EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Dobbie	v	**Paula Felton t/a Felton Solicitors**

Heard at: London Central

On: 3 and 4 October 2023

Before: Employment Judge Elliott

Appearances:

For the Claimant **In person**

For the Respondent: **Ms S Chan, counsel**

RESERVED JUDGMENT ON RECONSIDERATION AND REMEDY

1. The Judgment of the tribunal on Reconsideration is that the original decision of 7 December 2020 is confirmed.
2. The Judgment of the tribunal on Remedy is that the respondent shall pay to the claimant the sum of **£13,741.**

REASONS

1. The decision on Reconsideration was given orally on 3 October 2023 and the decision on Remedy was given orally on 4 October 2023 The claimant requested written reasons.

2. By a Judgment sent to the parties on 7 December 2020 the claim for unlawful deductions from wages succeeded in part and proceeded to this remedy hearing.

3. This litigation has been ongoing for over 7 years, the claim having been presented on 21 July 2016. There is a separate part to this claim which is a whistleblowing claim heard originally by Employment Judge Gordon, Mr J Walsh and Mr S Godecharle in June 2019. This was appealed to the Employment Appeal Tribunal which handed down a decision on 11 February 2021.

4. It was remitted to the Employment Tribunal and heard in June 2023 by Employment Judge Goodman, Mr R Pell and Ms N Sandler. Their decision was that the claimant was not subjected to detriment for making protected disclosures and the claim was dismissed. The claimant said there was an appeal pending before the EAT on that decision. The respondent was not aware of this.

5. This hearing was to deal with the claimant's reconsideration application of 13 December 2020 from the decision of 7 December 2020. It was also listed to deal with remedy. One of the reasons for the very long delay was the claimant's wish for the remitted hearing on the whistleblowing aspect of the claim to take place prior to this reconsideration hearing.

6. Where findings of fact have been made by the tribunal which heard the remitted whistleblowing claim in June 2023 impact upon the issue of unlawful deductions from wages, I considered this tribunal to be bound by those findings. That was a 5 day hearing, including deliberation time, before a 3 person tribunal.

Remote hearing on day 2

7. The hearing on day 1 was in person. The hearing on day 2 had to be a remote public hearing due to a rail and tube strike. After the hearing had been converted to CVP and the parties informed, the tube strike was called off. The rail strike went ahead. The hearing was conducted using the cloud video platform (CVP) under Rule 46.

8. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public attended briefly by CVP on the morning of day 2.

9. The parties were able to hear what the tribunal heard.

10. The participants were told that is was an offence to record the proceedings.

11. I was satisfied that the claimant, as the only witness, was not being coached or assisted by any unseen third party while giving his evidence.

The issues

12. The issues for this hearing were as follows:

13. Whether the findings made at the liability hearing on 2 and 3 December 2020 in relation to clients A and U should be varied or revoked and if revoked whether that decision should be taken again.

14. In relation to remedy, what is the amount due to the claimant based on the findings made at liability stage, including an findings on reconsideration.

15. In relation to the part of the claim that succeeded in relation to unauthorised deductions from wages, whether the tribunal should also award an amount under section 24(2) of the Employment Rights Act 1996 as compensation for financial loss?

16. Following then decision on Reconsideration, the parties were in agreement that the starting point for remedy was that the amount due to the claimant was £15,399.55 with credit to be given for the sum of £4,406.75 paid post-termination. It was agreed that the balance due to the claimant was **£10,992.80.**

17. The issue for the tribunal was whether the respondent should be given credit for other sums paid to the claimant in 2015 such that on the respondent's case, the claimant had been overpaid. At the start of day 2 the respondent no longer pursued this point.

Documents for this hearing

18. There was a bundle for each side. There was a bundle of 91 pages from the claimant including case law and 2 witness statements. There was a bundle of 153 pages including a witness statement from the respondent. Although there was a page limit of 100 pages, the claimant did not oppose the introduction of this bundle.

19. The claimant's bundle included a witness statement from Ms Rachel Robertson. This was relied upon by the claimant for remedy purposes and not Reconsideration purposes. It was before the tribunal in June 2023 before Employment Judge Goodman and colleagues. It was not challenged at that hearing as the respondent did not regard it as relevant to the issues for the whistleblowing detriment hearing. The respondent also regarded it as irrelevant to this hearing and did not propose to challenge it. The witness was not called. Ms Robertson's evidence was that she worked for Ms Felton and also was not paid.

