Case Number: 1402947/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Lightfoot-Webber**

First Respondent: **Lawcommercial Trading Ltd t/a Lawcomm Solicitors**

Second Respondent: **Lawcommercial Services Limited**

JUDGMENT

The Reserved Remedies Judgment dated 15 June 2023 and sent to the parties on 27 June 2023 is not reconsidered because there is no reasonable prospect of the decision being varied or revoked.

REASONS

Background

1. By a claim form presented on 10 September 2022 the Claimant claimed constructive unfair dismissal, made a claim for unlawful deduction from wages in relation to a bonus payment and a claim for a failure to provide a statement of terms of employment. The claim was heard on 21 and 22 February 2023. A remedies hearing took place on 5 June 2023.

2. In a reserved remedies judgement dated 15 June 2023, I determined that the First Respondent must make the following payments to the Claimant:
    a. Basic award: £3,426;
    b. Compensatory award: £1,228.61 (including an ACAS uplift of £111.69);
    c. Failure to give employment particulars: £1,187.68; and
    d. Breach of Contract: £7,035.75 (gross).

3. The First Respondent applied for a reconsideration of that Judgment on 10 July 2023. I refused that in a Judgment dated 17 July 2023. The First Respondent appealed the judgment, and I was invited to reconsider it in an Order of the

Employment Appeal Tribunal dated 16 October 2023.

4. The Claimant has appealed on the basis that I erred in awarding compensation for breach of contract on a gross rather than net basis. The Employment Appeal Tribunal has indicated that I appeared to have done so because of possible differences in the rate of tax which would be applied in different years (see paragraphs 68-69 of the Remedy Judgement) and paragraph 12 of the Judgment on reconsideration. The EAT considers that the explanation given by me is inadequate.

5. I wrote to both parties in a letter dated 30 November 2023 inviting submissions on a reconsideration to be made by 14 December 2023. Neither party responded.

The Rules

6. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 70 of the Rules, the Employment Tribunal may, either on its own initiative or on the application of a party, reconsider a decision where it is necessary in the interests of justice to do so. On reconsideration, the decision may be confirmed, varied or revoked.

7. This process of determining whether the decision should be reconsidered is on my own initiative.

8. Rules 71 and 72 give the Tribunal a broad discretion to determine whether reconsideration of a decision is appropriate. Guidance for Tribunals on how to approach applications for reconsideration was given by Simler P in the case of Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA. Paragraphs 34 and 35 provide as follows:

> "*34. […] a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration.*
> *35. Where […] a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application*."

Discussion

9. I made a finding that the Claimant should have been paid a contractual bonus of £7,035.75 by the Respondent on 29 April 2022. In breach of contract, this

was not paid to the Claimant.

10. Damages for breach of contract in relation to the bonus payment would be taxable as earnings pursuant to section 62 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). In the case of *Shove v Downs Surgical Plc [1984] I.C.R. 532* , Sheen J set out that "*in assessing the plaintiff's actual loss, his liability to pay taxes is something which the law does not regard as too remote, then by parity of reasoning, his liability to pay tax should not be regarded as too remote when assessing the sum of money which it is necessary for the court to award to compensate him for his loss*". This case in effect confirms that damages for breach of contract should be calculated on a net basis and then grossed up to leave the Claimant in an equivalent position as they would have been, had the breach not occurred.

11. If I had ordered the bonus payment to be made to the Claimant on a net basis, this would not absolve the Claimant from paying tax on it under section 62 of ITEPA. After paying such tax, the Claimant would then receive significantly less money than if the Respondent had paid the gross sum (itself making the relevant income tax and National Insurance deductions) on the date that it was owed. The aim of compensation for a breach of contract is to put the Claimant in the position that she would have been in, if the breach had not occurred. Against the background of section 62 of ITEPA, this can only be achieved by making the award on a gross basis.

12. In the remedies hearing, it was submitted by the Claimant that the sum should be grossed up to take account of a higher tax rate for the year in which it would be paid (i.e. the tax year 2023/24 when the payment would actually be made compared to the tax year 2022/23 when the payment should have been made under the terms of the contract). Whilst the Judge accepted this in principle, there was no evidence or calculations before the Tribunal showing what, if any, higher rate of tax would be applied to the Claimant in the year of payment. In the absence of this, the gross amount of the bonus payment was awarded based on the sum owed at the payment date on 29 April 2022. No additional grossing up was undertaken to account for unspecified additional tax liabilities in 2023/24.

13. The Claimant, since she was no longer in the employment of the Respondent, had the obligation to account to HMRC herself for any income tax and national insurance payable on the awarded gross bonus sum.

14. For these reasons, in my judgment, the Respondent's appeal on the basis that damages for breach of contract should be ordered on a net basis is wrong in law.

Conclusions

15. Having carefully considered the referral from the Employment Appeal Tribunal, and in the absence of any submissions being made by either party (in particular the First Respondent who makes the appeal), I am not satisfied that there is any reasonable prospect of the Judgment or any part of it being varied or revoked as it appears to me that the approach of awarding the sum on a gross basis was correct in law. As set out above, it would not have been correct to

award the bonus sum net of tax. It is hoped that the further explanation set out above is of assistance to the Employment Appeal Tribunal.

16. For the reasons set out above, I do not reconsider the Judgement on my own initiative.

Employment Judge Volkmer
Date: 15 January 2024

JUDGMENT SENT TO THE PARTIES ON

26th January 2024

FOR THE TRIBUNAL OFFICE