



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4100035/2018 (V) Reconsideration: Meeting of Tribunal at Edinburgh by
Cloud Video Platform on 16 March 2022

10

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

15

Yaya Barry

Claimant

Represented by
Mr R Lawson
Solicitor

20

The Mosque of the Custodian of the Two Holy Mosques and
Islamic Centre of Edinburgh Trust Limited

Respondent

Represented by
Mr L Lane
Solicitor

25

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Employment Tribunal is that the claimant's
application for reconsideration of the Judgment of 19 November 2020 is refused,
35 except insofar as relating to the third ground; and that therefore that Judgment is
hereby varied to the extent that the respondent is now ordered to pay to the
claimant the sum of Twenty Seven Thousand Six Hundred and Fifty Eight
Pounds and Forty Four Pence (£27,658.44).

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is Twenty Four Thousand Four Hundre and Seventy Eight Pounds and Forty Four Pence (£24,478.44) and relates to the period from 17 September 2017 to 17 September 2018. The monetary award
5 exceeds the prescribed element by £3,419.52.

REASONS

10

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
15 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. A Judgment was issued by the Tribunal on
20 19 November 2020, in which an award of £27,418.92 was made to the claimant. Reasons were set out at length in that Judgment.

3. On 17 December 2020, the claimant presented an application for reconsideration of that Judgment under Rule 70 of the Employment
25 Tribunals Rules of Procedure 2013, having been granted an extension of time within which to apply for reconsideration by the Tribunal.

4. The respondent opposed that application.

5. The Tribunal endeavoured to identify suitable dates upon which to convene a hearing on reconsideration, but after many unsi
30 attempts it was determined, with the agreement of the parties, that the reconsideration application should be dealt with on written submissions.

6. Submissions were elicited from the parties, and a meeting of the Tribunal was convened on 16 March 2022.

7. We set out below our decision on the application, by reference to the application itself, the respondent's objections and the reasons for our decision.

Application for Reconsideration

5 8 The claimant's application, set out on 17 December 2020, relied upon 3 grounds.

9. The first ground was that the Judgment incorrectly referred, at paragraph 111, to the Madrasah, which the claimant set up following his dismissal by the respondent, having been incorporated in August 2018. rather than 10 August 2019, which was the correct date and correctly noted in paragraph 30 of that Judgment.

10. The claimant submitted that the Tribunal's decision to restrict the compensatory period to September 2018 appeared to be predicated on our assessment that there was an absence of evidence as to the 15 claimant's losses in the period to the date of incorporation of the Madrasah. Given that that date was August 2019 rather than August 2018, the claimant submitted that the compensatory period, based on the Tribunal's own reasoning, should have ended no earlier than 20 August 2019.

20 11 The second ground was that the Tribunal made certain observations and conclusions in relation to the evidence about the claimant's losses which were not justified. He criticised the Tribunal's finding that the claimant's evidence was insufficient to allow it to make clear findings as to loss following termination of employment, and suggested that the claimant's 25 own evidence to the Tribunal provided that information to allow conclusions to be reached about his losses.

12. With regard to the findings of the Tribunal at paragraph 101. the claimant argued that the Tribunal imposed a burden of proof on the claimant which exceeded the balance of probability and which was not supported by

authority showing that the claimant ought to provide bank statements to corroborate his oral evidence.

- 5
13. Further, to impose such an obligation would not be consistent with the overriding objective, as it would potentially require him to produce hundreds of pages of documents to the Tribunal to corroborate evidence which was not meaningfully refuted by any documentary or witness evidence produced by the respondent.
- io
14. The Universal Credit documents demonstrate that the claimant was continuing to suffer a loss relative to his previous employment even if his wife's income were taken into account.
15. The claimant therefore invited the Tribunal to extend the compensatory period to that claimed in the schedule of loss.
- 15
16. The third ground pointed out that the proposed method of pension loss calculation was not addressed by the Tribunal in its Judgment, and if it had been applied, it would have resulted in an additional payment to the claimant of £239.52.
- 20
17. The claimant requested, in the alternative, that if the Tribunal were not minded to uphold any of these three grounds, it should revoke the decision not to award compensation after September 2018 and take that decision again.

