EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Usher**

Respondent: **Chief Constable of South Yorkshire Police**

In Chambers: **20 March 2017**

Before: **Employment Judge Little**

Members: **Mr K Smith**

Dr C Langman

SECONDJUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:-

1 The claimant's reconsideration application is refused.

2 The Tribunal declines to revisit the award made in respect of past loss so as to gross up the amount of the award.

3 The Tribunal concludes in principle that the awards for future loss and pension loss should be grossed up and the claimant's calculation of that exercise if preferred.

4 The awards made in respect of injury to feelings in the amount of £24,519.45, including interest and in respect of personal injury, £17,807.78 as in each case made at the conclusion of the remedy hearing in December 2016 are not considered to be liable to deduction of tax and accordingly (and assuming the Tribunal had the power to do so) it is not necessary for those awards to be grossed up.

5 The claimant shall now prepare a revised calculation of future and pension loss to reflect the principles set out above and so as to take into account the applicable discount factor be reference to the Ogden tables as updated on 15 March 2017. That will be done no later than 28 April 2017.

6 subject to it's approval of the recalculation the Tribunal will then issue a further and final judgment

REASONS

1 With the agreement of the parties we have determined the matters set out in this judgment without holding a further remedy hearing – there had been a live hearing in December 2016. Having determined that the claimant's losses would have ceased by 3 December 2018 the parties were left to agree the precise figures for future loss and pension loss. In default of such agreement they were to provide their written submissions with competing calculations so that the Tribunal could determine those amounts on paper.

2 We have therefore had the benefit of the claimant's submissions on remedy and future loss dated 24 February 2017 with a further document setting out future loss calculations and two appendices dealing with netting down; pension receipts and tax treatment – grossing up. In each case those have been prepared by the claimant's solicitors. From the respondent we have written submissions on remedy calculations prepared by their counsel, Mr Arnold, and dated 24 February 2017 together with a counter schedule of future loss post remedy judgment.

3 **The claimant's reconsideration application**

In their letter of 12 January 2017 the claimant's solicitors sought a reconsideration of paragraph 1 of the remedy judgment which had been sent to the parties on 30 December 2016. That part of our judgment had provided that there would be an award of compensation pursuant to the Employment Rights Act 1996, section 49:-

> "In respect of past loss of earnings (and by consent) the sum of £45,000 together with interest thereon of £5,084.38."

4 Paragraph 9 of the same judgment provided that compensation where quantified within our judgment would be paid by the respondent to the claimant forthwith.

5 The reconsideration application contended that there had been an inadvertent oversight in not clarifying to the Tribunal that the agreed figure was net. The reconsideration sought was that we should clarify that the sum in respect of past loss and interest was net and that in those circumstances it would be the respondent's responsibility to ensure that appropriate tax was paid on that sum before it was paid to the claimant. The application then went on to summarise the negotiations which had taken place on the first morning of the remedy hearing (7 December). The solicitors submitted that that showed that the figure of £45,000 was clearly agreed on the basis of it being a net figure. It was pointed out that as matters stood the claimant would be required to pay tax on that award which would be approximately £4,400.

6 We were referred to the case of **Obonyo v Wandworth Primary Care Trust UKEAT/0237/07/MAA**.

7 The respondent's solicitor objected to the reconsideration application in its letter to the Tribunal dated 25 January 2017. They had reviewed their contemporary notes of discussions on the first day of the remedy hearing and had discussed the matter with their counsel. The respondent had during negotiations put forward a figure of £45,000 in settlement of past losses and, according to the respondent's solicitor, there was no submission made on behalf of the claimant that that was a net figure. The respondent's counsel's understanding of their discussion was that the parties had agreed a fixed figure of £45,000 past losses and accordingly

any tax due on that would be a matter between the claimant and HMRC. The solicitor went on to note that it had genuinely been the respondent's understanding that the agreement reached in respect of past losses was in full and final settlement and had not been agreed on the basis of it being a net figure. That was underlined by the fact of there being no reference to it being a net figure when the agreement was relayed to the Tribunal.

8 The application and the respondent's objection were provisionally considered by Employment Judge Little who caused a letter to be written to the parties on 1 February 2017. In that letter it was noted that it seemed that the Tribunal were being invited to rule on the construction of an agreement between counsel and in those circumstances there was doubt as to whether that fell within the Tribunal's reconsideration jurisdiction. The claimant's solicitors were invited to provide any further submissions but did not do so. However, it is to be noted that whilst not referred to in the claimant's written submission which is under consideration today, Appendix 3 dealing with grossing up includes calculations for grossing up the past financial loss and interest. In footnote 2 to the respondent's written submissions which are before us there is the observation: "The claimant now seeks to unilaterally vary what was agreed by consent, by way of a reconsideration". At paragraph 7.2 of the same submission it is further noted that the claimant had attempted to gross up the agreed past loss of earnings figure but it was contended that that was not possible because:-

> "This was an agreed figure, and is payable as such. To seek to unilaterally vary the agreement is impermissible, whether by way of reconsideration or otherwise. The agreed figure is reflected in the remedy judgment at paragraph 1."

