Ruskin University, for which he was interviewed on 2 October 2017; he was advised that he was unsuccessful on 5 October 2017 (129);

- 27 October 2017 – application for the Muslim Chaplain post at Keele University, for which he was interviewed on 10 November 2017; he was informed that he was unsuccessful on 14 November 2017 (130);

- 15 December 2017 – application for the Lead – Chaplaincy and Community role at Swansea University; he was informed that the role was no longer available by email of 19 December 2017 (131);

- 4 September 2018 – application for part-time role of Muslim Chaplain at Heriot-Watt University, for which he was unsuccessful following interview; he was notified of the outcome by email dated 24 September 2018 (132);

- 31 May 2019 – application for the position of Alwaleed Early Career Teaching and Research Fellow at the University of Edinburgh; he was notified on 10 June 2019 that his application was unsuccessful (133);

- 23 January 2020 – application for Place Vision Lead at the Whale Arts Centre; he was notified on 29 January 2020 that his application was unsuccessful (134);

- 30 April 2020 – application for Postdoctoral Research Fellowship at the Institute for the Advanced Study of the Humanities at the University of Edinburgh; he was notified that he was unsuccessful on 18 August 2020 (135).

14. The claimant also made inquiries in February 2020 to the University of Edinburgh in relation a vacancy for the position of Lecturer in Islamic Studies, but was advised that he would be unsuited to the position due to the specific requirements of experience and expertise. As a result, he did not make an application for that post.

15. The claimant's evidence was therefore that he applied for 3 posts in 2017 following his dismissal, 1 in 2018, 1 in 2019 and 2 in 2020, all of which were unsuccessful.

16. On 22 September 2020, he applied for the position of Lecturer in Islamic Studies (History, Civilisation and Shari'ah) at the Unversiti Brunei Darussalam (357). He explained that he had been approached by the Dean of the Faculty at the University, who had been recommended him by another colleague, and asked to submit his CV. He did so, and is optimistic that when the appointment period is concluded in 2021, he will be appointed to be in place for the start of the next academic year, commencing in September 2021. Although no offer has been placed before him, he has had correspondence with the Dean which he considers that he may be appointed.

17. The claimant took up a number of unpaid, voluntary or honorary positions following his dismissal by the respondent in order to advance his experience in a number of areas.

18. On 23 January 2019 he was appointed to be the Muslim Belief Contact at the University of Edinburgh, within the Chaplaincy Service; he accepted an invitation to join the Multi-Faith Chaplaincy at Trinity Academy on 12 February 2019; on 21 January 2020, the claimant was invited to be an academic visitor in the Department of Islamic and Middle Easter Studies, The Alwaleed Centre, in the School of Literatures, Languages and Cultures, at the University of Edinburgh, from 1 February to 30 April 2020 (285); on 6 May 2020 he volunteered for the Edinburgh Interfaith Association's Listening Service to support those communities affected by the Covid-19 pandemic; on 6 July 2020 he accepted the role of trustee

and head of research for BE-United, an Edinburgh-based charity working to provide services to the BAME community, and is now the Chair of the Board of Trustees; and on 27 July 2020, the claimant was appointed to the position of Visiting Senior Researcher at the Centre of African Studies, University of Copenhagen, with effect from 1 September 2020 until 30 June 2021 (292).

19. Each of these positions was unpaid.

20. The claimant did carry out paid work following his dismissal.

21. Firstly, the claimant worked, from time to time, as a translator, using his linguistic skills in Arabic, for Elite Linguists. On each occasion when he carried out work for them, he was paid according to the length of time in which he was engaged. The remittance advices totalling the payments he received were produced at 136-141, 143 and 145.

22. Secondly, the claimant provided services to BBC Scotland for which he was paid. Those payments are recorded at 142, 144, 147, 148 and 153.

23. Thirdly, the claimant submitted an invoice to the Olive Tree Madrasah, of which further details are set out below, for tuition in Arabic (146).

24. Fourthly, the claimant provided services – under the heading of "casual assistance" - to the University of Edinburgh, and payments are shown on 149 and 152. Further invoices were produced in respect of services to the University in the name of Olive Tree CIC at 154-156.

25. Fifthly, the claimant provided a service to the Scottish Children's Reporter Administration (150) for which payment was made.

26. Sixthly, the claimant provided services to Dumfries & Galloway Council, shown on the invoice at 151.

27. There is no dispute by the respondent that these payments were made to the claimant in respect of work carried out.

28. In May 2018, the claimant set up the Olive Tree Madrasah, a school with the intention of providing educational services to Muslim families in Edinburgh, outwith school hours, based in Craigentinny Community Centre, where the Madrasah rented two rooms. He announced this to his followers on the social media site Facebook on 25 May 2018 (301):

"Since September 2017, when the mosque fired me, I have continued teaching from my home those who sought my knowledge. I continued to attend church invitations for interfaith dialogue. The city of Edinburgh has continued to provide opportunity. And here I am taking one such opportunity to found and open a unique Islamic education institute whose aim is to be a positive influence in how the Muslim world lives and is understood by bridging the Islamic tradition with the social sciences, arts and humanities, in setting this foundation stone. I ask of you my friends who know me and know what I stand for to help by spreading the word and showing your support.