Respondent's Opposition

18. On 23 December 2020, the respondents agents submitted their opposition to the claimant's application for reconsideration.
- 25
19. With regard to the first ground, they acknowledged that the Judgment erroneously refers to August 2018 in paragraph 111. However, they argued that reading paragraphs 111 to 117 as a whole, this error did not undermine the reasoning as to the appropriate compensatory period. They referred to the findings which they argued were supportive of the

findings in relation to the compensatory period which were unconnected to the incorporation of the Madrasah.

20. In addition, they observed that there was evidence before the Tribunal which indicated that the Madrasah commenced its operations, and therefore potentially generated income, from August 2018 onwards.

5

21. With regard to the second ground, they submitted that the challenges to the Tribunal's reasons were not well-founded.

22. They submitted that paragraphs 98 and 99 made clear the meaning of "rather than direct evidence of the claimant".

23. There was no finding, they submitted, that the claimant was or would be capable of benefit fraud. It was a fair observation that the claimant was not untruthful but that his evidence on loss was unsatisfactory.

10

24. The Tribunal did not impose an evidential burden on the claimant which was excessive, but considered all the evidence presented and chose which to accept and which not to accept. It was open to the Tribunal to make the findings in paragraph 103.

15

25. There is an attempt, they argued, to rehearse the same evidence with a different emphasis, which is not appropriate in reconsideration.

26. With regard to the third ground, the respondent accepted (that the claimant's calculation was correct, and that a differential in the award arises from the Tribunal's error. Accordingly, that differential should be taken into account, of £239.52.

20

Discussion and Decision

27. We address each of the grounds of the application for reconsideration in turn.

25

28. The first ground refers to the finding, in paragraph 111, that the Madrasah was incorporated in August 2018, rather than August 2019, and that this affected the Tribunal's reasoning as to the compensatory period.

29 We acknowledge that the reference in paragraph 111 is incorrect, and that the Madrasah was incorporated not in August 2018 but in August 2015

5 30. However, there is no criticism of the other findings made about the Madrasah nor any reference to those findings in the application for reconsideration.

31 It is important, in our judgment, to read the whole of the Judgment together. In so doing, it is clear that the Tribunal found that the Madrasah was set up in May 2018 (paragraphs 28 and 29). The Tribunal was well
10 aware of the different timescales involved here.

32. The misgivings expressed in paragraph 117 about the lack of evidence presented by the claimant about what the claimant received in payments from the Madrasah once incorporated must be read in light of the previous misgivings expressed by the Tribunal about the information
15 provided by the claimant (set out in paragraphs 111 and following) relating to his earnings from the Madrasah and elsewhere. Further, our finding as to the compensatory period was not confined to considerations about the evidence of loss, but also to our view of the attempts made by the claimant to secure alternative employment following his dismissal in
20 September 2017. We made clear, in paragraph 114.. that the period of loss sought by the claimant was excessive in duration.

33. Taking all of these matters into account, and not just the evidence relating to the Madrasah, we considered that it was just and equitable to award the claimant twelve months' losses following his dismissal. In our
25 judgment, that is a conclusion amply justified by the totality of the evidence before us, and we are unpersuaded that there is any basis, in the first ground of the application, upon which to revoke or vary that finding.

34. The second ground was that the claimant criticised the Tribunal for our
30 conclusions about the nature of the evidence presented on his behalf about the losses which he suffered.

35. The claimant criticises paragraph 99 on the basis that the claimant provided oral evidence which constituted direct evidence about his income during the compensatory period. It is also said on his behalf that the Tribunal did not find the claimant to be untruthful, nor was there any basis upon which it could be found that the claimant was guilty of a criminal offence in failing to disclose correct details in connection with a claim for benefits.