9 Having given consideration to the judgment of the Employment Appeal Tribunal in **Obonyo** the Tribunal feels the need to temper the provisional view expressed by the Employment Judge in the Tribunal's letter of 1 February 2017. We note that Burton J giving the judgment of the Employment Appeal Tribunal observed that there were circumstances in which settlement could be set aside and consequently a consent order based on that settlement. That could be done if there had been fraud, misrepresentation or mistake. If there was mutual mistake by which both parties were affected then the contract entered into under that mutual mistake could in appropriate circumstances be rescinded. Where however each party was labouring under a different belief and there is no mutual mistake then – if one party asserted that she entered into the agreement under a mistaken belief – then the issue would be whether the other party who did not share that mistake must not be allowed to take the benefit of a contract which the other side had entered into on a mistaken basis. Burton J went on to acknowledge that the law of unilateral mistake was a difficult area to establish because it needed to be shown that the other party either knew of, or must have known of, the opposing contracting party's mistake, and that would require a clear and full analysis of the precise circumstances.

10 Pausing there we identify the claimant's application to be based upon alleged unilateral mistake. We also need to bear in mind that the agreement in question was being brokered or negotiated for the claimant by a Queen's Counsel and for the respondent by experienced counsel.

We have recorded what we are told Mr Arnold's recollection of the agreement was as relayed to us by the respondent's solicitors. In the circumstances we cannot contemplate that Mr Arnold knew or must have known that the claimant was allegedly proceeding under a mistaken belief. In crude terms we cannot therefore accept that Mr Arnold's professional responsibilities to a fellow member of the Bar would have allowed him to take advantage.

11 We note that in **Obonyo** that Employment Tribunal was also being asked to make an order clarifying the order it had originally made so as to make the position clear – that there could be a declaration. We do not understand that that is what we are being invited to do. However even if we were, we do not accept the claimant's suggestion that in December all that was done was to identify a figure for past loss which would then be further considered in terms of taxation when the other losses – future and pension – were agreed or adjudicated. We consider that the part of our December remedy judgment now under consideration is clear. The parties had agreed that the claimant's past losses were £45,000 and that figure with interest was to be paid by the respondent to the claimant. Nothing was conditional on the agreement or determination of future and pension loss.

12 Accordingly for all these reasons we refuse the reconsideration application and decline to deal with grossing up of past loss as set out in Appendix 3 or otherwise.

13 **Future loss and pension loss**

These therefore are the two areas where the parties have not, post 7 December, been able to reach agreement. They have however been able to agree certain preliminary matters and these are referred to in both the written submissions we now have before us.

14 **The agreed issues in respect of future loss**

We can summarise these as follows:-

- The claimant's gross salary as a police inspector – if her employment had continued.
- The current gross income from the claimant's business and from the ill health retirement pension.
- That the difference between those two figures in principle represents the claimant's future loss of earnings.
- That the appropriate Ogden discount rate is 0.9518 (although we now need to enquire of the parties having regard to the change to the discount rate for personally injury damages recently announced by the government and which we understand came into effect on 20 March 2017).

15 **The agreed issues in relation to pension loss**

These can be summarised as follows:-

- The loss is just in respect of the so called 2015 pension.
- The period of loss is 1 April 2015 to 3 December 2018.

- The Ogden multiplier is 24.97 (although we also see that there is a reference to 26.92).
- That the claimant's gross annual pension is £2,340.29.

16 **The issues which remain disputed**

Again, by reference to the written submissions these can be identified as the following:-

16.1 Should future loss be calculated as gross or net?

16.2 Should pension loss be calculated by reference to the currently agreed gross amount (see above) or a net amount?

16.3 How should the grossing up exercise be conducted?

16.4 It being common ground that, unsurprisingly, the reimbursement of fees by way of a costs order does not attract tax liability, should the awards for personal injury and injury to feelings (with interest in each case) attract a charge to tax?

17 **Should future loss be calculated as gross or net?**

We consider that it is well established that the loss to be compensated should reflect the actual net payments which the claimant would have received had her employment continued. It follows therefore that a net figure for that loss must be calculated by reference to the already agreed gross figure.

18 **Should pension loss be calculated as gross or net?**

For the same reasons as set out above, it should be net and so the same exercise will need to be conducted to arrive at that calculation.

19 **Grossing up**

As we noted in our first remedy judgment the compensation to be awarded in the jurisdiction we are dealing with requires the claimant to be put into the position she would have been in but for the unlawful conduct and that by a financial award. We are reminded of this principle by the claimant's current submissions where at paragraph 20 there is a reference to the same principle as set out in the case of **Wells v Wells [1999] AC 345**. It follows that the incidence of tax has to be taken into account to ensure that the award to the claimant is sufficient to leave in her hands, after tax and national insurance, a figure which accurately reflects the net loss. In other words there has to be grossing up.

20 In principle we prefer the claimant's approach to this exercise rather than the respondent's suggested approach – which, with respect in a less sophisticated way, begins the exercise with gross figures.