Please visit the website to find out more and like the Facebook page to keep updated about this venture."

29. The Facebook page also noted that the claimant had "Started new job at Olive Tree CIC" on 25 May 2018.

30. Olive Tree Madrasah CIC (Community Interest Company) was incorporated under the Companies Act 2006 on 20 August 2019 (157), as a private company limited by shares. Its registered office was the claimant's home address. In the declarations made on the foundation of the CIC, it was stated that the company was a social enterprise seeking to serve communities through its educational programmes, outreach and services, specialising in Islam, Muslims, African, Arabian, Middle Eastern and South East Asian cultures.

31. The Year's Review of 2019 published by the Madrasah (164ff) noted that the claimant was the founder and director, and also confirmed that the Madrasah welcomed Ustadh Abdusalam Himdan as a Teaching Assistant

in May 2019. It was stated that the teacher-student ratio stood at 1:7 "because we prioritise quality".

32. The claimant registered himself as self-employed with Her Majesty's Revenue and Customs in March 2018, and considers himself to be self-employed in relation to the work carried out for the Madrasah.

33. The claimant produced to the Tribunal bank statements in the name of the Treasurer's Account, Olive Tree Madrasah CIC (180ff). From those statements it is apparent that the claimant drew funds from time to time from the bank account. For example, on 2 March 2020, the claimant was paid £234 against an invoice number, and £200 as travel expenses for a journey to Dumfries (188). The claimant explained in evidence that the payment of £234 was a payment for rent into his personal bank account. He said that he did not draw a salary from the Madrasah, as he could not be sure that the income would cover a salary for him.

34. No bank statements in respect of the claimant's own bank account were produced, and no explanation given for this. The Tribunal therefore has very limited evidence as to the earnings which the claimant has received since his dismissal by the respondent. We have found it very difficult to understand why the bank statements of the Madrasah, a separate legal entity, were presented to the Tribunal, but no statements were provided in respect of the claimant.

35. The claimant applied for Universal Credit, and on 16 October 2019, the Department of Work and Pensions wrote to him to confirm (220) that they considered that he was "gainfully self-employed". This relieved the claimant of the need to look for work or be available for work in order to claim Universal Credit. On 13 October 2019, the claimant was entitled to be paid the sum of £1,193, together with his wife, Courtney Taylor. This was made up by a standard allowance (taking into account that they were a couple), a payment in respect of housing and a payment for the support of 2 children. His earnings from self-employment were taken into account as well, and were said, at that point, to be £853.66.

36. Since this was a joint claim, and a joint payment, it is not clear from the evidence whose account this money was paid into and how it was divided between the claimant and his wife. It appears that the sum paid in Universal Credit remained the same each month, until April 2020, when it increased to £1,411. The earnings reported each month by the claimant and his wife fluctuated, and required to be taken into account in calculating the sums due under Universal Credit.

37. From May 2020 onwards, the claimant and his wife received £1,408 per month in respect of Universal Credit.

38. In the Universal Credit statements, a note is made of expenses as well as income. At 229, for the month to October 2019, those expenses included rent for the Community Centre, which was plainly incurred by the Madrasah, but also rent in respect of “Airbnb A” and “Airbnb B”, Council tax in relation to those properties and a stair cleaner as well as linen laundry expenses. The claimant explained that his wife, not he, ran two Airbnb properties at that time, and that he would, occasionally, attend at those properties to ensure that they were properly cleaned in preparation for a new guest.

39. The claimant gave evidence about the impact upon him of the detriment which the Tribunal, in its Judgment, had found him to have been subjected to by the respondent. He said that this amounted to humiliation, as he was imam, the head religious figure within the mosque, at the time of the visit of the most senior person in Islam. He said that even the security guards and volunteers, and even cleaners, were permitted to meet him, but he found it belittling to him that as the imam he was not excluded from the visit of the Secretary General. He said it raised insecurities for himself, and made him wonder if he was good enough for the job, if it was because he was black African, and affected his ability to do the job. It knocked his confidence, and he described suffering from a “psychological onslaught”, and in tandem with other issues, such as being marginalised from meetings, had an impact on his health and wellbeing. Although he described himself as being ill over a

period of three months, there is no evidence that he went to see his GP, saying that it is rare for him to do so. He maintained, when asked why he had not produced any GP records, that the GP told him that such a request would have to come from the Tribunal. It is not clear from that evidence whether he did attend his GP, and if so why, and with what medical complaint. He does not know whether or not his exclusion from the visit was common knowledge within the mosque.

