Case Number 2500991 /19

EMPLOYMENT TRIBUNALS

Claimant
Professor S. Cang

Respondent
University of Northumbria at Newcastle ("the University")

REMEDY JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE by CVP **On 17 December 2021**

Before Employment Judge Garnon **Members: Ms C. Hunter and Mr S. Moules**

Appearances

Claimant	Dr. H.Yu	her Husband
For Respondent	Ms C. Millns	of Counsel
Interpreter	Ms W.G. Ng	

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. On the claims of breach of contract, we award damages of £14884.22 for wrongful dismissal and £30.34 for unpaid expenses.

2. On the claim for compensation for untaken annual leave, we award £2234.65

3. We order the deposit of £1000 paid by the claimant to be paid to the University.

4. Applications for costs must be in writing within 28 days of this being sent to the parties.

REASONS (bold is our emphasis and italics are quotations)

1. After a hearing on 6-8 &10-20 September and deliberations 1 October 2021 the unanimous judgment of the Tribunal was:

1. The claims of wrongful dismissal, failure to pay some expenses and compensation for untaken leave are well founded to the extent explained in the reasons.

2. The claims of discrimination and harassment based on race are not and are dismissed.

3. Remedy will be decided on a date to be fixed.

2. On 30 November 2021 the University's solicitors wrote to the claimant with their schedule of the financial value of the findings in her favour. The effective date of termination (EDT) was 28 January 2019. Her gross salary at EDT was £63,203.04 and net salary £40,393.92 per annum. The employer's pension contributions were 16.48% of gross pay.

3.The claimant wrote, (which EJ Garnon saw only on 13 December) to the Employment Tribunal (ET) confirming she had no earnings or benefits in the notice period then :"*The University had made a wrongful decision based on lies and had conducted serious wrong doings based on their wrong beliefs. The false allegations would have not been believed if I had worked in my previous university(Bournemouth).Therefore, the University should make the compensation below*

1) I have suffered stress, anxiety, depression, lost my career and reputation. The respondent should provide compensation on my personal injury and feeling injury (evidence in bundles).

The fundamental flaws in the claimant's approach to remedy are her apparent belief an ET (a) can, and should, award whatever she says, and it agrees, is "fair" regardless of limitations the law imposes, and (b) research matters and put arguments for her because she is unrepresented , which Langstaff P. resoundingly rejected in East of England Ambulance Service NHS Trust-v-Sanders .

4.1. As we said in the liability decision, damages for wrongful dismissal are the pay and other benefits the employee would have received during her notice period. In Addis-v-Gramophone Co Ltd 1909 AC 488 the House of Lords ruled an employee wrongfully dismissed without notice could not recover damages to compensate for the manner of the dismissal, injured feelings, or loss sustained due to dismissal making it more difficult to obtain new employment. The claimant's schedule made claims for nearly £70000 damages for such losses. In an ET damages are limited to £25000 anyway by Reg. 10 of the Employment Tribunals (Extension of Jurisdiction) Order 1994.

4.2. In Johnson-v-Unisys Ltd 2001 ICR 480, the employee brought an action alleging the manner in which the employer had conducted disciplinary action culminating in his dismissal had been a breach of the implied term of trust and confidence. The House of Lords held Addis **in itself** did not stand in the way of a damages claim rooted in a breach **other than** failure to give notice. However, their Lordships went on to rule by a majority the implied term of trust and confidence was concerned with preserving the ongoing relationship between the parties and was not appropriate for use in connection with the way in which the relationship is terminated. Nor should the employer be under any implied duty to dismiss only for good cause. It would be contrary to public policy and an improper exercise of the judicial function to develop a new common law right which covered the same ground as the statutory right not to be unfairly dismissed, as this would defy the statutory limits Parliament had prescribed in the legislation on unfair dismissal.

4.3. Lord Hoffman said , but not as part of the decision itself, compensation for the manner of the dismissal, eg injured feelings, may be awarded in unfair dismissal claims.The House of Lords rejected this in Dunnachie-v-Kingston upon Hull City Council 2004 ICR 1052, holding compensation for unfair dismissal is recoverable only in respect of identifiable financial loss which excludes non-economic loss, such as injury to feelings. The claimant does not have the qualifying period to claim unfair dismissal anyway. In the absence of a finding of discrimination under the Equality Act 2010, what she claims in part 1 of her schedule of loss cannot be awarded. We have no jurisdiction or discretion to find it can. The claimant accepted this only recently.

