



EMPLOYMENT TRIBUNALS

First Claimant: Mr A. Patel

Second Claimant: Mrs J. Patel

Respondent: Mr. Vasaf Ali trading as Bulwell Convenience Store and Bulwell News

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The application by the Claimants for reconsideration of the judgment on remedy under rule 71 of the Employment Tribunals Rules of Procedure 2013 is well founded and succeeds.

The judgment dated 17 October 2021 is varied such that the award of compensation to the Claimants shall now include an additional payment by the Respondent to take into account the amount due in respect of tax which the Claimants' will have to pay on receipt of the compensation awarded.

The additional sums to be paid are:

First Claimant :

- **Grossing up for tax :** The Respondent is in addition to the sums awarded under the judgment dated 17 October 2021, ordered to pay the First Claimant the sum of : **£3,360.79**

Second Claimant:

- **Grossing up for tax :** The Respondent is in addition to the sums awarded under the judgment dated 17 October 2021, ordered to pay the Second Claimant the sum of : **£1,823.44**

REASONS

Background

1. The Respondent failed to enter a response to the claims. The case was listed for a final hearing which the Respondent failed to attend.
2. At the commencement of the hearing, the Claimants' representative confirmed that the claim was for unfair dismissal, discrimination with respect to the dismissal only i.e. a claim under section 39 (2)(c) Equality Act 2010 (ERA), notice pay, holiday and unpaid wages. It was not asserted that the issues included any act of discrimination pursuant to section 39 (2)(d) ERA.
3. By a Judgment dated 25 June 2021 it was adjudged that all the claims were well founded and succeeded. The Judgment on liability was made against the Respondent at the hearing and the reasons were given orally by the Tribunal. The Judgment was served on both parties. Neither party requested written reasons.
4. The Tribunal was presented with impact statements for each of the Claimants at the final hearing, the truth of which they confirmed under oath. The Tribunal was also presented with documents relating to remedy however, it was deemed necessary to make Orders for the Claimants' to provide further information including revised schedules of loss. It was agreed with the Claimants that the decision on remedy, would be determined by the Tribunal on the papers.
5. Since the hearing the Claimants' produced further information copied to the Respondent, which included a further bundle of documents, amended schedules of loss and written submissions in support of an award for injury to feelings, aggravated damages and an Acas uplift. The Respondent did not provide any representations or comments on the further information provided.

Compensation Awarded

6. The sums awarded and the calculation of those awards, were as follows:

First Claimant

1. Basic Award: 26 x £419.22 : **£10,899.72 (gross)**
2. Loss of statutory rights : **£500**
3. Loss of earnings during notice period: 12 x £346.62 : £4,149.44(net) = **£4,149.44(net)**
4. Loss of earnings – discrimination (sums sought pursuant to the Equality Act 2010)

4.1 Loss of earnings from end of notice period to the hearing: Claimant was entitled to 7 weeks sick pay at full pay under the contract of employment with the Respondent following by SSP;

- 12.12.20 – 17.05.21: £346.62 X 22 weeks : £7,625.64 (net)
- 18.05.21 – 25.06.21 : £346 x 6 = £2,079.72 (net)

- £9,705.36 less sums earned through new employment during period 12.12.20 – 25.06.21 : £10,911.27 (net)
- Claimant also received job seekers allowance/ income support (£541.10) from 27.09.20 – 20.11.20.

Losses from EDT to the hearing less mitigation from new employment and job seekers/ income support: £14,354.80 (net) - £10,911.27 - £541.10= **£2,902.43 (net)**

4.2 Loss of pension benefit:

18.09.20 – 11.12.20 (notice period) = £9.04 x 12 weeks = £108.48

12.12.20 – 25.06.21 (£9.04 x 28 weeks) : £253.12

less pension benefits received during mitigation £17.46 x 18 weeks = £314.28 :

Total loss of pension benefit : **£47.32 (net)**

4.3 Future loss of earnings.

Claimant on sick leave for a week , had he remained employed with the Respondent he would have received full pay £346.62 x 1 week :£346.62 less £130.15: **£216.47 (net)**

5. Arears of Earnings/ unlawful deduction claim

5.8.20 – 18.09.20 [EDT] : £346.62 x 7 weeks = **£2,426.34 (net)** plus pension loss
£63.28 (£9.04 x 7 weeks) = **£2,426.34 (net)**

6. Holiday Pay

Accrued holiday claimed from 24.07.20 to 18.09.20 : £346.62/45 hours - £7.70 per hour
net . 38.77 hours x £7.70 = **£298.53 (net)**

7. **Injury to feelings :** **£15,000**

8. **Aggravated Damages:** **£2,500**

9. **Acas Uplift : 22.5%** (excluding basic award)

22.5% x £28,040.53 = **£6,309.12**

10. Interest on discrimination;

12.1 on injury to feelings plus 22.5% uplift : from 18 September 2020 to 25 June 2021
(40 weeks) @ 8%: **£1,372.00**

12.2 on financial losses with 22.5% (£3166.22 x 22.5 % =£3,878.62) uplift from mid-
point of 4 Feb 2021 (20 weeks)@ 8%: **£119.34**

Second Claimant

1. Unfair dismissal

1.1 Basic Award: 26 x £226.72 : **£ 5,894.72 (gross)**

1.2 Loss of statutory rights : **£500**

2. **Wrongful dismissal – notice period : 18.09.20 – 11.12.20**

12 weeks x 203.93 = £2,447.16 (net)