40. The claimant has not applied for any position as an Imam on the basis that he was left with "scars" following his treatment by the respondent which meant that entering into a similar environment would not be easy for him; and in addition, he believes that any other Mosque in Scotland would be aware that he was dismissed by the respondent, and therefore would not be willing to appoint him in such circumstances.

Submissions

41. For the claimant, Mr Lawson opened by saying that he intended to address the Tribunal about four matters:

- The Schedule of Loss;
- Mitigation of Loss in terms of section 123(4) of the Employment Rights Act 1996;
- Deductions from compensation; and
- Injury to Feelings.

42. With regard to the Schedule of Loss, Mr Lawson said that he understood there to be no dispute about the net nor gross income earned by the claimant (361). He confirmed that the claimant had received two months' pay by way of payment in lieu of notice, and therefore his losses commenced on 1 December 2019.

43. Mr Lawson submitted that following completion of his PhD the claimant applied for Universal Credit, which he has received from 16 October 2019

to date. He has required to provide vouching of his earnings together with expenses incurred.

44. He argued that the claimant's losses to date amount to £78,192.92 (362), and have been restricted, so far as future loss is concerned, to the point where the claimant hopes to commence employment at the University of Brunei in September 2021. Universal Credit will cease to be paid if he receives an award of £16,000 or more.

45. It is agreed that the claimant's pension contribution was £5.14 per week. The Tribunal requires to consider a discount for the accelerated receipt of any pension entitlement, with interest at 2.5%. So far as an award for injury to feelings is concerned, Mr Lawson submitted that it should fall in the higher end of the lower Vento band, plus interest thereon.

46. Mr Lawson then moved to the question of mitigation of loss. He understood that the respondent intends to challenge the claimant's efforts to have mitigated his losses. He pointed to the principles set out in **Cooper Contracting Ltd v Lindsey UKEAT/0184/15/JOJ (Langstaff J)**, and in particular to the first principle enunciated there, that the burden of proof to show that the claimant has failed to make reasonable efforts to mitigate loss is upon the wrongdoer, or in this case the respondent. The claimant does not have to prove that he has mitigated his loss. Mr Lawson observed that if evidence as to mitigation of loss is not put before the Tribunal by the wrongdoer, the Tribunal does not require to "go and find it", as the employer must prove that the claimant acted unreasonably. In any event, the Tribunal should not apply to the claimant a standard which is too demanding, and he should not be put on trial as if his losses were his fault.

47. In this case, Mr Lawson argued that being self-employed can amount to reasonable mitigation of loss.

48. It is important to consider that the claimant was employed in a specialized field where openings for new jobs are few and far between, and in such circumstances the claimant's losses will be found to be heavier than in a situation where the claimant has been able to find new employment. The

claimant first attempted to secure alternative employment, and only when this did not succeed did he initiate self-employment. He took all the available options from translation and media work.

49. Mr Lawson submitted that the course of action adopted by the claimant was entirely reasonable given his academic background and qualifications. It is not enough to say that there are other steps which could have been taken. The respondent requires to show that they would have mitigated his losses.

50. He accepted that the claimant did not apply for any positions as an Imam in any other Mosque, but there was no evidence led that any such vacancies existed, and it was not put to the claimant that there were such vacancies for which he should have applied, but did not.

51. Mr Lawson then raised the question of deductions from the claimant's award. He said that he did not understand that the respondent was seeking to argue that any award should be subject to a "just and equitable" reduction. He submitted that the EAT has found that the burden of proof that an employee would have been dismissed in any event falls upon the employer (**Britool Ltd v Roberts [1993] IRLR 481**).

52. He observed that even though there is no reference to this in the ET3, the Tribunal has an obligation to consider whether or not the claimant was guilty of contributory conduct (**Nelson v BBC (No 2) [1980] ICR 110**): the conduct must be culpable and blameworthy, it must have caused or contributed to the claimant's dismissal and it must be just and equitable to reduce the compensation.

53. In the April 2017 meeting, he submitted, contributory conduct cannot be established. The clear findings in the Tribunal Judgment at paragraphs 296 to 301 demonstrate that the Tribunal had considerable difficulties with the conclusions and questioned whether there was a fair investigation into the matter.

54. The second allegation related to the meeting in July 2017, and to the findings about what was said by the claimant in that meeting. That conduct

does not reach the level of culpable and blameworthy conduct: it was a heated discussion in the context of a difficult working relationship. The claimant had already been subjected to the detriment which the Tribunal had found established, and the claimant considered that he had been provoked during that meeting. There must be a causal link shown to the dismissal, and therefore the employer must be found to have dismissed at least partly in consequence of that conduct. There is no evidence as to the extent to which the asserted conduct played a part in the decision to dismiss.

55. In the absence of evidence about the decision itself, it is not possible to say that the conduct played any part in the dismissal of the claimant.