5.1. Her schedule continued (we have rounded up/corrected some figures)
2) I have not been paid for 3 months' notice according to the contract due to the University management gross misconducts, Wrongful dismissal 3 months' salary = £15,800.76
3 months' pension contribution = £15,800.76 x16.48% = +£2,603.96 (note: the figure was calculated at that time, it should increase by now)

5.2. These claims are sound in theory. Dr Yu, himself an employee at a university, referred to teacher's pension contributions increases later in 2019 than the EDT. We cannot award more than the rate at the EDT. The respondent takes issue with the method of payment and tax. It says:
As the payment will be made in the current tax year, taking the gross amount as the correct figure is only accurate if the Claimant is currently a higher rate taxpayer. She refuses to confirm whether this is the case. If the Claimant is not a higher rate taxpayer the net sum should be grossed up to account for a deduction of basic rate tax, not higher rate tax. …

The amount due in respect of the Claimant's pension entitlement should be paid into her pension, but the Respondent would be willing to make the payment separately. However, if paid as additional compensation, and not into the Claimant's pension, it may also need to be taxed.

The Respondent must make the payment using an 0T tax code as the Claimant's employment has ended so the actual sum paid to the Claimant will be the amount produced after the deduction of the tax the Respondent is obliged to deduct, including Employee's NICs.

If the Claimant can establish she is currently a higher rate taxpayer the Respondent is willing to gross up the compensation payment at the higher rate .. Again this sum would be subject to the deduction of tax at source ...

5.3. An award of damages for wrongful dismissal must put the claimant into the position she would have been had the wrongful dismissal not occurred (British Transport -v-Gourley), **no worse and no better.** The problem arises from the tax treatment of certain termination payments changing from April 2018. Prior to then such payments, **not otherwise chargeable to tax**, escaped tax up to £30000. Damages for wrongful dismissal, unlike wages payable during the notice period when an employee is on "garden leave", were not chargeable to tax as "earnings" (Delaney-v-Staples). Thus, if the award was made gross and escaped tax, the employee would receive more than she would have had notice been given **.** Prior to the change the loss was calculated net of tax and grossed up at the employee's rate of tax to the extent all termination payments exceeded £30000.

5.4. The changes invented the concept of "Post Employment Notice Pay (PENP) which **is** charged to tax as earnings, so we believed before hearing Ms Millns today, in the hands of the receiving employee. Many employers rightly fear if they do not deduct tax at source when HMRC rules say they should, HMRC will make them pay tax on top of the gross sum already paid to the employee. Employed people are taxed using "Pay As You Earn (PAYE)", as a means of tax collection. When employment ends, we initially thought so did the employer's duty to deduct tax at source from a PENP. On that basis, it would be of no concern of the respondent whether the claimant is a higher rate taxpayer or not. The simple course would be to award damages for wrongful dismissal based on gross pay i.e. £63,203.04 divided by four to give 3 months basic pay = £15800.76. None of us are tax experts. Ms Millns agreed neither is she, but her instructing solicitors and the University's payroll provider had given her instructions **they are** obliged to deduct tax at source and the claimant did not show otherwise. We accept that if at the date of termination the claimant was a higher rate tax payer but she no longer is, and we awarded the gross sum **which was now taxed at basic rate in the year of receipt**, she would be over-compensated.

5.5. Another fundamental flaw in the claimant's approach to remedy has been to insist on communicating with the University's solicitors via ACAS only, despite them explaining to her such communications cannot be referred to in the ET. What they, and we, needed to know was enough about her other income (which may include investment income) to make as accurate an estimate as possible of the tax treatment of these awards. On the day of this CVP hearing in the Court and Tribunal Centre, the entire Outlook system "crashed". Documents sent in during the week by email could not be accessed by all of us but we could deal today with remedy if the parties co-operated. The claimant and Dr Yu, often together, talked over Ms Millns and the ET protesting vehemently about the University's treatment of her in various respects, as they did at the liability hearing. We had to stop this because it was not helping us to help her. Dr Yu said he and the claimant did not understand the tax system and we sympathise but they distrust the University's solicitors to such an extent as to impede their ability to understand and put any alternative arguments about tax.