20. The claimant complained that the respondent had only produced part of his contract of employment. He had only noticed this on the day of this hearing. I was not prepared to delay the proceedings further for a full copy to be produced when the parties have been litigating for over 7 years, they are both lawyers and they know what is required. The claimant said he could point the tribunal to parts of a Judgment from Employment Judge Spencer in 2017 that could reference this. The provisions of his consultancy agreement were recorded in every judgment in these proceedings.

21. There were written and oral submissions from both sides. All submissions including any authorities relied upon were fully considered, whether or not expressly referred to below.

Witness evidence

22. The tribunal heard from the claimant only. There were 2 witness statements from the claimant, one dated 5 June 2019 and the other dated 23 August 2023.

23. It was not necessary to hear from the respondent given the concession made at the start of day 2.

24. As stated above there was an unchallenged witness statement for the claimant from Ms Rachel Robertson. This witness was not called.

Matters upon which the claimant succeeded

In relation to client A

25. The finding was that there was no agreement to increase the claimant's monthly fee for client A to £10,000 per month and that his entitlement was to £5,000 per month. The finding was that even if the claimant did not do the work to the standard required by the respondent, there was no entitlement on the part of the respondent to "claw back" his pay and he was entitled to be paid in respect of client A but at a monthly fee of £5,000 and not £10,000.

For client WK

26. The finding was that as there was no dispute on the entitlement to £4,000, this was the amount to which the claimant was entitled. Credit had to be given overall for sums paid by the respondent.

For client M

27. The finding was that the claimant did the work and the client was billed and paid the respondent. The respondent made a reduction in the amount paid to the claimant because she had to deal with a client complaint and do work herself. She paid £556.75 against the £906 due. The finding was that there were no grounds to withhold payment of wages. The balance due to the claimant in respect of client M was £349.55.

For client U

28. The finding was that the claimant was entitled to be paid £800 in respect of work done for client U on one matter but there was no entitlement on the other two matters.

For client FE

29. The finding was that the claimant is entitled to the sum of £250 with credit to be given for any sums already paid by the respondent.

The claimant's application for Reconsideration

30. On 13 December 2020 the claimant made an application for Reconsideration in respect of the findings in relation to clients A and U. The application was amended on 18 July 2023. The respondent's submission was at page 117 of their bundle.

31. Set out below are submissions made by the parties but it is not intended as a full replication of the entirety of the written and oral submissions which were fully considered.

In relation to client A

32. There was a finding of fact in relation to client A that there was no agreement to increase his monthly fee for that client from £5,000 to £10,000 per month. There were three reasons given for this finding at paragraph 40 of the liability decision. The claimant said that ground (b) was an "*error of reasoning*". The finding was:

    "(b) there is no written record of any such agreement - clause 14 of the Consultancy Agreement of 6 March 2014 states that the agreement "*shall only be capable of being varied by a supplemental agreement in writing signed by or on behalf of the parties hereto*". The claimant is a solicitor and understands the importance of a written record of an agreement, particularly one that is as important to him as his pay. It was a simple enough matter, had there been such an agreement, for him to send an email shortly after the meeting to say "*This is to confirm our agreement on 19 January 2016 that my fee for client A will be increased to £10,000 per month*"".

33. The claimant's case is that on the list of issues - paragraph 11 liability decision, being - the issue was whether the claimant was entitled to payment under his consultancy agreement in respect of the interim bills paid by client A in 2016 or whether the respondent is entitled to refuse or reduce the amount paid to the claimant on the basis that the claimant did no or little work of value in January or February 2016 and if so whether it is true that the claimant did no or little work of value in January or February 2016 – he is entitled to 40% of £25,000 being £10,000 per month.

34. The claimant's case is that the tribunal having made a finding in his favour in relation to client M on the 40% basis, it could find that there is a such an agreement in relation to client A. The 40% basis is a reference to the claimant's Consultancy Agreement is set out at paragraph 28 of the decision sent to the parties on 7 December 2020.

35. The claimant relied upon paragraph 7 of Employment Judge Spencer's decision of September 2017 which was a decision about his status as a worker. Clause 2 said that the agreement was for 6 months and thereafter could be renewed. The claimant said that the respondent could have terminated the consultancy contract.. The claimant said that under the terms of clause 5 of the contract (set out at paragraph 7c of the decision of Judge Spencer) he was entitled to be paid for doing the work.