56. If the Tribunal did not agree, he said, any deduction should be no more than 10%, given the surrounding circumstances, including the fact that it was a single incident of alleged misconduct, the conduct was relatively innocuous, the absence of prior warnings and the provocation to which the claimant was subject at the time.

57. Finally, Mr Lawson referred to the injury to feelings award, which related only to the detriments claim, but not to the dismissal.

58. He suggested that the lower band of Vento is appropriate here, given the single instance of detriment, but since the claimant has given evidence about the feelings of upset and humiliation he experienced due to the detriment, the extent of which was very serious as felt by him, and led to a negative impact upon his health, the award should be at the top of the lower band, which should be adjusted for inflation at the appropriate rate. Mr Lawson directed the Tribunal to the Presidential Guidance.

59. He concluded by objecting to any attack on the claimant's credibility. The claimant's evidence was both credible and reliable. He answered every question clearly and in detail, and no documentary or oral evidence has been presented to contest the claimant's evidence.

60. For the respondent, Mr Lane confirmed that he had no arithmetical challenge to the calculations nor to the quantification of the claimant's pay and pensions contributions.

61. With regard to the applicable loss period, he submitted that a key dispute relates to the financial success of the Madrasah, as there is a marked difference between the evidence of the claimant and the documentary evidence before the Tribunal. According to the documents, the interest in the Madrasah was greater than first expected, with a new branch being opened. Students were charged fees. The claimant has given oral evidence which is inconsistent with that. He suggested that there were unhelpful social media posts denigrating the Madrasah but has failed to provide any evidence of those posts. The salient documents which would elucidate just how much the claimant has received from the Madrasah, namely his bank statements, have not been produced. The claimant's reason for non-disclosure, particularly in light of an Order having been issued by the Tribunal, was a questionable one relating to the practicality of obtaining his own personal bank statements. An inference, said Mr Lane, could be drawn from that, and he invited the Tribunal to find that the claimant's income from the Madrasah was at least equal to that he had received from the Mosque, and concluded that the loss period ended when he established the Madrasah.

62. Mr Lane then said that if the Tribunal accepts that the claimant's evidence is correct, the guidance in **Cooper Contracting** is the basis upon which the Tribunal should proceed.

63. He argued that if the claimant has chosen to spend the majority of his time on the Madrasah even if it is not providing him with a realistic source of income, it is not for the respondent to criticise him for doing so. The claimant clearly felt that the Madrasah plays an important part in the community in Edinburgh. However, he said, having made that election to devote time to such work which does not provide a realistic income stream, the respondent is not responsible for that over-claimed loss period of up to 4 years.

64. The claimant appeared, he submitted, to accept that he could continue with a low income until he takes up the post at the University of Brunei. The respondent has been found to have done wrong, but there is only so far that that can be taken for the purposes of awarding compensation for the claimant's loss of earnings.

65. The Tribunal must make deductions for alternative work streams, of which the claimant has had a number since his dismissal. It is open, he submitted, for the Tribunal to find that there were other forms of income which were not disclosed by the claimant, such as from the private teaching of individuals, because of the lack of clarity as to the precise income the claimant has earned in that period. The Tribunal does not have the claimant's personal bank statements which would clear this up. The claimant has chosen not to disclose them, and he should not benefit from that choice.

66. With regard to the injury to feelings award, Mr Lane suggested that since the claimant claimed 8 detriments in his original claim, and was only found to have suffered one of those, any award should be divided by 8. He suggested that the Tribunal take the sum sought at the outset for injury to feelings - £16,000 – and divide it so as to bring out the figure of £2,000.

67. The claimant raised a grievance in April 2017 but did not mention the detriment in that grievance, and also continued to work for the respondent until September 2017. In addition, the absence of any medical evidence of any substantial injury to feelings and a limited absence from work thereafter should lead to an award of £2,100.

68. Finally, Mr Lane pointed out that there has been a claim that interest should be payable on lost earnings. In this case, he maintained that interest is not awardable in an unfair dismissal claim.

69. Mr Lawson responded further to Mr Lane's submission. He submitted that the details of earnings, which were called for by the Order of the Tribunal, were provided in the Universal Credit documents. It was open

to the respondent to seek for specific personal bank statements, but they did not. He also said that Mr Lane's criticism of the claimant for the time spent on the Madrasah as not fair – he was trying to avoid a gap in his CV and thereby improve his employability.

70. He rejected the approach suggested to the injury to feelings award in such a mathematical way.

71. With regard to interest, Mr Lawson referred the Tribunal to **Melia v Magna Kansei [2006] ICR 410** as authority that that applied to awards for unfair dismissal compensation.