5.6. The claimant in the tax year ending 5 April 2019 earned nothing from 1 February so may well have "dropped out" of the higher rate tax band. An award paid now would fall in the tax year 2021-2022 during which she has had employment, or pay in lieu of notice, at a salary of about £53000 per annum for 40 weeks of the year at Nottingham Trent University. Her earnings would be that sum

divided by 52 x40 =£40769. That would not put her into the higher rate tax band. Her net pay at the University during the notice period 29 January -28 April 2019 would have been £10098.48. If we gross that up at basic rate of 20% it produces **£ 12623.10**. The value of the employer's contributions to her pension in the notice period must be included as part of her loss. Apparently that cannot now be made directly into the pension fund. It would escape tax because it is a pension contribution. At the time the rate was 16.48%of her gross pay = **£2603.96.**

5.7. As she was paid in error for three days, 29-31 January inclusive, the net amount of that also falls to be deducted from her loss **£342.84** .The lost earnings are therefore **£ 12623.10** +**£2603.96 - £342.84 = £14884.22.** Ms Millns says this will be paid using an "OT" tax code. If this results in the claimant being paid less than that figure , she should be able to claim tax back from HMRC.

5.8. Having worked out the sum we believe will put the claimant into the position she would have been, after tax, had the wrongful dismissal not occurred, no worse and no better, HMRC rules govern what deductions must be made at the point of payment. If necessary, we could reconsider this part of the judgment in the event HMRC adopt a different approach to that which we have in arriving at the true net loss.

6.1. As for "holiday pay",the claimant's schedule uses an unnecessary daily rate method *" 3) I have not been paid for my annual leave from 1 Sept 2018 to 29 Jan 2019 which is about 5 months (35/12)-3days (for Jan. 2019) = 14.58-3 = 11.58 days = 11 days 11 days = £228.99 (per day) 11 (1+25%) = £2518.96 (1+25%) =* ***+£3,148.70"***

6.2. Regulation 14 of the Working Time Regulations 1998 (WTR) applies where—

(a) a worker's employment is terminated during the course of a leave year, and

(b) ***on the date on which the termination takes effect*** *("the termination date"), the proportion she has taken of the leave to which he is entitled in the leave year under regulation 13(1) and regulation 13(1A) differs from the proportion of the leave year which has expired.*

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a)such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b)where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula (AxB)-C where—

A *is the period of leave to which the worker is entitled under regulation 13(1) and regulation 13(1A);*
B *is the proportion of the worker's leave year which expired before the termination date, and*
C *is the period of leave taken by the worker between the start of the leave year and the termination date.*

6.2. The leave year is agreed as 1 September to 31 August and the annual entitlement 7 weeks **plus** bank holidays. The respondent was unable to say whether the claimant took any leave apart from bank holidays of which there were three in the leave year before the EDT. If a party is entitled to contractual leave there is no **implied** right to be paid in lieu of any untaken (Morley-v-Heritage plc) but in this employment there is an express right to pay on termination in lieu of the contractual as well as statutory leave. This contractual provision appears to be part of a "relevant agreement". Such sums are not "earnings" but termination payments, and escape tax because the total of such

payments is less than the £30000 tax free under s.401 of the Income Tax Earnings and Pensions Act. So this should be awarded net of basic rate tax to avoid over compensating the claimant.

6.3. The claimant also says the *proportion of the leave year which has expired* should include the notice period not given. She writes the "real ending date" (RED) is the EDT, 28 January + three months i.e 28 April 2019, 240 days into the leave year ,not 150**.** That conflicts with Reg 14(1)(b). Termination, though wrongful, is still **effective**. She has 7 weeks untaken at net weekly pay of £776.81 = £5437.64. 150 days of the leave year had elapsed so we divide by 365 and multiply by 150 =£2234.65. When giving our decision orally E.J. Garnon may have mistakenly applied 20 % tax to this when it was already calculated net and stated a different sum but £2234.65 is the right figure.

7. Had the claimant not been wrongfully dismissed her employment would have lasted over one year and only 50% of her relocation expenses would have been repayable by her. She says the total relocation she was **entitled** to claim was £5000 according to the respondent policy, half of it is £2500, so she owes **£1972.58** (£4472.58-£2500). This is not right. If £5000 is the maximum payable but as she incurred and was paid less, it is half of what the respondent paid which she now owes. This is an "employer's contract claim" which was not "pleaded" in the ET3. The claimant did not raise this but as it is a point of law she may not know, EJ Garnon did and Ms Millns agreed that was so. The claimant's schedule says "*It is the University wrong doing; therefore, I should not pay back the relocation fees. It has cost me a lot of more for moving on this job."* For the very same reason we give for rejecting her claim for lost property in paragraphs 8.3–8.5. below we can order no repayment or deduct it from the award.

