EMPLOYMENT TRIBUNALS

Claimant: Mr S Nunns

Respondents: SBH Windermere Limited
Mr A Wilson

Heard at: Manchester (by CVP) **On:** 17 October 2024

Before: Employment Judge Phil Allen
Ms C Linney
Ms V Worthington

REPRESENTATION:

Claimant: In person
Respondents: Ms E Afriyie, litigation consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The remedy Judgment made on 5 April 2024 should be varied, so that the damages awarded as a result of the unlawful harassment found as set out at point three of that Judgment, shall be £43,044 rather than £35,656 (as recorded in our earlier Judgment).

REASONS

Introduction

1. This was a reconsideration hearing conducted under rule 72 of the Employment Tribunal rules of procedure. What was being reconsidered was a Judgment on remedy of 5 April 2024 (sent to the parties on 22 April 2024).

2. This Judgment relates to only one of the amounts awarded in that Judgment, we have not needed to reconsider the other amounts, which I will not further refer to.

Claims and Issues

3. In the remedy Judgment we had awarded the claimant damages as a result of unlawful harassment in the sum of £35,656. Prior to and at the time of the remedy hearing, the claimant had been in receipt of Universal Credit. When calculating the future loss included in the damages awarded, we took into account the Universal Credit which the claimant received. That is, the future loss awarded to the claimant was not the full sum lost based upon what he would have earned had he continued to be employed by the first respondent, because we deducted from that amount the sums we considered he would receive as Universal Credit payments, based upon the Universal Credit payments he was receiving at the time.

4. Following the Judgment, on 23 April 2024, the claimant sent an email to the Employment Tribunal in which he said that when he received the award from the respondents his Universal Credit would be closed, and he would cease to receive Universal Credit. He said that meant there was a shortfall in his future losses of £6,000.

5. The claimant's email was treated as an application for reconsideration of the remedy Judgment. I considered it under rule 71 and, having undertaken the initial sift, I allowed it to proceed to hearing as my provisional view was that the application to reconsider should be granted. I did so because it appeared that if the claimant ceased to receive Universal Credit, his losses would be greater than those we had calculated and used to determine the damages awarded. I also suggested in a letter sent to the parties that if the Universal credit ceased one month after the award was made, the losses would be £5,399 greater than had been calculated (without grossing up), with a further £1,080 if using the same approach to grossing up as had been used in the remedy Judgment. Accordingly, I confirmed that views were sought on whether the general damages figure should be varied to be £43,044 rather than £35,656.

6. This hearing had been arranged to consider whether the remedy Judgment should be varied or confirmed.

Procedure

7. The claimant represented himself at the hearing. Ms Afriyie represented the respondents.

8. The hearing was conducted as a hybrid hearing with all parties and one of the members attending remotely by CVP and one member and myself attending inperson at Manchester Employment Tribunal.

9. In advance of the hearing, the claimant had sent an email of 1 May 2024 which attached a statement which had been sent to him by the DWP regarding Universal Credit dated 29 April 2024.

10. The respondents' representative provided a submission document in advance of the hearing. She also provided a copy of one authority. We heard oral submissions from each of the parties. After adjourning to consider our decision, we provided our Judgment and reasons verbally. As the respondents requested written reasons, these written reasons have been provided at the same time as the written Judgment.

The Law

11. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70). We considered and applied rules 70-72 of the Employment Tribunal rules of procedure when reaching our decision.

12. Rule 70 says:

"*A Tribunal may … 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 …"*

13. The Court of Appeal in **Ministry of Justice v Burton** [2016] EWCA Civ 714 emphasised the importance of finality, which militates against the discretion being exercised too readily. The respondents' representative provided us with a copy of that decision, and we considered what was said in it, particularly in paragraphs 21, 24 (a paragraph addressing a particular argument not originally advanced in that case), and 25:

"*An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743 , para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review. In my judgment, these principles are particularly relevant here …*

Quite apart from these considerations, in my view it is highly material, as EJ Macmillan thought, that this argument was not addressed before the judge. Nobody suggested that there should be tapering or a cap. If the point was an obvious one for the judge to consider, it must have been obvious for counsel to raise it at the material time. Given the observations of Mummery J in the Lindsay case, the refusal of the judge to reconsider the point in these circumstances was wholly apt. The principle that it will not in general be in the interests of justice to reopen a case on the basis that counsel had not raised a certain point should not be circumvented by suggesting that the point should have been taken by the judge of his or her own motion ...