The Relevant Law

72. The Tribunal must refer to section 123(6) of the Employment Rights Act 1996 (ERA), which provides: *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

73. In **Brown v Baxter (t/a Careham Hall) UKEAT/0354/09**, the EAT held that when considering an award of compensation under section 123 a Tribunal must answer 3 questions:

    i. Was the loss occasioned as a consequence of the dismissal?

    ii. Was the loss attributable to the conduct of the employer?

    iii. If so, was it just and equitable to award compensation?

74. **Polkey v A E Dayton Services Ltd [1987] IRLR 503** is authority for the proposition that the chances of whether or not the employee would have been retained, had a fair procedure been followed, must be taken into account when calculating the compensation due to the employee. If the prospects of the employee keeping his job had proper procedures been complied with were slender, then there would be a significant reduction in compensation.

75. **Software 2000 Ltd v Andrews [2007] IRLR 568** provided further guidance in relation to the assessment of compensation in **Polkey** situations. Included within that guidance were the following principles (though this does not seek to include all of the principles laid down by that case, some of which related to the assessment of whether the dismissal was fair in itself):

    1) The task of the Tribunal, in assessing compensation, is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

    2) If the employer contends that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued indefinitely in employment, it is for the respondent to adduce any relevant evidence on which he intends to rely.

    3) There will be circumstances where the nature of the evidence which the employer seeks to lead is so unreliable that the exercise of trying to reconstruct what might have had happened is so riddled with uncertainty that no sensible prediction can properly be made.

    4) The Tribunal must exercise its judgment in reaching any conclusion on this point, but it must have regard to any material and reliable evidence which might assist in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been.

    5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative, but it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

76. In the **Cooper Contracting** case, at paragraph 16, the Court set out guidance for Tribunals in determining the issue of mitigation of loss, as follows:

"(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

*(2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of **Tandem Bars Ltd v Pilloni** UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle - which itself follows from the cases I have already cited - that the decision in **Pilloni** itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.*

*(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see **Waterlow**, **Wilding** and **Mutton**).*

*(4) There is a difference between acting reasonably and not acting unreasonably (see **Wilding**).*

(5) What is reasonable or unreasonable is a matter of fact.

(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the

*wrongdoer (see **Waterlow**, **Fyfe** and Potter LJ's observations in **Wilding**).*

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

77. The Tribunal also had reference to **Adda International Ltd v Curcio 1976 IRLR 425**, in which Mr Justice Bristow in the Employment Appeal Tribunal said, in relation to the claimant's obligation to provide evidence of his or her losses, "the tribunal must have something to bite on, and if an applicant produces nothing for it to bite on, he will have only himself to thank".

Discussion and Decision

78. In this case, the Tribunal found in favour of the claimant following the liability hearing, on the basis that he had been subjected to "a detriment" on the grounds of having made a protected disclosure; and that he was automatically unfairly dismissed following the making of a protected disclosure.

79. The parties have correctly identified the need to consider these two findings separately, on the basis that the awards sought in relation to each are different.

Detriment

80. In this case, the Tribunal found that the claimant was subjected to a detriment by the respondent in his exclusion from the planning meetings for the visit, and the visit itself, of the Secretary General of the Muslim World League (paragraph 278 of the Judgment (106)).

81. The Tribunal also noted, at paragraph 265 (103) that: "It was clear to us that the claimant, as the Imam in the Mosque, felt that to be excluded both from the planning of the visit and the visit itself was an affront to his dignity and status. No explanation was given to him about the fact that he was invited to the first one or two meetings of the planning group, but not thereafter, and that he was not informed of the details of the visit itself nor invited to meet with Dr Al-Assa. He put it very strikingly when he complained that even the security staff were able to meet with him."

82. In evidence before us in the remedy hearing, the claimant went slightly further, and said that he had felt humiliated by this, and that even the security staff, volunteers and cleaners were able to meet the Secretary General, but that he was excluded. As the Imam, he was responsible for the teaching of Islam within the Mosque, and it was clear to us that this was a position of considerable responsibility and status within the congregation. He had a high profile in the community and within the organisation.

83. The claimant was unable to say whether or not anyone other than those who met the Secretary General were or would have been aware that he was excluded from the visit, and therefore we have been unable to make any findings that the affront to his dignity and status was known beyond that group. It does not seem to have been a public matter known more widely.

84. We have no doubt that the claimant felt deeply that he had been deliberately deprived of the opportunity to meet with the most senior figure within Islam, an opportunity which would be rare indeed. However, his evidence does not extend, in our view, to demonstrating that he was made to be unwell specifically as a result of this issue, for

two reasons: firstly, that we have no clear evidence that he visited his GP about this specific matter following the visit of the Secretary General, and secondly, that we have no evidence that he was so unwell as to require to take significant time off work, nor indeed any time off work, specifically as a result of this matter.

