**Case No: 2201027/17**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms T. Robinson**
**Respondents:** **His Highness Shaikh Khalid bin-Saqr al-Qasimi**

**London Central Remote hearing (MS Teams)**
**Employment Judge Goodman** **4 January 2022**

**Written reasons having been given requested under rule 62,** the following reasons are recorded for the order of 4 January for remission back to the same tribunal.

# REASONS

1. On 21 November 2018 the employment tribunal (Employment Judge Goodman, Mrs D Olulode, Ms M Jaffe) found that the claimant had not been subjected to detriment because she had made protected disclosures, but that she had been unfairly and wrongfully dismissed, although those claims failed for illegality in performance of the contract.

2. On the claim for unlawful deduction from wages, the deductions having been made by the respondent in respect of tax on her wages, no order was made upon the respondent undertaking to pay the full amount to HMRC on the claimant's account. For completeness, I add that on a subsequent costs hearing in June 2019, the tribunal was told that this payment had been made to HMRC, but it appeared that the money had not allocated to the claimant's account, because the claimant had not, despite request, told the respondent her national insurance number.

3. On appeal against the decision to the Employment Appeal Tribunal, it was held by Lewis J. (judgment 4 February 2020) that the contract had been illegal in performance from 2008 to 2014, but not thereafter, when the respondent began to withhold tax from wage payments, such that, as at dismissal in 2017, the contract could be enforced. Consequently, the tribunal was required to make an assessment of remedy for the unfair and wrongful dismissal claims.

4. The respondent appealed further on the illegality point. The Court of Appeal upheld the decision of the EAT (Judgement 10 June 2021).

5. The claimant's solicitor then wrote to the Regional Employment Judge for London Central employment tribunal on 22June 2021, an email headed "urgent… Remission to freshly constituted tribunal", requesting a case management hearing to discuss: "next steps in the remission as set out in Paragraph 100-103 of Lewis J judgment".

6. Paragraphs 100 to 103 of the EAT judgment follow the decision on the points appealed, and are headed: "the consequences of these conclusions". Paragraph 100 identifies 10 weeks' notice due for wrongful dismissal, an additional month's pay for the compensatory award for unfair dismissal. Paragraph 101 notes that the basic award related to length of service might be subject to reduction as just and equitable because of the claimant's conduct, and that the tribunal would have been entitled to make such reduction for the years 2007-2014, but should hear argument about the basic award related to other periods. In paragraph 103 Mr Justice Lewis said that he would now hear submissions as to appropriate order to make.

7. The reasons, but no separate order, were sent to the tribunal by the claimant's solicitor.

8. Neither the regional employment judge nor I could find any mention in the judgements of the Employment Appeal Tribunal or the Court of Appeal of remission to a freshly constituted tribunal, as suggested in the claimant's solicitor's email of 22 June 2021. In case we had missed something, especially given the administrative discontinuities of lockdown, the matter was listed before me to hear the parties on the point.

9. On 22 November 2021 the parties were sent a notice of listing for today. On 21 December 2021 the claimant's solicitor wrote to the employment judge make an application for the case to be remitted to a new tribunal. If remedy was decided by the original tribunal, there was a risk of justice not been seen to be done when the original tribunal had formed an adverse view on the issue of illegality, and could not be expected to clear their minds entirely of the views and conclusions reached first time round. Remission to the same tribunal would allow it to have a second bite of the cherry to make good deficient reasoning on the illegality point; the judgement was "totally flawed". There was a risk of partiality.

10. Regional employment Judge Wade responded (31 December) that the application should be made to Employment Judge Goodman at the case management hearing, and that in the absence of any direction by the

Employment Appeal Tribunal it would be inappropriate for her to intervene. The claimant's solicitor then wrote at length on 3 January. Among other things, she said the question of remission had not been addressed by the appeal tribunal, and should be considered by this tribunal; it would not be appropriate for the original tribunal to decide remedy because their finding of illegality followed from their doubting of her credibility arising from the 2007 mortgage application. The illegality finding had been overturned, and she would not get a fair hearing in contravention of article 6.

11. This prompted the respondent to point out the same afternoon that Lewis J. *had* made an order on 4 February 2020 (the same date as the reasons) , which states at paragraph 2:

> "the claims for wrongful and unfair dismissal succeed and are remitted to the same employment tribunal for determination of remedy, unless in the view of the learned Regional Employment Judge factors emerge which render such an arrangement impractical or impossible in which case the matter be remitted to be heard by a differently constituted tribunal as directed by the Regional Employment Judge". (Emphasis added)

12. The first issue then to be determined today was whether the Employment Appeal Tribunal had made a remission direction. Mr Stevenson, for the claimant, submitted that he had no recall of any submissions being made, as invited in paragraph 103. The order must have been made without submissions, and should be considered now. Ms Davis, for the respondent, had no recollection of the hearing, had assumed submissions had been made, as there was an order, and had not researched the point.

13. There being no direct evidence of whether submissions were made, orally, or in writing, I consider what can be inferred from other circumstances. I consider it very unlikely that the Employment Appeal Tribunal, having first invited submissions, should go on to make an order, on the very same day, without submissions. Further, had this been the case, I would have expected one or other party, but particularly the claimant, who considered the original tribunal to be partial, to have written asking for an opportunity to make submissions and for the direction to be reconsidered. Against that, I know that usually the Employment Appeal Tribunal gives reasons, if only in half a sentence, why a remission decision is being made. It may of course be that the point was not contested, so reasons were not needed. Taking these circumstances in the round, there is no reason to think the order was made without hearing the parties first. In any case, even if it was, it is not for this tribunal to reconsider an order made by the Employment Appeal Tribunal.