36. We were puzzled by this criticism. There is simply no basis upon which, in our view, the Judgment can be read as having criticised the claimant for being untruthful or for having committed a criminal offence. Reading paragraph 99, it is clear in our view that what we were criticising was the sufficiency of the evidence presented. The information provided was confusing and the claimant's oral evidence did not clarify that confusion. We considered the evidence before us, including the Universal Credit statements, but did not suggest that those statements were the product of some form of deception on the part of the claimant. Our difficulty was that those statements did not satisfactorily separate out what income was attributable to the claimant or to his wife, and in our judgment, that was a failure which prevented us from making firm findings of fact as to what income the claimant actually received, himself, and therefore, if he suffered loss, the extent of that loss.

37. The reference to Adda International Limited v Curcio 1976 IRLR 425 appears to us to be entirely relevant.

38. The claimant criticises the Tribunal for having imposed a standard of proof higher than that of balance of probability. Again, the Tribunal does not accept that that was the standard of proof applied. What the Tribunal requires to do when assessing evidence is to determine what findings may be made on the basis of that evidence. In this case, as we have clearly set out, we were simply not satisfied that the claimant had presented clear evidence on which we could establish, on the balance of probabilities, what earnings he had received during the compensatory

period, and as a result, it left us in difficulty in seeking to establish what issues therefore arose.

5 39. The claimant suggests that presenting bank statements to demonstrate earnings would impose an oppressive burden on the claimant and his wife, leading to the presentation of (potentially) hundreds of pages of documents. The respondent's response, which we accept, is that online banking now makes it much easier for particular payments to be isolated and detailed separate from irrelevant entries. Again, we were not satisfied that the presentation of bank statements from the Madrasah, 1 which were relied upon as evidence of income or loss, were sufficient to allow, on the balance of probabilities, the making of findings of fact as to the personal losses sustained by the claimant himself.

1 40. We find it difficult to reconcile the claimant's position in declining to or asserting as unreasonable the obligation of providing available direct evidence as to his losses with his presentation of written but irrelevant financial evidence to us. This is why we considered the evidence to be unsatisfactory, and remain of the view that the claimant has not been, as a matter of fact, as candid as he may have been in presenting the evidence. This is not, in our judgment, a mark of dishonesty, but simply a statement that we would have expected to see further evidence of the 20 type he was able to produce but properly directed at the issue in hand, namely what losses he himself actually sustained. That is a conclusion which we considered, and consider, entirely justifiable on the evidence we heard.

25 41. As to the suggestion that the Tribunal could have ascertained from the Universal Credit statements that the claimant was continuing to sustain a loss even if his wife's income was taken into account, we reject this on the basis that it was known to the Tribunal that the claimant's position was that he had suffered ongoing losses following his dismissal. That was not itself, the primary concern of the Tribunal. It was the extent of 30 those losses that required to be established, and in our judgment this was where the evidence failed. It is not appropriate to seek to revisit this

matter by suggesting that a further arithmetical calculation would be provided when it was open to the claimant to seek to persuade the Tribunal in the remedy hearing itself.

42. Accordingly, it is our judgment that the application fails on the second
5 ground, and no varied n or revocation of the Judgment is required in the interests of justice.

43. The third ground is that there is a need to review the pension loss calculation in paragraph 119 of the Judgment.

1, **44. We accept that this is a valid point, and accordingly, we are prepared to grant this application on this ground alone, and adjust the pension loss figure by the agreed figure of £239.52.**

45. The final point in the application for reconsideration is that the Tribunal should reconsider its decision not to award compensation after September 2018. Aside from the points made above, no further justification for this application is provided, and we are not persuaded that there is any basis for such a decision to be made

46. Accordingly the claimant's application for reconsideration of the Judgment of 19 November 2020 is refused, except insofar as relating to the third ground.

20 **47. The Judgment of the Employment Tribunal is therefore varied so that the respondent is now ordered to pay to the claimant the sum of £27,658.44.**

i5 **Employment Judge: M Macleod
Date of Judgment: 12 April 2022
Entered in register: 19 April 2022
and copied to parties**