85. Mr Lane's novel suggestion – that there were 8 detriments for which the claimant's original claim was for £16,000, and therefore £16,000 should be divided by 8 (since only 1 was established before the Tribunal), leaving a figure of £2,000 – was interesting but not one which we considered we should adopt. Approaching the calculation of an injury to feelings award in such an arithmetical matter rather misses the point, which is to seek to establish what connection there was between any injury to feelings and the detriment which caused that injury.

86. The evidence about this matter, on the other hand, simply did not allow us to conclude that the claimant was affected by this incident in any lasting or significant matter. It is our judgment that he was upset and offended, but the extent of any "humiliation" which he suggested he suffered must be very limited, owing to the fact that it is unclear how many people were aware of it.

87. We have therefore concluded that it is just and equitable to award a figure which is towards the lower end of the lowest Vento band, simply because the claimant has not persuaded us that the injury to feelings he suffered as a result of the detriment was anything other than minor.

88. The figure which we consider to be just and equitable in these circumstances, therefore, is **£2,500**.

Unfair Dismissal

89. The calculation of the compensation to be awarded in relation to the unfair dismissal claim is considerably more complicated than that required for the injury to feelings claim.

90. We are conscious that the statutory limit on compensatory awards in unfair dismissal claims is disapplied where the Tribunal has found, as here, that the claimant was automatically unfairly dismissed as a result of having made protected disclosures.

91. The first task before us is to determine what losses the claimant has suffered in consequence of his unfair dismissal. It is necessary for us to consider this in the following way:

i. Was the loss occasioned as a consequence of the dismissal?

ii. Was the loss attributable to the conduct of the employer?

iii. If so, was it just and equitable to award compensation?

92. There was a great deal of focus, in the remedy hearing, on the issue of mitigation of loss, to which we shall come in due course, but before reaching that point, it is necessary for the Tribunal to decide what losses arose not only in the period following the claimant's dismissal, but as a consequence of that.

93. The task before us was rendered more difficult by the way in which the claimant's evidence was presented to us. We do not consider the claimant to have been untruthful before us, but the evidence on loss is quite unsatisfactory, and has made the assessment of that loss extremely difficult.

94. We consider the evidence to be unsatisfactory for a number of reasons:

95. The claimant was unable to provide us with detailed evidence about his earnings following dismissal;

96. In particular, he failed to produce any personal bank statements for an account in his name, despite there being clear evidence in the bank statements of the Madrasah that payments were made from their account to an account in the claimant's name;

97. It was suggested that we could and should rely upon the evidence of the Madrasah's bank account, a suggestion we reject as confusing and unhelpful. The claimant was said to be self-employed, and not to take a salary from the Madrasah. As a result, we do not understand why the Madrasah's bank account was seen to be in any way relevant to the assessment of his post-termination earnings, and conversely why his own bank account statements were not produced;

98. The claimant's explanation for not producing bank statements for his own account was, frankly, extremely unhelpful: he said that it would take too long and was too complex to do so. Why he was able to produce the bank statements of the Madrasah at the same time but not his own is left unexplained. We simply cannot understand why this was not done;

99. We were also told that we could take the claimant's income from the statements produced by Universal Credit. Leaving aside that the income set out in those statements was a third party organisation's statement of what had been disclosed to it, rather than direct evidence from the claimant, this presented a much larger difficulty for the Tribunal: that the Universal Credit application was a joint application in the name of the claimant and his wife. We are left to guess how much of the sum paid by them to the couple was allocated to the claimant himself. We have no evidence as to where the payment was made. We know that the claimant has a bank account in his own name, but do not know whether the Universal Credit payment was made to that account, to his wife's account, or to a joint account in both names, from which payments were then made to each. This left us in the dark as to the precise sums given to the claimant by Universal Credit. Of itself, that would not be a particular issue for the Tribunal – after all, any such benefits received by the claimant would require to be subject to recoupment following an award by this Tribunal, a matter left to the Department of Work and Pensions – but what it does is leave us entirely unclear as to the extent to which any reliance could be placed on these statements as indicating how much the claimant himself earned during that period following his dismissal.

100. The matter was confused further by the notes setting out the expenses paid out by the claimant, some of which quite clearly related to his wife's Airbnb business. It was not clear to us, nor even, we observed, to the claimant, exactly which expenses belonged to which business. Again, while we are not concerned with his expenses in calculating loss, we are very concerned that this should be relied upon as the primary source of information which the Tribunal is directed towards by the claimant in seeking to identify what earnings, if any, he had following his dismissal.

101. It is for the claimant to prove his losses, and in doing so, to lay candidly before the Tribunal his full financial earnings so as to assure us that we have the best evidence upon which to rely in determining this critical matter. This is particularly so where the claimant is seeking a very large sum in compensation, as here.

102. We are therefore drawn to the conclusion that we require to treat the evidence which we have heard about the extent of the claimant's losses with some reserve. Even though it is clear that some earnings following dismissal have been declared to us, we cannot be sure that the documents presented to us are reliable enough to give us a clear picture of exactly what further earnings he may have received.