21 Insofar as the claimant's calculation in her Appendix 3 document has shown future grossing up as influenced by the attempt to gross up past loss, there will need to be a recalculation. In principle we prefer, subject to that observation, the grossing up calculation conducted by the claimant in Appendix 3.

22 **Are the awards for personal injury and injury to feelings subject to a charge to tax?**

Our first observation here is that we are in this context in effect being asked to either reconsider or at least clarify parts of our December 2016

judgment. On that occasion we simply found that the claimant should receive £20,000 plus interest for injury to feelings and £16,000 plus interest for personal injury. We said nothing about tax. That is unsurprising as we have not been addressed on the point. As a decision on this point within this judgment has the result of leaving our December judgment in these regards unaltered – and as perhaps any grossing up here could have an effect of grossing up elsewhere – and as we are invited jointly by the parties to consider this point we proceed.

23 **The position regarding personal injury**

As the claimant's solicitors point out we made a separate award for personal injury and a further award for injury to feelings. We accept the claimant's contention that having clearly identified such loss under a separate head the claimant is entitled to the benefit of the exception in section 406 of the Income Tax (Earnings and Pensions) Act 2003. Insofar as it is relevant to the case before us that section provides:-

> "This chapter does not apply to a payment …. provided …. on account of injury to …. an employee."

24 We do not accept the respondent's assertion that the case of **Moorthy v The Commissioners for Her Majesty's Revenue and Customs [2016] UK/UT13TCC** is authoritative for the proposition that awards for injury to health are taxable. We read **Moorthy** as a case dealing with how awards for injury to feelings (rather than personal injuries) are to be treated for tax purposes.

25 The starting point in terms of payment on termination of employment is section 401 of the 2003 Act which provides:-

> "This chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with …. the termination of a person's employment."

26 Section 406 must be understood as applying to payments on termination of employment – otherwise it would not form part of chapter 3. Moreover, although it is not particularly clear, it seems that the reference to "in connection with the termination of employment" in section 406(a) – where the employment is terminated by death, was also intended to apply to section 406(b) which should be understood as employment terminating on account of injury.

27 Accordingly in our view it is not necessary to debate whether the injury for which the personal injury award was made [*I've slightly rethought this during the course of dictating this passage*] it follows [*for my benefit having regard to slight change of direction please check that it does follow*] that if the claimant's employment had been terminated on account of the relevant injury there would be an exception to tax under section 406. However the claimant's employment was terminated because of a physical impairment – her renal condition – not because of the mental impairment which we found had been caused by the detriment. In those circumstances we conclude award personal injury is not to be treated as a payment received directly, indirectly or in consequence of termination of the claimant's employment and so her case is outside section 401. However if we are wrong and the award did have that connection to the

termination of the employment then there is still no tax because the claimant has the benefit of section 406.

28 **Is the injury to feelings award taxable?**

Here **Moorthy** is on point. In his written submissions Mr Arnold refers us to paragraph 60 of the judgment in **Moorthy**. There the Upper Tribunal observed that section 406 was not a general exemption from tax for payments on account of injury to an employee. Instead that section only took payments out of tax where there would otherwise by virtue of section 401 fall within chapter 3 because they were payments in connection with termination of a person's employment. "Injury" failed to be considered and interpreted together with "death" and "disability" in section 406 because it has to be something which has led to the termination of employment.

29 However, over and above this, in paragraph 63 of their judgment the Upper Tribunal found that "injury" as referred to in section 406 referred to a medical condition and did not include injury to feelings.

30 Accordingly it is clear that section 406 is irrelevant to the issue now before us.

31 The focus turns to section 401. Again the consideration is whether the injury to feelings award is to be received directly or indirectly in consideration of termination of employment or in consequence or otherwise in connection with such termination.

32 It is in this context that the claimant refers us to the case of **Walker v Adams [2003] SpC 344** which is mentioned and discussed in paragraphs 27-30 of the **Moorphy** judgment. The Upper Tribunal note that during the course of Mr Walker's appeal to the Special Commissioner the Inland Revenue had withdrawn their claim to tax the amount of money paid to Mr Walker for injury to feelings. That was on the basis that the Revenue accepted that the award was not a payment made in connection with the termination of Mr Walker's employment.

33 For the reasons we have referred to above we conclude that the award to Mrs Usher was in respect of injury to her feelings caused by detriments done during the course of her employment and so cannot be regarded as a payment or award made in connection with the termination of that employment. [*At this point or possibly in a separate document I will then need to give some directions for what recalculations the parties need to do – primarily the claimant – to put into effect the principles set out in our judgment above. Before I do this I will need to reconsider the claimant's current calculations in the light of what is set out in our judgment. Also to note that I have agreed to send a copy of this judgment in draft form to the members for preliminary approval. As part of the directions to the parties I will need to ask them whether the Ogden discount rate is to be recalculated in the light of the government announced reduction to -0.75% for the discount*].

Employment Judge Little

Date: 6 April 2017

Sent on: 6 April 2017