36. Following ***Arnold v Britton 2015 UKSC 36*** the claimant submits that the respondent does not like the commercial consequences of the consultancy agreement but he should still be paid under it. The respondent invoiced £25,000 on it at the relevant time and he should be entitled to 40% being £10,000. The case law concerned the interpretation of a service charge clause in the lease of a holiday chalet and was on interpretation of contractual provisions.

37. I asked the claimant which contract he sought to rely on for his entitlement to £10,000 – was it the oral agreement he said was made on 19 January 2016 or the consultancy agreement? He said both agreements applied because they were consistent with each other.

38. The claimant also submitted that in relation to the finding that he did not record the oral variation upon which he relied, it was for the respondent to have recorded the variation. The claimant read back paragraph 40 of the December 2020 decision, substituting the word 'respondent' for the word 'claimant'.

39. The respondent said that the claimant was relying on a totally different case to that which he relied upon in December 2020. At the hearing in December 2020 he put his case on firmly the basis of the 19 January 2016 oral agreement in Richmond and the finding was that this was not agreed.

40. At this hearing in October 2023, Mr Dobbie argued that client A was billed at £25,000 and he was therefore entitled to 40%, namely £10,000. On the respondent's submission this was a new approach which was misconceived. The claimant said that the original finding was correct, that he was entitled to £5,000 and it was not varied.

41. The respondent said that the claimant sought to argue that under the terms of the consultancy agreement, he would have received £10,000 and this involved looking at what the respondent was billing client A for his and 3 other fee earners' work. Judge Goodman and colleagues found at paragraph 70 of their decision that no time recording had been done in relation to the claimant's work for this client.

42. The respondent relied upon paragraph 46 of the decision of Employment Judge Goodman's tribunal, where they decided in relation to client A as follows:

> *"The claimant suggested that Claire Duncan was added to work on the file and the client be asked to agree to pay for her time as well on the monthly retainer. Paula Felton wrote to client A explaining that payments on account were billed and transferred, there was unlikely to be any overpayment because of the intensity of her time and the work ahead. In October she told the claimant that she was likely to agree a team retainer with client and at the end of October she went to meet the client in Stuttgart, with the claimant, though as found by the Gordon tribunal he did not stay for that part of the meeting where she stated that other fee earners besides the claimant would work on the file from then on. She noted at that meeting that the client spoke good English and the claimant was not needed to translate. It was agreed that there would be a monthly retainer for the next four months and thereafter itemised bills. The client care*

letter that followed showed a retainer of 50 hours per month for the claimant and another 50 hours for other members of the team, equating to £25,000 per month from the 1st of November. Leading counsel was brought in to advise and direct."

43. The respondent submitted that if the tribunal found that the consultancy agreement applied, the claimant should not be paid for work carried out by other fee earners.

In relation to client U

44. There were three amounts claimed in relation to this client. The first was for £300 for a matter called 1 USQ and the second and third payments were both for £800 for 25 O Square and 81 O Square. The finding was that the claimant was entitled to be paid £800 in respect of work done on one matter for client U but not on the other two matters.

45. At the hearing in December 2020 the tribunal heard from Mr Rupert Wertheimer, a witness called by the claimant, who was a property manager at this client and who was responsible for paying the respondent firm's invoices. He said at the date of his departure it was all paid up to date.

46. I found based on Mr Wertheimer's evidence with his confirmation that invoices referring to money on account was for work pending and his lack of confirmation that the work done on the other two matters was done by the claimant, that the claimant did discharge the burden of proof in relation to two matters for client U. He succeeded only in relation to one matter for £800.

47. The claimant submitted that he should have succeeded on the other matters but said that relevant documents were not in front of the tribunal in December 2020 because of late disclosure by the respondent.

48. The claimant says that had disclosure been made earlier, he would have relied on an invoice that had been in the bundles before Judge Gordon's tribunal. He accepts that the document was not in front of the tribunal in December 2020 and complains that this was because of the respondent's late disclosure.