103. Taking together the unreliable nature of the Universal Credit documents in demonstrating exactly what the claimant as an individual earned, with the absence of the claimant's own bank account statements, we are left with the sense that the claimant has evaded the requirement to present his financial affairs openly and candidly to the Tribunal, for reasons which we cannot divine.

104. In the words of Mr Justice Bristow in **Adda International Ltd v Curcio (supra)**, the claimant has given us something to "bite on", but not enough, and the responsibility for that lies with the claimant. The respondent suggested that he should not benefit from his failure to

produce such information. Mr Justice Bristow puts it more pithily: he only has himself to thank.

105. Turning then to what this means for the claimant's claim, and acknowledging our gratitude to the parties for their agreement as to the arithmetical figures contained in the Schedule of Loss, we have sought to work out the claimant's losses first, then look both at the question of mitigation of loss and any contributory conduct which may bring about a reduction in compensation, and then determine a figure for those losses which we consider to be just and equitable in all the circumstances.

106. The claimant's net pay with the respondent was £572 per week, and his pension contributions were £5.14 per week.

107. The claimant seeks compensation for loss, firstly, for the period from the date when his losses began, due to the payment in lieu of notice received on dismissal (1 December 2017) to the date of the hearing on 6 August 2018, a period of 34 weeks. That brings a sum of £19,448.

108. The respondent does not appear to dispute this figure significantly, but approaches the matter from a different perspective, by calculating the loss period from the date of dismissal to 24 May 2018, which is when the claimant established the Madrasah, and on the basis of that period of 35.4 weeks, calculates the claimant's loss to the hearing as £20,248.80.

109. Although the figures do not differ substantially, it is clear that the basis for calculation is completely different, and raises a number of questions.

110. The respondent does not make any deductions for earnings received nor for the payment in lieu of notice. By contrast the claimant, though relying on a different loss period, takes into account the payment in lieu of notice. Also, the claimant has calculated that the

total sum earned in that period relied upon them (December to August) was £2,132.98 gross, though all earned in the period up to June 2018.

111. We have to determine the period of losses to be considered here, and of course the claimant claims a period of continuing loss beyond the date of establishment of the Madrasah in May 2018. The claimant argues that the Madrasah was unable to take any income until it was incorporated in August 2018, and thereafter argues that in any event he did not receive any salary from that work, but from time to time payments were made to him.

112. As yet, the claimant has not obtained a salaried post, though he has sought a number of posts and has carried out unpaid work for the good of his future career, but takes his future losses no further than September 2021, when he expects that he will take up appointment at the University of Brunei.

113. For the Tribunal, this is not a simple task, but we approach it, based on the evidence we have, on the basis that we must establish how long the claimant should be compensated for, in relation to his dismissal. Essentially, having been dismissed in September 2017, the claimant seeks compensation for a period of loss, mitigated by some earnings in the meantime, to September 2021, a period of four years.

114. We consider this to be an excessively long period of time for a well-qualified and highly motivated person such as the claimant to require compensation. We bear in mind that our task is to compensate for loss, not to penalise for egregious treatment.

115. We have come to the conclusion that notwithstanding the long period from the date of the claimant's dismissal to the date of the hearing, it is just and equitable in this case to compensate the claimant for losses for a period of twelve months from the date of his dismissal to September 2018.

116. We have reached this conclusion on the basis that the claimant was working as the Imam of the Edinburgh Central Mosque, and we accept his assertion that he would be a well-known figure in the Islamic community across Scotland, and possibly beyond, and accordingly the fact that he was dismissed would damage his standing within that community and reduce his chances of obtaining alternative employment therein as an Imam. We find it credible that he would face difficulties in obtaining alternative employment within the specific field for which he was trained, and consider that the period of one year is not excessive for him to seek that employment in a way which continues his career.

117. However, we are also influenced by the fact that the evidence does not persuasively demonstrate to us whether, and if so to what extent, the claimant suffered any losses beyond September 2018. We have expressed our misgivings about the lack of information presented to us about what the claimant actually received in payments from the Madrasah once incorporated, and in the absence of any financial statements from his personal accounts we are unable to find that he has proved exactly what his losses were during that period. The absence of that evidence which could have been presented to the Tribunal should not benefit the claimant and we must reach our conclusions based on the information which we have.

118. We consider that the claimant did take reasonable steps to mitigate his losses. He did not apply for any post as an Imam within Scotland, but did apply for a number of positions in Universities and other institutions which would make use of his training and experience. He completed his PhD, and he sought to narrow the gap in his CV by setting up a school for Muslim children, with a view to continuing his work of Islamic teaching. Although he did not express it in these specific terms, we sense that the claimant is motivated by a strong vocational call to Islamic teaching, which he sought to fulfil both in his efforts to find alternative employment and in setting up an educational institute for Muslim children to learn more about the faith.