14. I do not understand Employment Appeal Tribunal's order for remission back to include an opportunity to argue that it is *impracticable* (because of partiality) to have remedy heard by the original tribunal, when that tribunal is available. The reference to the Regional Employment Judge varying the

decision is merely making provision to appoint a new tribunal when there is difficulty reconstituting the original tribunal, whether because of illness or death or retirement, and is an entirely usual order on remission back to the original tribunal. Therefore remedy should be decided by the original tribunal, as directed.

15. Nevertheless, I have, as requested by the claimant, as a point delegated by the Regional Employment Judge to me, considered whether remission for determination of remedy should be to the original tribunal, or to a freshly constituted tribunal.

16. The factors to be considered on remission decisions were set out in **Sinclair and Roche v Temperley (2004) IRLR 763,** at paragraph 46. They were: (1) the proportionality of the additional cost of a fresh tribunal measured against the likely award; distress at having the matter heard by the original panel was to be discounted as it would inevitably arise from reopening the matter. (2) the passage of time may be relevant, although knowledge could be refreshed if not retained; (3) bias or partiality were relevant, and not necessarily limited to where the appeal finding had depended on a finding of bias or misconduct; (4) where the decision was totally flawed, the appellate tribunal must have confidence that, with guidance, the tribunal could get it right second time; (5) whether it is right to give the original tribunal a second bite if it had already made up its mind, when it "may be difficult to change it". Finally (6) tribunal professionalism: where a tribunal "is corrected on an honest misunderstanding or misapplication of the legally required approach", it could be presumed that it would follow appellate guidance.

17. Mr Stevenson makes clear that it is not suggested that the original panel was biased, and I am told that bias played no part in the notice of appeal. He advocates however that the tribunal was partial. The finding as to the claimant's credibility, arising from the mortgage application, had followed through in series of findings (paragraphs 8, 18.2, 42, 45, 46, and 94 to 105 of the November 2018 judgement) to arrive at the finding of illegality through illegal performance of the contract throughout. Having made that finding, with the best will in the world, the tribunal would find it "impossible" to put to one side its original finding.

18. The respondent argues that none of the tribunal's findings of fact were doubted, in particular, as to the reason for any detriment and dismissal, nor was the tribunal's finding about how long it would have taken to conduct a fair process subjected to criticism; importantly, the finding that there was illegality from failure to declare income for tax was upheld for the period 2007-2014, at both appeal stages. The error had been in what weight should have been given to the respondent making deductions for tax (not paying the money to HMRC, but retaining it in a separate account) from 2014 to 2017, because the tribunal had not paid adequate heed to the decision in **Patel v Mirza**. This was an error about how to apply the law to the facts, but it was not suggested that the tribunal has been wrong

in its findings of credibility and illegality to 2014.

19. Proportionality: the likely scope of remedy - there is not yet a schedule of loss – consists of contractual notice, a basic award for unfair dismissal, and a compensatory award of one month's pay, which I was told is in the order of £7,500 at most. It may be less, because the respondent will argue there should be just and equitable reductions for conduct. If a freshly constituted panel is to hear remedy, on the claimant's case that panel should not be invited to rely on the findings made in the original judgement, because of the taint of the finding of dishonesty on the claimant's part, but will have to reconsider the conduct issues afresh. It is hard to see how this will not require the calling further evidence from the claimant, and from two witnesses for the respondent. That means at least a two-day hearing, so additional cost, which should be weighed together with other factors.

20. It is relevant that both sides have outstanding costs applications. The claimant's application relates to interlocutory matters, not involving the current panel, but the respondent's applications, whether for costs to be paid because of unreasonable conduct, or because misconceived, or for costs wasted by representatives (if that is still pursued), are better dealt with by the tribunal that heard the original proceedings than by a fresh tribunal which must rely entirely on the written findings of the original panel. If that is right, even if remedy was remitted to a fresh tribunal, there would have to be a hearing before the original panel on costs. That adds to the costs to be weighed against the value of the claim.

21. On second bite of the cherry point, it is clear that the temporal scope of illegality has been determined by the Employment Appeal Tribunal, and upheld by the Court of Appeal. There is no opportunity for the employment tribunal to improve on its reasoning on illegality; that has been decided, and only remedy is remitted back. It is not an issue for the remedy hearing. The tribunal at the remedy hearing does have to consider any point on just and equitable reduction argued by the respondent, but it has not yet heard argument from the parties on the point. The credibility findings, and the finding of illegality for a period of seven years, were not touched by the appeals.

22. As for recollection, the findings of fact were detailed and recorded in writing, if there is doubt, the original witness statements and notes of evidence are available. In any case there were several unusual features of this hearing which made it memorable.

23. Taking these factors together, and weighing them up, there will be disproportionate delay and expense in remitting remedy to a freshly constituted tribunal, which is not justified by any other factor. The findings of fact have not been disturbed by either appeal court. It is a case where the tribunal can make an assessment of remedy, in full knowledge of the facts of the case, on the claims it had found would have succeeded but for

illegality. None of these suggests it is not possible or practicable to have remedy decided by the original panel.

24. Remedy will be listed before the original panel as directed by Lewis J.

Employment Judge Goodman
17th Jan 2022

REASONS SENT to the PARTIES ON

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. 18/01/2022.

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FOR THE TRIBUNAL OFFICE