8.1. The claimant next says *4) I went to Germany for the University business trip from 6-12 Nov. (only air ticket from London Heathrow and hotel in Germany fees are paid by the university). For the receipt, please see below. The dinner, travel cost in Germany and the travel cost from Newcastle to Heathrow airport are not paid to me. 7 days travel cost such as taxi, train and bus (£10) + food (breakfast £5 + lunch £7 + dinner £13) + travel from/to Newcastle to Heathrow (£277) = £245+ £277= £522 (1+25%)= £652.50, booking hotel phone call charge: £30.34. Total: £652.50 + £30.34 =* ***£682.84.*** She was arrested and suspended on 30 November 2019. She has produced no evidence she had to travel to Heathrow from Newcastle rather than her home in Bournemouth or what, if anything , the respondent is obliged to pay for her meals

8.2. The respondent agrees she was entitled to £30.34 expenses for phone calls . Our findings included: "*4.174. The only expense claim* ***she has evidenced*** *is a telephone bill £30.34 for the Germany hotel which will be paid.* The issues as set out by Ms Millns at the liability hearing included "*The Respondent has set out what it had paid the Claimant as expense for the same trip at para 31 of its Amended Grounds of Resistance .. and denies any more expenses are payable.*

Questions for the Tribunal to consider

a. What was the Claimant's contractual right to have expenses reimbursed?
b. Has the Claimant proved that the Respondent was in breach of that contractual right by failing to pay her expenses?
c. If so, in what amount?

8.3. The claimant also says "*The Respondent lost my personal belongs in my office (I had never been allowed to collect my personal belongs in my office). This issue had been fully discussed in the preliminary hearing on 15 December 2020 with Judge Sweeney who had* ***asked*** *the Respondent to give back all personal belongs to me".* Our findings included: "*4.174. The claimant says the University sent one and half boxes of her personal belongings to her however, most are still missing.* ***There is no claim for missing property.*** *In an ET such matters can be dealt with if, but only if,*

*there is an express or implied term of the employment contract that the employer will safeguard employees property **and** the ET1 contains such a claim. **It does not."***

8.4. At the PH before EJ Sweeney no judgment was, or could be, made. Chapman-v-Simon held we cannot find in favour of a claimant on something which has not been put forward in her claim ("pleaded") or added by way of an amendment. A claim can be amended to include an event which had not occurred on the date it was issued (Prakash-v-Wolverhampton Council). At no time before the full hearing was this claim amended to add a claim for lost property, so we cannot deal with it.

8.5. In a case before EJ Garnon last year, Ms Millns represented the respondent, an Academy. The claimant, a PE teacher, prepared his own claim (but was represented at the hearing). We made an award for property he had left on the premises in a secure place and was "lost". The distinguishing features are (a) his claim **was pleaded** (b) he prepared an inventory of the missing property, with replacement prices evidenced by price lists from the internet. Had the claimant applied to amend her claim, and given such details of the property "lost", we may have been enabled to find in her favour. **She has not.** All she writes is "*5) The university treated me without any respect and did not allow me to collect my personal belongs in my office. My personal belongs in my office (clothes, receipt **and other stuff)** are missing caused by the respondent wrong doings. The total cost: **+£2,000** on the missing stuff".*

8.6. The claimant says: "*The personal belong in my office includes the receipts for my trip to Germany, It happened after I had submitted the ET1 since I had assumed that the Respondent would give back all my personal belongs. Therefore **£30.34** expenses are only a small part of the Respondent have owned me for phone call. If the tribunal **ignores** this issue, please let me know where I could pursue this issue further.* She has since added *"The receipt was missing due to that the Respondent lost my personal belongs in my office (I still don't understand why the Respondent did not allow me to collect my personal belongs in my office! **I am also at a lost to understand why the ET has ignored this serious issue**).*

8.7. We are not "ignoring" anything. The claimant does not explain why she could not have claimed her expenses nearer the time and/or told the University where the vouchers /receipts were. In short, she had her opportunity to put this claim properly at the liability hearing and failed to then or since.