Although this was expressed as a desire to fill in a gap in his CV, rather than specifically to mitigate his losses, we understand why he sought to do this, and concluded that the effect was to try to mitigate his financial losses as well as the impact on his future career.

119. We would express the claimant's loss for simplicity as 52 weeks' net pay at £572 per week, bringing a total net loss of £29,744. In addition, we take into consideration a loss of £5.14 per week in respect of pension contributions, and for 52 weeks, that total loss is £267.28. The claimant's total wage loss therefore amounts to £29,744 + £267.28, which comes to **£30,011.28**.

120. Having concluded that the claimant did suffer losses for twelve months, and did make reasonable efforts to mitigate his loss following dismissal, we then require to take into account any pay which he received during that period from September 2017 until September 2018.

121. The claimant did receive a payment in lieu of notice (125) of £6,548.84 (gross). His final net pay was £6,543.71. His normal net pay was £2,477.73, and accordingly, we have calculated his net payment in lieu of notice as **£4,065.98**, which must be deducted from the claimant's net loss.

122. Thereafter, we know that the claimant received income from a number of sources, specifically BBC Scotland and Elite Linguists, to June 2018, of £2,132.98 gross. In the complete Schedule of Loss, that figure appears (362) as the deduction from net loss, but it would be more appropriate to deduct a net figure. We have no evidence as to what the net figure would be, and accordingly have estimated that the appropriate deduction would be 20% less than that. Accordingly, to June 2018, the claimant received £2,132.98 - £426.60, amounting to a net deduction of **£1,706.38**.

123. The claimant also disclosed that he received gross payments of £325 from the BBC and MCFB for services rendered between July 2018

and September 2019. It is not clear to us exactly when those payments were received, and we are only seeking to take into account payments received up to September 2018. Accordingly, we take no account of these payments.

124. Overall, then, it is our conclusion that the claimant's losses in the period from 17 September 2017 to 17 September 2018 were **£30,011.28**, from which the total deductions for payments received are **£5,772.36**, bringing out a total loss figure of **£24,238.92**.

125. We must then consider whether or not any deductions should be made from the claimant's compensation on the basis that he contributed or caused his own dismissal. Any such conduct must have been culpable and blameworthy, must have contributed to the dismissal and, on a just and equitable basis, must be taken to have the effect of reducing the claimant's compensation.

126. We have concluded that no reduction is appropriate on the basis of contributory conduct here. The claimant was dismissed, in our Judgment, because he raised protected disclosures with his employer, which led directly to his dismissal. The decision-making process was opaque and unreasoned, and based on two incidents (with hints at others which were not specified), both of which we considered did not justify dismissal nor were clear enough, on the evidence, to attract a finding of gross misconduct by the claimant.

127. In any event, we are not of the view that the respondent sought to argue that the compensation should be reduced on this basis, and accordingly, no deduction is made in this case.

128. The final issue is whether or not interest is due on any part of the awards to be made. With regard to the unfair dismissal claim, we were referred to **Melia v Magna Kansei Ltd 2006 ICR 410** by Mr Lawson. In that case, the EAT considered that where a reduction in compensation was made in respect of accelerated receipt of payments, a commensurate increase should be made in relation to

payments which were delayed by the litigation. In our judgment, that simply does not apply in this case, and accordingly there is no statutory basis, nor any authority quoted to us, which would permit us to award interest on a compensatory award in an unfair dismissal case, pre-Judgment (and we take that to mean prior to the remedy Judgment making the compensatory award).

129. With regard to the injury to feelings award, we refer to The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. The calculation of interest is on a simple basis, at 8% of the award (in this case, £2,500).

130. The relevant period, in our judgment, is the period from the date upon which the claimant suffered the detriment of which he complains (8 May 2017, the date of the second day of Dr Al-Assa's visit to the Mosque) and the date upon which the Tribunal calculates the amount of interest (which we have decided should be the date of this remedy hearing, 5 October 2020).

131. The interest, therefore, should be calculated at £2,500 x 8% = £200, and should then be multiplied by 3.4 to take account of the period from 8 May 2017 to 5 October 2020, bringing out a total interest figure of **£680**.

132. Accordingly, it is our conclusion that the respondent should now pay to the claimant the following sums:

- **£3,180 – Injury to feelings and interest thereon; and**
- **£24,238.92 – Compensatory award**

133. The respondent is therefore ordered to pay to the claimant the total sum of **£27,418.92**.

134. As the claimant has been in receipt of Universal Credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it in respect of Universal Credit. In the meantime

the respondent should only pay to the claimant the amount by which the monetary award exceeds the prescribed element. The balance, if any, falls to be paid once the respondent has received the notice from the Department.

Employment Judge: Murdo Macleod
Date of Judgment: 11 November 2020
Entered in register: 19 November 2020
and copied to parties