49. The claimant drew the tribunal's attention to an email from Ms Felton to Ms Duncan, who was working for Ms Felton in April and May 2016. The claimant said that the pleaded case in the ET3 was that the claimant did not do the work for this client and it was Ms Duncan who did the work. The claimant said that in the email at page 105, dated 31 March 2016, Ms Felton says: "*He will be paid on [SQ] when I am."* The claimant says that this shows that he did the work. The claimant says that the email does not say that Ms Duncan did the work.

50. The next sentence of that email said: "*I am costing 25 and 81 O Square and if justified he will be paid the £800 per case".* I found in the claimant's favour on 81 O Square but not on 25 O Square.

51. The respondent said that this email was not an admission that the claimant had done all the work on O Square, just that if the work was evidenced, he would be paid.

52. The claimant drew the tribunal's attention to a letter from solicitors acting for clients of the respondent dated 14 April 2016 (page 149) using his reference, his initials "*AD*". The claimant's termination date was 15 March 2016. The claimant submitted that the respondent would not have used his reference on this letter unless he had been doing the work on 25 O Square. The claimant said that the letter showed that it was an ongoing matter on which he was working.

53. The claimant took the tribunal to an invoice at page 72 dated 30 November 2015. This was not in front of the tribunal in December 2020. This related to 81 O Square on which I found in the claimant's favour. The claimant suggested that it showed there had been a lack of disclosure by the respondent.

54. The respondent took the tribunal to page 144 relating to 25 O Square, dated 28 November 2016 which was 8 months after the termination of the claimant's engagement. This was an invoice which itself described work going to 28 November 2016. The work billed was for £2,000, 40% of which is £800. The respondent also took me to an email of 23 June 2016 at page 151, regarding 25 O Square from solicitors for the freeholder of the respondent's client. The date of the correspondence was 3.5 months after the claimant left. The respondent submitted that this showed that there was continuing correspondence after the claimant left including the letter at page 149 referred to above. The respondent submitted that it could not be the case that the work had all been done and paid by the time the claimant left.

The relevant law

55. Under Rule 70 of the Employment Tribunal Rules of Procedure 2013 a tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

56. In ***Outasight VB Ltd v Brown 2015 ICR D11 (EAT)*** HHJ Eady accepted that the words "*necessary in the interests of justice"* allows the tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. 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*" (judgment paragraph 33). The EAT also held that the rules in relation to Reconsideration in relation to the introduction of "new evidence" did not change with the introduction of the Tribunal Rules in 2013; the principles under the preceding Rules remain the same.

57. The relevant principles are set out in ***Ladd v Marshall 1954 3 All ER 745*** where the Court of Appeal said that in order to justify admitting fresh evidence, it is

necessary to show: (i) that the evidence could not have been obtained with reasonable diligence for use at the original hearing; (ii) that the evidence is relevant and would probably have had an important influence on the hearing; and (iii) that the evidence is apparently credible

58. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

59. In relation to remedy section 24(2) of the ERA 1996 provides that where a tribunal makes a declaration that the claimant is entitled to payment of any unlawful deduction, it may order the employer to pay to that worker, in addition to any other amount ordered to be paid to the claimant, such amount as the tribunal considers appropriate in all the circumstances to compensate him for any financial loss sustained, which is attributable to the matter complained of. The loss must be as a result of the unlawful deduction.

Conclusions on Reconsidération

On client A

60. At this Reconsideration hearing, the claimant ran an argument that he had not pursued in December 2020. This was that in the alternative to the tribunal finding that no agreement was reached on 19 January 2016 to increase his fee from £5,000 to £10,000 per month, he was entitled to it under his Consultancy Agreement.

61. Whilst I agreed with the respondent that the claimant did not run this argument in December 2020, when represented by counsel, the claimant was right that the point was contained in the list of issues identified by Employment Judge Gordon in 2019. It needed to be dealt with.

62. I deal first with the claimant's submission that it was for the respondent and not himself to have recorded in writing any variation to the contract. I found on a balance of probabilities that there was no agreement made on 19 January 2016 for the doubling of the claimant's fee on client A. The claimant says there should have been a variation to the agreement because he was not satisfied with the fee and he considered that the basis for it had changed, but my finding was that there was no such agreement.

63. I gave three reasons for that finding, all of which are stand alone. I found that the respondent did not agree to double the claimant's fee because she was dissatisfied with the standard of his work. This is sufficient on its own to support the finding that the agreement was not reached.