9. The claimant asks for "*interest for three years according the tribunal court normal practice (8% per year)*". The ET can award interest in discrimination cases because a Statutory Instrument authorises us to do so. The civil courts have their own rules about interest. We have no power to award interest in a breach of contract or holiday pay claim. Why this should be so, we do not know but it is for Parliament, not us, to amend the law.

10.1. In points 6-10 of her schedule the claimant appears to claim elements of costs thus

*6) Some of my solicitor fees: = **+£3,468***

*7) Some of my hotel stays cost at Newcastle: = **+£1,171.92***

*8) My Traveling cost to/from Newcastle: **+£2,000***

*9) The cost on S-bundles = **+£170.45***

*10) Deposit order **£1,000***

10.2. The Rules include as far as relevant

74. *(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).*

75.*(1) A costs order is an order that a party ("the paying party") make a payment to—*
(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

76.*(1) A Tribunal may make a costs order.., and shall consider whether to do so, where it considers*
*(a) a party (or that party's representative) has acted vexatiously**,** abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
(b) any claim or response had no reasonable prospect of success.

77. *A party may apply for a costs order .. at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless* ***the paying party has had a reasonable opportunity*** *to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

10.3. The Court of Appeal have said costs orders in the ET (a) are rare and exceptional (b) whether the ET has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so (c) the paying party's conduct as a whole needs to be considered per Mummery LJ in Barnsley MBC-v-Yerrakalva 2011 EWCA 1255 at para. 41: "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct .. in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."

10.4. The claimant lost most elements of her case and there is no basis to find any part of the response had no reasonable prospect of success. The way the proceedings were conducted by the respondent cannot be sensibly criticised, though Dr Yu often did so. The University's solicitors and Counsel are obliged to do their best for the University, not for the claimant, and we can only make a costs order if they act unreasonably. We cannot find they have.

10.5. Ms Millns said the University wished to apply for costs, not of the proceedings as a whole but for today's hearing, which she submits was wholly avoidable had the claimant complied with her duty under the overriding objective (which we quoted at para 1.12 of the liability judgment) to co-operate with the ET and the other party. We were not willing to deal with any applications for costs today because a claimant not legally represented needs more time to consider and answer any such application.

11.1. As for the deposit, Rule **39 includes**

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party …
otherwise the deposit shall be refunded.
(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

11.2. We deliberately do not read the reasons for deposit orders before the hearing to avoid any suggestion the views expressed by the EJ who made the order influenced our thinking . The only issue is whether we rejected the part of the claim on which a deposit was ordered for *substantially the reasons given in the deposit order.* The claim in question was that Professor Wathey failed to correct an error in a letter **because of race.** We found he did not, for the same reasons EJ Sweeney ordered the deposit, so rule 39(5) (b) says what we should do.

12.1. The claimant asks " *.. I would also like to clarify which parts of the documents from the Respondent bundle and S-Bundle I am allowed to publish or send to the third party, in particular, I would like to publish or send to the third party the interview note with Prof Andrew Wathey and the academic misconducts to make sure that the lessons are learnt and the justice heard.* This is not something the ET should address. In effect the claimant seeks legal advice on the extent to which documents disclosed for the purpose of litigation can be published. She must take legal advice from an independent lawyer. We can say, generally, using documents disclosed for the purpose of the litigation for another purpose may be unlawful, and though what is said in the ET is privileged for the purposes of the law of defamation, repeating it outside the ET may not be, so the claimant should be very careful.

12.2. Ms Millns expressed concern about a document the claimant sent to the ET entitled "*Hearing Record with Professor Andrew Wathey*" saying it suggested she had made a covert audio recording of his evidence which would be a contempt of the ET. E.J.Garnon saw it shortly after it arrived, and thought it may have been produced from a thorough note as it did not include some things Prof Wathey said. E.J.Garnon said he would mention it in these reasons but, in the absence of evidence of an audio recording, thought nothing more should be done. On the strike out application (1.14-1.19 of the liability reasons) we allowed for the claimant being less aware of procedure than a legally represented party would be. We raised the legal point which saves her repaying relocation expenses. She and Dr Yu have said more than once we have treated her less favourably than the University and its representatives when the history of the case as a whole shows the opposite. They have wasted time in cross examination and on arguments which cannot succeed, rather than being thorough on those which if pleaded, prepared and put better, might have.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 17 December 2021