Case Number 2500991 /19

EMPLOYMENT TRIBUNALS

Claimant
Professor S. Cang

Respondent
University of Northumbria at Newcastle

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
Without a hearing

Made at NEWCASTLE **On 11 January 2022**
EMPLOYMENT JUDGE GARNON

JUDGMENT

Under rule 72(1) of the Employment Tribunal Rules of Procedure 2013('the Rules'), I refuse the application for reconsideration of the Judgment dated 17 December 2021 because I consider there is no reasonable prospect of it being varied or revoked.

REASONS (emboldening is mine unless otherwise stated and italics are quotations)

1. The claimant applied on 3 January 2022 for reconsideration of the judgment and reasons I, sitting with members Ms Hunter and Mr Moules by CVP, made on remedy. The Rules include:
70. A Tribunal may .. . on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
71. .. an application for reconsideration shall .. set out why reconsideration of the original decision is necessary.
72. (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers there is no reasonable prospect of the original decision being varied or revoked (including,,.., where substantially the same application has already been made and refused), .., the application shall be refused and the Tribunal shall inform the parties of the refusal.

2. At the liability and remedy hearings, Dr Yu, the claimant's husband, represented her and Ms Claire Millns of Counsel represented the respondent. The unanimous remedy judgment included :
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. The claimant's application set out 7 "issues" thus :

1. *Had the Respondent submitted or shared a 'Secret' bundle to the Tribunal without the knowledge of the Claimant before the hearing on 17 December 2021?*
2. *Should the hearing on 17 December 2021 be postponed?*
3. *Has this Tribunal made an individual (employee) to get a justice more difficult?*
4. *Has the Tribunal made a fair and justified decision?*
5. *Has the Tribunal followed the right law* ***or is the law fair to the employee****?*
6. *Have the Respondent (Professor Andrew Wathey) made a lie under the oath?*

7. *Have the Respondent followed the Tribunal order?*

4. The parties were sent the liability judgment on 11 October 2021. The reasons concluded: "*As for remedy, this was always listed as a liability only hearing. We cannot think of any good reason why remedy cannot be agreed. The claims we have found proved only require correct arithmetic calculation*." The claimant received an email from ACAS who offered remedy conciliation on 15 October 2021. She replied on 20 October. The respondent did not reply to ACAS as it wished communications about remedy to be "on record". The parties had two months to agree a relevant document bundle. I was sent one shortly before the remedy hearing which included some copy payslips and emails between the parties. I did not refer to it in the reasons as there was little relevant to the only real issue which was the tax treatment of the awards.

5. The effective date of termination (EDT) was 28 January 2019. The claimant's 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. 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, **nothing more**.

6.The claimant sent a remedy proposal on 26 November 2021 to ACAS who passed it to the respondent. It was unsustainable containing claims for injury to feelings. The respondent submitted a counter proposal on 29 November. I took the initiative of directing a letter to the parties on 14 December saying non-economic loss could not be awarded adding I was at a loss to understand why remedy could not now be agreed. The claimant submitted a revised proposal in which she appeared to accept this but made other claims which were also unsustainable. I suggested by email on 15 December postponing the hearing **if** both sides agreed. The respondent wished to proceed to ensure finality.

7. Damages for wrongful dismissal must put the claimant into the position she would have been had the wrongful dismissal not occurred, **no worse and no better.** Unlike wages paid during the notice period to an employee not required to work, they were not chargeable to tax as "earnings" (Delaney-v-Staples). Section 401 of the Income Tax Earnings and Pensions Act (ITEPA) exempted termination payments not otherwise chargeable to tax which did not exceed £30000 from tax ,so if the award was made gross **and** escaped tax, the employee would receive more than she would have had notice been given**.** Prior to April 2018 loss was calculated net of tax and grossed up at the employee's rate of tax to the extent all termination payments exceeded £30000. From April 2018 "Post Employment Notice Pay (PENP) **is** charged to tax as earnings. , as After employment ends, I initially thought the employer was under no duty to deduct tax from a PENP so tsimplewould be i.e. 3 basic .76 and leave the claimant to pay the tax. If employers do not deduct tax at source when HMRC rules say they should, HMRC will make them pay tax on top of the gross sum paid to the employee. Ms Millns' instructing solicitors and the University's payroll provider gave her instructions **they are** obliged to deduct tax at source and the claimant did not show otherwise.

8. If at the EDT the claimant was a higher rate tax payer, but no longer is, and what we awarded was now taxed at basic rate in the year of receipt, she would be over-compensated. We and the respondent needed to know enough about her other income to make as accurate an estimate as possible of her tax liability in the tax year 2021-2022 **and** what she earned, if anything, in the notice period. She had not provided that information to the respondent. The remedy hearing was not, as the claimant says, "*dominated by*" Ms Millns. I challenged her on tax and other issues. Having received answers the claimant had not previously given about her earnings after dismissal, Ms Millns asked for a break to take instructions and agreed the grossing up method. I did have the up to date schedule the claimant had prepared. On the day, the Outlook system in the Court and

Tribunal Centre, "crashed", so I could not be sure all documents sent in during the week by email could be accessed **by the members who were participating from home.** However, we could deal with remedy with only the payslips and other documents we all had.

9. On Issues 1 and 2, the claimant says she suspects the respondent sent to the ET a bundle without her knowledge and both she and Dr Yu were "*lost during the first 30 minutes discussion, and we did not know which documents Judge Garnon and Ms Claire Millns were discussing. It appears that the Judge Garnon and Ms Claire Millns were discussing a document we did not know**. If this is true, it has put the Claimant and her representative in an extremely disadvantage** since we could not follow the discussion between Judge Garnon and Ms Claire Millns. During the conversation, they referred page 70 which we didn't know. … I require **the Tribunal to investigate whether the Respondent had submitted a bundle for the meeting on 17 December 2021 without the Claimant knowledge***" (bold print the claimant's). There was no "secret bundle". Dr Yu said he did not understand the discussion about tax and we sympathised, but, despite knowing from the emails exchanged during that week, tax was the main issue, he had done no research to enable him to put any alternative arguments. Neither he nor the claimant have said anything to persuade us the grossing up process was not correct. The claimant asks "***why did the Tribunal not postpone the hearing as indicated in Ref 6 and follow the Respondent who insisted to go ahead?*** *Is this fair to all parties? To me and Mr Yu, the hearing on 17 December is wasting our time. The Claimant remedy (Ref 5) was not discussed, and we did not understand the conversation between EJ Garnon and Ms Claire Millns most of the times*." The simple answer is we did not **need** to postpone to deal with remedy,and the claimant could be paid promptly.

10. The claimant was entitled to the value of employer pension contributions. The employer contribution for universities to the Teacher Pension Scheme rose from 16.48% to 23.68% **in September 2019**.We cannot award more than the rate which would have been paid up to the end of April 2019. The respondent could **not** now pay into her pension fund but, as we pointed out, a payment to her would not be taxed so we awarded it gross. The claimant says "*Another question is what is the justification for the tribunal to use the 16.48% (not 23.68%) in the pension calculation (para 2).* The simple answer is that is the value of the loss to her.

11. The leave year was 1 September to 31 August. Awards of compensation for untaken leave are not "earnings" but termination payments, so escape tax if the total of such payments is less than £30000 under s.401 of ITEPA. We awarded it net of basic rate tax. The claimant also said the *proportion of the leave year which has expired* should include the notice period not given as the "*real ending date*" is 28 April 2019, 240 days into the leave year, not 150**.** That conflicts with Reg 14(1)(b). Termination, though wrongful, is still **effective**.

12. The claimant again asks for "*interest for three years according the tribunal court normal practice (8% per year)*".An ET can award interest in discrimination cases because the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 authorises us to do so. The claimant says I **"***did not show which law he used***"**. I did not expressly refer to it because she was not legally represented. The civil courts have their own rules about interest but 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.

13. On issue 7, the claimant says we ordered the respondent to pay a total of £17,149.21 but it only paid £10,012.61 . Having worked out the sum we believed would put the claimant into the position she would have been, after tax, had the wrongful dismissal not occurred, HMRC rules govern what deductions must be made at the point of payment. Ms Millns clearly said the claimant would be paid using an "OT" tax code which may result in her being paid less than the figure in the

judgment but she should be able to claim tax back from HMRC. If the difference is not due to tax she can sue in the County Court to enforce the award. There is no need for a reconsideration.

14. The claimant makes miscellaneous points such as *"Has this Tribunal made the individual (employee) to get a justice more difficult?"* objecting to her date of birth and her working after dismissal at Nottingham Trent University being mentioned in the liability and/or remedy decisions. She asks "*what is the purpose for Tribunal to publish those sensitive data? Has the Tribunal considered my future career, my privacy and security… Does this tribunal want to make an employee life more difficult to launch their complaint to their unfair employer?* ". Dates of birth are given on the claim form and I always record them partly because some compensation calculations require them . Her work at Nottingham Trent was raised in cross examination at the liability and remedy stages. It was relevant and there is no secret about it. We have no power to prevent on-line publication of judgments.

15. The claimant asks *"Has the Tribunal made a fair and justified decision?* and *"Have the Respondent (Professor Andrew Wathey) made a lie under the oath?"* She raises the same points she did in her earlier application for reconsideration of the liability decision which I also refused under rule 72(1), with written reasons.

16. Para 12.2 of the remedy decision said Ms Millns expressed concern about a document the claimant sent to the ETentitled "*Hearing Record with Professor Andrew Wathey"* that it suggested she had made a covert audio recording of his evidence which would be a contempt of the ET. The claimant adds "*This is another example which demonstrates that the Respondent have made a blind allegation on me without any evidences. They were based on their wrongful believes without any evidences reporting me to the Police and putting my life extremely difficult.*" We agreed there was no hard evidence she had made an audio recording and took no step adverse to her.

17. We said in the remedy decision the fundamental flaws in the claimant's approach 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. This is supported by her comment "*Has the Tribunal followed the right law* ***or is the law fair to the employee?*** She blames the ET, Ms Millns and her instructing solicitors for her own, and Dr Yu's, failure to prepare and present her case properly despite guidance from us and EJ Sweeney at case management . On none of the issues she raises has the claimant shown any need at all for a reconsideration.

EMPLOYMENT JUDGE T M GARNON

AUTHORISED BY THE EMPLOYMENT JUDGE ON 11 JANUARY 2022