64. The fact that there was nothing in writing to record that agreement is of great significance in that the beneficiary of that agreement was the claimant. Had he reached an agreement to double his fee, I find on a balance of probabilities,

knowing the terms of the agreement as to variation, he would at the very least have dropped a short email to confirm the agreement that his fee for client A had been increased from £5,000 to £10,000 per month.

65. I saw no basis upon which to vary the finding made at paragraph 40(b) of the decision of December 2020 and confirm the decision that there was no such agreement.

66. At paragraph 30 of the decision of December 2020 I found that: "*There was a separate arrangement for the claimant in relation to his work for this client.*" This is my primary finding of fact, that there was a separate agreement in place for work on client A. It was the agreement to be paid at £5,000 per month for 50 hours work. That was the governing agreement in relation to client A and not the consultancy agreement.

67. If I am wrong about this, I deal with the claimant's submission that he is in any event entitled to be paid the sum of £10,000 under the terms of the consultancy agreement. He relied on the undisputed fact that the respondent invoiced Client A in the sum of £25,000 and says his 40% share was £10,000. The result to him is the same as if he had succeeded in showing that there was an agreement in January 2019 to double his fee.

68. Employment Judge Goodman's tribunal found that the client care letter to client A following the meeting in Stuttgart, *"showed a retainer of 50 hours per month for the claimant and another 50 hours for other members of the team, equating to £25,000 per month from the 1st of November".* My finding on reconsideration is that by seeking 40% of the fee billed at £25,000, the claimant is seeking to benefit from the work done by fee earners other than himself. He is not entitled to be paid at 40% of fees billed and paid in relation to work done by other fee earners.

69. As found by Judge Goodman's tribunal at paragraph 70, there was no time recording for the Client A file. For this reason I find that even if I am wrong on my primary finding, the claimant has not discharged the burden of proof as to his entitlement to be paid an additional £10,000 for work <u>he</u> did on client A. Other fee earners were involved.

70. The claimant is not left without any payment for his work for client A. His entitlement is at £5,000 per month and not £10,000 per month. The original decision in relation to client A is confirmed.

<u>On client U</u>

71. The claimant said that there were missing documents and emails in relation to client U. At no point had the claimant made any application for specific disclosure of any missing emails in relation to 25 O Square or the transaction called SQ. This reconsideration hearing had been on hold for nearly 3 years so there was ample time to make such an application.

72. In relation to the respondent's email saying: "*I am costing 25 and 81 O Square and if justified he will be paid the £800 per case",* I agree with the respondent's

submission that this is not an admission of liability in relation to 25 O Square. It is a statement that the respondent is looking at it, and if it was justified she would pay the claimant in relation to those matters.

73. In terms of the use of the claimant's initials in the reference on a letter from solicitors dated 14 April 2016, this is not enough to show that the claimant did the work which was billed and paid by client U. It shows that at some point a reference was generated using the claimant's initials. It is not evidence of the work done by the claimant, or that the bill was paid by the client.

74. The claimant's reliance on a list of apparent attachments to an email on what appears to have been 10 May 2016 (bundle page 151) to the respondent, is not enough to satisfy the tribunal that the claimant was working on the other matters for client U. It shows that some correspondence took place some of which was with solicitors.

75. The invoice at page 150 was dated 30 November 2016, eight months after the termination of the claimant's engagement. It gives no indication of who did what work or on what dates. It shows that work was taking place 8 months after the claimant left.

76. At the hearing in December 2020 the claimant called a witness from client U, Mr Wertheimer. He could not confirm that the work was done by the claimant other than on 81 O Square. He did not corroborate the claimant's case on the other 2 matters. He was the person responsible for paying the invoices from the respondent. I found that the claimant had not discharged the burden of proof as to his entitlement to wages for work done on the other two matters for client U.

77. It was clear from the documents that work for client U went on for many months after the termination of the claimant's engagement in March 2016. There were no records supporting the work done by the claimant on those two matters. I accept that work was done on these two matters for this client, but the claimant has not discharged the burden of proof and he did not gain support from his witness on these two matters.

78. The original decision as to payment in relation to client U is confirmed.

Remedy

The starting point

79. The parties were in agreement as to the starting position on remedy. It was set out in a letter sent to the respondent from solicitors then instructed by the claimant. The letter was dated 5 January 2020 but it was agreed that it was incorrectly dated and should have said 5 January 2021 as it followed the December 2020 hearing. It was at page 55 of the respondent's bundle.