… to allow a case to be reopened in order for further argument or crossexamination would undermine the important principle of finality. Moreover,

if a party wished to adduce more evidence, as again seems likely if the review application had been granted, that would conflict with the principle, recently reaffirmed by Judge Eady QC in the Employment Appeal Tribunal in Outasight VB Ltd v Brown [2015] ICR that it will only be in the interest of justice to allow fresh evidence to be introduced on review if the well known principles in Ladd v Marshall [1954] 1 WLR 1489 have been satisfied. The first of these is that the evidence could not have been obtained for the original hearing"

14. That Judgment refers to: **Newcastle upon Tyne City Council v Marsden** [2010] ICR 743; **Flint v Eastern Electricity Board** [1975] ICR 395; **Lindsay v Ironsides Ray & Vials** [1994] ICR 384; and (the important and well-known case on reconsideration) **Outasight VB Ltd v Brown** [2014] 11 WLUK 651, which itself refers to the decision in **Ladd v Marshall** [1954] 1 WLR 1489.

15. The respondents' representative's submissions provided a detailed and thorough analysis of the relevant legal principles, all of which we took into account. She submitted that the requirement set for it to be necessary in the interests of justice was a higher bar than simply it being in the interests of justice, and we agreed.

Conclusions – applying the law

16. We considered all that was said in the submissions. In summary, the respondents' representative's argument focussed on two contentions.

17. First, relying in particular upon the Judgments in **Burton** and **Lindsay**, the failure of a party to draw attention to a particular argument will not generally justify granting reconsideration. The respondents contended that the argument now being considered was one the claimant could have raised at the remedy hearing but did not.

18. Second, relying in particular upon the Judgments in **Burton** and **Outasight**, it is not in the interests of justice to allow fresh evidence to be called (unless the evidence could not have been obtained for the original hearing). In this case, the respondents say that the issues are more complex than had been suggested when I explained my preliminary view reached when considering the application to reconsider under rule 72, emphasising what was said in the letter from the DWP about the withdrawal of Universal Credit and the alternative benefits available (about which we had not heard evidence and they say we would need to hear).

19. We fully understood and considered the importance of finality, which is something which we had at the forefront of our minds.

20. We appreciated that in many cases remedy is awarded based upon decisions made at the time which contain a degree of uncertainty. That, for example, is the case where an assessment is made about the likelihood of a claimant obtaining new employment. However, we considered this case to be different. We made an error in our calculation of damages. We did not have the foresight to identify that the award made, when paid, would stop the Universal Credit payments which we had taken into account in our calculation.

21. We did not need in our Judgment to address point by point all of the issues raised by the respondents' representative in her submissions. However with respect to one issue, we disagreed with point three of the points made at the end of (on the last page of) the respondents' submissions (where it was said that the point of the impact on the claimant's benefits would have been obvious given (what was described as) the well-known £16,000 cap on benefits which the claimant would surely have been alerted to by previous decisions on his benefits). To experts on benefits such a position may have been obvious, but it was not obvious to us, nor do we accept that it would be evident to the vast majority of those in receipt of such benefits.

22. The argument that Universal Credit should not be factored into the calculation of the claimant's future loss, was not necessarily an argument that the claimant should have argued at the remedy hearing (albeit that notionally he could have done so), it was rather something which became evident to the claimant after the hearing when he was told by the Benefits Agency that his Universal Credit would stop.

23. In considering what is said in the legal authorities, we also noted that in our view there is a difference between a professional representative failing to identify a material argument, and an unrepresented claimant with impairments failing to identify a complex issue arising from the payment of benefits and future loss.

24. To the extent relevant to our decision, we found that the evidence relied upon in this case was something found out about after the decision. It was a decision of the DWP post-hearing, and the confirmation in writing was post-hearing evidence (even if potentially or arguably it might have been foreseen), so the requirements for further evidence to be considered as set out in **Ladd v Marshall** would have been met even if further evidence had been required.

25. We decided that we were not going to hear further evidence. The argument that the claimant could have claimed other benefits as put forward, was not the focus of our decision. The focus of our decision was that in our remedy decision we had reduced the amount payable to the claimant for future loss by the amount of Universal Credit which it was believed he would receive. That was the key factor behind this reconsideration decision, not whether other benefits might also have been available.

26. The assessment we made of the claimant's future loss was wrong. We, accordingly, made the decision that we should vary the Judgment as a result. That did not require us to hear further evidence.

27. Therefore, it was our decision that it was necessary in the interests of justice to correct the error that we made in calculating general damages.

28. We heard no argument that the figures in our letter of 25 April 2024 were wrong (nor any argument about the correct figures). Accordingly, and based upon the calculation set out in that letter, the general damages awarded (order three) in the remedy Judgment was varied to £43,044 from the £35,656 previously awarded. That accurately reflects the claimant's losses, when the figure in the previous

Judgment had not done so because we had erroneously calculated it on the basis that the claimant would continue to receive the same Universal Credit payments (when he has not, because of the award made).

Employment Judge Phil Allen
18 October 2024

RECONSIDERATION JUDGMENT AND REASONS
SENT TO THE PARTIES ON
24 October 2024

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/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2403944/2022**

Name of case: **Mr S Nunns** v **SBH Windermere Limited & Other**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 24 October 2024

the calculation day in this case is: 25 October 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearingsjudgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.