3. **Loss of earnings – discrimination (sums sought pursuant to the Equality Act 2010)**

3.1 From end of notice period to hearing 25 June 2021 :

- 28 weeks x 203.93 (net) £5,710.04
 - Less benefits 27.09.2020 – 03.04.2021 (£2,007.45)
 - Subtotal: £3,702.59 (net)
 - Plus loss of pension benefits £126.40
- £3,828.99 (net)**

3.2 Future loss of earnings: 25 June 2021 to 18 .09 2021 12 months from EDT

£203.93 x 12 weeks **£2,447.16 (net)**

£3.16 x 12 weeks **£37.92**

:

4. **Arears of Earnings/ unlawful deduction claim**

Unpaid salary from 10.08.20 up EDT : **£ 1,019.65 (net)**

Unpaid pension contributions at 3.16 X 5 weeks: **£ 15.80**

5. **Holiday Pay** **£175.61 (net)**

6. **Injury to feelings :** **£14,000**

7. **Aggravated Damages:** **£1,500**

8. **Acas Uplift : 22.5%** (excluding basic award)
22.5% x £25,972.29 **£5,843. 77.**

9. Interest on discrimination;

12.1 on injury to feelings plus 22.5% uplift : from 18 September 2020 to 25 June 2021
(40 weeks) @ 8%: £ 18,987.05 x 8% x 40 weeks : **£1,168.46**

12.2 on financial losses with 22.5% (£) uplift from mid-point of 4 Feb 2021 (20 weeks) @
8%: £6314.07 x 22.5% = £7734.73 x 8% x 20 weeks: **£237. 99**

The Application – reconsideration

7. The judgment on remedy was sent to the parties on 28 October 2021. Employment Judge Broughton informed the parties that the information submitted by the Claimants had not accounted for grossing up. The Claimants were required to provide calculations to

account for 'grossing up' within 14 days and the Respondent to provide its comments within 7 days thereafter, and the Tribunal would then consider whether to reconsider its judgment on remedy.

8. The Claimant submitted the further information on 9 November 2021 to take into account the need for 'grossing up the awards' and that has been treated as an application for reconsideration. The Respondent was copied in but made no representations.
9. Employment Judge Broughton did not understand the way in which the Claimants had calculated the tax due on the awards and the Claimants were invited to submit revised calculations or request a hearing.
10. The Claimants' submitted revised calculations on the 7 March 2022 but did not request a hearing however the Respondent had not been copied in. The Tribunal forwarded the revised calculations to the Respondent on 9 March 2022 informing the Respondent that the application would be dealt with 7 days thereafter. By the date of this judgment on the 26 March 2022, the Respondent has not commented on the Claimant's application or calculations.
11. The calculations put forward by the Claimants include a further sum based on what they assert their liability at marginal rate of tax (20%) will be;
12. The First Claimant seeks a further sum of £3,360.79 based on the compensation of £46,803.99 to the extent it exceeds £30,000 at 20% tax.
13. The Second Claimant: seeks a further sum of £1,823.44 based on the compensation of £39,117.23 to the extent it exceeds £30,000 at 20% tax.

Rules of Procedure

14. I considered the application for reconsideration under Rule 72(1) of the 2013 Rules of Procedure.
15. The test is whether it is necessary in the interests of justice to reconsider the Judgment (Rule 70).
16. The Tribunal on receiving the application considered that this was a case where there were reasonable prospects of success.
17. The Respondent has made no comments on the application.
18. The Claimant has not requested a hearing. The application has been considered on the papers.

The Legal Principles

Grossing up

19. When tax is payable on compensation under section 401 of the Income Tax (Earnings and Pensions) Act 2003, the standard practice is for tribunals to increase the amount of compensation so that, after the appropriate amount of tax has been paid to HMRC, the claimant is left with the figure the tribunal originally intended to award. This is the so-called 'Gourley principle' derived from the House of Lords' decision in ***British Transport Commission v Gourley 1956 AC 185, HL***.

20. In the context of damages for wrongful dismissal, the High Court in ***Shove v Downs Surgical plc 1984 ICR 532, QBD***, held that the employee's liability in that case to pay income tax was not too remote to be taken into account when determining or estimating his actual loss, and his liability to pay income tax was not to be regarded as too remote when assessing damages.
21. The principle requires that a tribunal's approach to tax must not put the claimant in either a better or worse financial position than if the dismissal had not occurred.

Reconsideration

22. Rule 70 a judgment will only be reconsidered where it is 'necessary in the interests of justice to do so'. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' — rule 2.
23. The tribunal should also be guided by the common law principles of natural justice and fairness
24. In ***Outsight VB Ltd v Brown 2015 ICR D11, EAT***, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in Rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, 'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.

Further Information

25. I consider that it is in the interests of justice to ensure the award takes into account the tax which the Claimant will pay and the Respondent do not dispute the figures which the Claimants' have put forward.

Conclusion

26. The Respondent does not plead any prejudice or hardship and indeed makes no representations at all on the issue of whether the application for reconsideration should be permitted or on how the tax payable has been calculated.
27. I have taken into consideration the importance of finality of litigation, which is in the interests of both parties but I consider that it is outweighed in this case by the injustice to the Claimants' if steps are not taken to ensure that they receive the correct payment. The application for reconsideration is granted and the judgment varied to the extent that it now includes an element to take into account the need for grossing up.

**Case Number: 2604304/2020 &
2604305/2020**

Employment Judge Broughton
26 March 2022

Sent to the parties on:

.....

For the Tribunal Office:

.....

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.