80. The parties agreed that sums found to be due to the claimant amounted to £15,399.55 and that credit was to be given for the sum of £4,406.75 being made up of two post-termination payments. It was agreed that this left a balance due to the claimant of **£10,992.80.**

81. What was initially in dispute was whether the respondent had made such payments to the claimant that meant he had been paid this amount during his time working for the respondent and furthermore he had been overpaid. The respondent's initial position was that she did not owe any further sums to the claimant as she sought credit to be given in the sum of £14,131.38.

82. Counsel for the respondent said that there had been email correspondence between the parties overnight between day 1 and day 2 of this hearing, regarding the financial transactions between the parties. I did not have sight of this correspondence. The claimant had sent a Schedule of Overpayments and the claimant had sent a Reconciliation Statement. I was told that the amounts were in dispute. I had indicated to the parties that if it was necessary to go into the detail of all the transactions between the parties over the period of the claimant's engagement it may be necessary to have a jointly instructed accountant's report which would involve further time and cost. The respondent said that she had made a decision to be pragmatic on the matter and had decided not to pursue an argument that the claimant had been overpaid. Whilst the claimant did not accept this reasoning, it gave an agreed starting point for remedy.

The claim under section 24(2) ERA 1996

83. This left for determination the claim under section 24(2) Employment Rights Act for losses as a result of the unlawful deductions.

84. The claimant said that he sought the sums set out in the letter from his then solicitors, sent on 5 January 2021, at page 55 of the respondent's bundle. At the end of the letter, (page 57) the claimant sought in addition to the sum of £10,992.80 interest, costs and interest on legal costs in the total sum of £19,288.95. Together with the sum found due, this made a total of £30,281.75.

85. Item (c) on page 57 was described at "*Additional costs incurred - £13,339.80".* The claimant said that this was his legal costs including counsel's fees and item (d) was interest on those legal costs.

86. I explained to the claimant that an application for costs was a separate matter, not covered under section 24(2) ERA.

87. In the solicitor's letter of 5 January 2021, interest was claimed at the Judgment Debt rate of 8%, being a daily rate of £2.41 and calculated in that solicitor's letter of 5 January 2021 at £4,258.47.

88. The claimant also wished to claim interest on his overdraft. The claim for overdraft interest did not appear to be included in the calculations set out in the letter from the claimant's solicitors.

89. The claimant took the tribunal to an email at page 106, dated 10 July 2023, in support of his claim for the interest he said he incurred on an overdraft to cover the £10,992.80 unpaid by the respondent.

90. It was not apparent that this was an email from either of his banks, NatWest or Lloyds. It was an email from clientsupport@premierukbusiness.com. The subject title of the email was "*Please send me my SATR's for 2015 onwards, thanks*". It was not disputed that SATR's referred to Self-Assessment Tax Returns.

91. That email gave a total figure for interest from 2016 to 2022 of £8,257.17.

92. There was nothing to show from that document, how or on what base figure, the interest had been calculated. The claimant said that the figures for 2019 to 2020 covered an overdraft of £16,000 and not £10,992.80. He said that the figures from 2016 to 2019 covered the sum unpaid by the respondent. There were no underlying documents to support this.

93. The claimant's evidence was that the first £5,000 incurred interest at a rate of 49.9% with a Lloyds overdraft and the remainder with NatWest at 34.4%. Again no underlying documents were produced to evidence this.

94. I asked the claimant if he had explored cheaper ways of funding the overdraft and he said yes, he had by taking out a loan in 2019 at 7.9% and he had borrowed from friends. The claimant said that this was almost the same as the amount of interest on judgment debts at 8% which is what he sought. The claimant had produced no documents to show the taking out of this loan at this rate of interest.

95. The respondent submitted that there should be no award under section 24(2). It was discretionary in any event. The respondent submitted that the claimant's evidence as to the loss he said was attributable to the lack of payment of £10,992.80 was "*confused and hazy*".

96. The respondent said that the figures set out in the email at page 106 gave no basis upon which to discern how the figures were calculated.

97. The respondent submitted that until today, there was no Judgment Debt so that the claimant could not claim interest at 8% on Judgment Debts.

98. It appeared to the respondent that the claimant was saying that he needed to take out an overdraft because he was impecunious although the claimant did not make that express submission.

99. The respondent pointed to the income received by the claimant from his employment with the respondent, his employment with the next firm of solicitors and legal fees earned in acting for his parents in their litigation. It was submitted that this produced a figure of in excess of £300,000 and the claimant did not need to run up such substantial overdraft fees.

100. The claimant said that his earning capacity was hindered due to restrictive covenants with the respondent.

101. The respondent said that the claimant had not shown that the overdraft costs he sought were directly related to the sum of £10,992 and this was for him to prove.

102. The claimant said that for two years he was only earning around £18,000 and even now he considered that he was earning less than the average rate for a solicitor in London.

103. The claimant pointed to the lack of engagement with the letter from his solicitors of 5 January 2021. He said it was not even acknowledged.

104. The claimant said that he wanted to be compensated for the consequences of the respondent's non-payment.

Conclusions on section 24(2) ERA

105. Neither party was aware of any case law on this issue. I was also not aware of any case law on the point.

106. Section 24(2) gives the tribunal a discretion to award such amount as it considers appropriate in all the circumstances, to compensate the claimant for any financial loss sustained, which is attributable to the matter complained of. This means that the loss sustained must be attributable to the non-payment of the sum of £10,992.

107. Any losses which the claimant says he has suffered as a result of being held under restrictive covenants do not fall for consideration. The issue of restrictive covenants fall outside this tribunal's jurisdiction.

108. Although it has been submitted that the tribunal should award 8% as the interest on judgment debts, there has not until day 1 of this hearing, been a judgment debt upon which the interest could run.

109. The claimant was aware that it is unusual for a wages claim to be left outstanding for seven years. I make the finding that it was the claimant's wish for this Reconsideration and Remedy hearing to be delayed until after the outcome of the remitted whistleblowing detriment claim. This hearing could have taken place earlier, certainly during 2021.

110. I decline to award interest at the rates the claimant says he was charged by his banks on his overdraft. This is firstly because he has not produced any documentation evidencing the interest rates claimed or the amount of the overdraft upon which these rates were calculated. These are very substantial rates at nearly 50% and 35%. Secondly, the claimant could secure borrowing at a much lower rate of interest. He says he did this in 2019 by taking out a loan at 7.9%. Again, there were no documents to support this.

111. It is a matter of public record that bank base rates were under 1% from 2016 until 2021. It is accepted that the base rate is not the borrowing rate but I find that the cost of borrowing was lower from 2016 to 2021 than it is today.

112. The tribunal has a discretion to award a sum considered appropriate to compensate the claimant for any financial loss sustained, provided it is attributable to the unpaid wages of £10,992.80.

113. I accept that the claimant had to borrow to cover the amount of unpaid wages. The fact that he has other earnings does not mean that he can afford to take the brunt of wages which are unpaid. He gave evidence that he had considerable outgoings and it was not in dispute that he had approached the respondent during his consultancy for money on account to help him with cashflow. I accept and find that the claimant borrowed to cover the amount of unpaid wages and it is not acceptable for him to be kept out of his wages for a number of years.

114. There was very little supporting documentation to show the amount borrowed or the basis of the calculations. I find that the claimant did not need to incur exorbitant overdraft rates when it was possible for him to take out a loan to cover the unpaid wages. He said he did this in 2019 at 7.9% but there was no supporting evidence of this.

115. Awards under section 24(2) are rare. Wages claims brought independently of other claims regularly fall under a faster process in the Employment Tribunal and are heard relatively swiftly.

116. In this case given the number of years for which the claimant has been kept out of his wages and my finding that he has had to borrow to cover it, I have decided to exercise the discretion. I find that the borrowing was attributable to the non-payment of wages.

117. I exercise the discretion for a five year period from 2016 to 2021. As I have said above, the claimant wished to delay this hearing until after he had an outcome from his remitted whistleblowing detriment claim. This hearing could otherwise have taken place in 2021.

118. In the exercise of this discretion I apply a notional borrowing rate of 5% across the five year period. Applying this rate to £10,992.80 over five years gives an annual figure of £549.64 x 5 years = **£2,748.20.**

119. The respondent shall pay to the claimant the sum of £10,992.80 + £2,748.20 making a total award to the claimant of **£13,741.**

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Employment Judge Elliott

4 October 2023

Sent to the parties

04/10/2023

For the Tribunal: