



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Waller-Flynn

**Respondent:** Alternative Futures Group Limited

**HELD AT:** Liverpool **ON:** 9 February 2017

**BEFORE:** Employment Judge Shotter  
Ms H D Price  
Mr P C Northam

## REPRESENTATION:

**Claimant:** Submissions  
**Respondent:** Submissions

## JUDGMENT

The unanimous judgment of the Tribunal is:

1. The Judgment promulgated on 8 August 2016 is reconsidered under Rule 70 of the Tribunal Rules 2013 in the interests of justice and the Judgment is varied to include a grossing up of the basic and compensatory award in excess of £30,000.
2. The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £71,511.92 comprising of a basic award in the sum of £3325, a compensatory award £51582.15 consisting of loss of earnings £42161.17, loss of statutory rights £300 and loss of long notice £2392 a 15% uplift for failure to comply with the ACAS Code at £6727.98. Compensation in excess of £30,000 has been grossed up to allow for taxation at 40% in excess of £30,000 resulting in the additional sum of £16,604.76.

## REASONS

### Preamble

1. This is a preliminary hearing dealing with a reconsideration application lodged on behalf of the claimant. The parties have agreed for the application to take place by way of written submissions and the Tribunal has had sight of various documents, including the email sent on behalf of the claimant dated 18 November 2016 and written submissions made on behalf of the respondent dated 19 August 2016. The issue is straightforward, is it in the interests of justice to reconsider the reserved judgment following the remedy hearing and if so, the recalculation.

2. The application for a reconsideration is allowed on the basis that in order to achieve a just and equitable award grossing was required to the extent the award exceeded £30,000, despite the fact it had not been a live issue before the Tribunal at the remedy hearing and was not considered by the parties at the time.

3. The Tribunal was referred to the relevant Rules 70 and 71 in the Employment Tribunal Rules of Procedure 2013, and the overriding objective set out under Rule 2, which it does not intend to repeat.

4. The Tribunal took into account written submissions filed on behalf of the parties, including alternative calculations put forward on behalf of the claimant which the respondent has not questioned concluding compensation in excess of £30,000 should be grossed up to allow for taxation at 40%, resulting in an additional sum of £16,604.76.

5. The respondent's argument that grossing up had not been an argument raised before the Tribunal until the reconsideration application, and the Tribunal has considered the submission that it would have been open to it, had it considered it just and equitable under section 123 of the Employment Rights Act 1996 (as amended "the ERA") to do so at the time of calculating remedy, to have included in the compensatory award an amount for grossing up. The Tribunal was not invited by the claimant to consider grossing up, and it was not considered at the time. Following this application the Tribunal concluded it was just and equitable to do so, having considered the submissions put forward on behalf of the respondent. It would be an injustice to the claimant if he were to pay 40% tax on compensation over and above the sum of £30,000 with the result that he would not be fully compensated.

6. The Tribunal notes that despite the claimant having been in possession of the respondent's submissions dated 19 August 2016 he is silent on the point raised in paragraph 12 of those submissions, namely, there are parts of the compensatory award which are not based on net earnings

7. On behalf of the claimant the Tribunal were referred to the law on taxation set out in Harvey on Industrial Relations and Employment Law at B11 para. 216 set – "An award of damages or other compensation will generally be calculated on the

basis of the net loss to the claimant, after deduction of the income tax which he would have been required to pay in the absence of the relevant wrong (British Transport Commission v Gourley [1956] AC 185, *HL*). So account has to be taken in calculation of the damages or compensation of the incidence of tax under s 401 on the excess over £30,000 (see Bold v Brough, Nicholson & Hall Ltd [1963] 3 All ER 849, [1964] 1 WLR 201, Phillimore J, and Shove v Downs Surgical plc [1984] IRLR 17, [1984] ICR 532, Sheen J, departing from the approach in Parsons v BNM Laboratories Ltd [1964] 1 QB 95, [1963] 2 All ER 658, CA). Any statutory cap on the amount of compensation will continue to apply.”

8. The Tribunal also took note of Example 2 - “An employee succeeds in an unfair dismissal claim. His basic award (ERA 1996 s 119) is £4,000. In calculating the compensatory award (ERA 1996 s 123) by reference to net losses, the Employment Tribunal arrives at a starting figure of £45,000. The total notional award of £49,000 would be subject to tax under ITEPA 2003 s 401 on the excess over £30,000, i.e. £19,000. Grossing up that £19,000 by a factor of 100/60 (for a 40% taxpayer), will give £31,667 to be added to the tax free slice of £30,000, a notional figure of £61,667. £4,000 of this is the basic award (fixed by the statutory formula in ERA 1996 s 119). The balance of £57,667 forms the basis for calculation of the compensatory award and includes an element of grossing up attributable to the basic award. The actual compensatory award applicable at the relevant effective date of termination is, however, capped at (say) £55,000 (ERA 1996 s 124). So the employee is awarded a total of £59,000 (rather than £61,667) of which £29,000 will be subject to tax under ITEPA 2003 s 401. Again, PAYE will be applied to the taxable sum under tax code 0T (in accordance with PAYE tax tables, non-cumulative basis, no allowances).

9. The respondent does not dispute the claimant will be taxed at a rate of 40% due to his employment, and the Tribunal accepts this is the case given his high earnings. It is aware the correct approach is for the Tribunal to gross up the sum in excess of £30,000 taking into account the employee’s personal allowance and tax banding (Shove v Downs Surgical Plc [1984] 1 All ER 7). The Tribunal was not provided with any information concerning the claimant’s personal allowances; but it accepts on balance, he fell within the higher tax bracket.

10. The Tribunal was referred to a number of cases on behalf of the respondent dealing with the interests of justice requiring a finality in the litigation – Flint v Eastern Electrical Board [1975] ICR 395 EAT and only in unusual cases should a party be given a “second bite” at the cherry. Failings of a representative will “not generally constitute a ground for review...that may involve the tribunal in inappropriate investigations into the competence of the representative who is not present...” Ironsides Ray & Vials v Lindsay [1994] ICR 384. In the present case the Tribunal took the view that the interest of justice concerning the taxable element of the claimant’s claim overrode the requirement for finality and whether or not there was an issue of competence. The grossing up of the claimant’s award for unfair dismissal was not an issue picked up by either party, or the Tribunal at the remedy hearing and this reconsideration is the proper means by which to make good that error. The Tribunal was supported in this view by the EAT decision in Williams v Ferrosan Limited [2004] IRLR 607 to which it was referred to on behalf of the respondent, who

submitted the present case could be differentiated on the basis that there had been no mistake on the part of the respondent or Tribunal. The Tribunal agrees there was no duty on the respondent to point out to the claimant that his case could be put in a way which might persuade the Tribunal to award a higher amount. The issue of grossing up should have been raised by the Tribunal on its own volition when it became apparent the claimant would not receive the entire compensatory award in his hand as a result of taxation, and a failure to do so is an error of law: Yorkshire Housing Limited v Cruden UKEAT/0397/09/SM.

11. The respondent is correct in its submission that at the remedy hearing no evidence was given (with the exception of the evidence pointing to the claimant attracting a higher rate of tax as a result of alternative employment) to suggest the Tribunal should make a finding on the impact of tax despite the compensatory award all three schedules of loss exceeding £30,000.

12. Turning to the submissions put forward on behalf of the claimant the Tribunal accepted it was an error of law not to gross up "when it should." It did not accept grossing up applied to the holiday pay award and costs and the Tribunal were not referred to any authority on this issue. The Tribunal is of the view the net holiday pay award takes into account the claimant's liability for tax on this amount before termination of his employment. The contribution towards costs award takes into account any VAT payable on costs, and there is no evidence before the Tribunal, one way or another, that the claimant will be liable to pay tax on the £10,000 cost contribution.

13. The Tribunal does not accept the claimant's methodology of grossing up set out in the claimant's amended schedule which appears to consist of multiplying the award by 40% for the reasons set out above.

14. The Tribunal has grossed up the basic and compensatory award in excess of £30,000 by deducting the basic award of £3325 and compensatory award of £26675 which leaves £24,907.15 subject to tax at 40%.  $£24,907.15 \times 100/60 = £41,511.92$ , the grossed up compensation. The total compensation award is  $£3325 + £26675 + (£30,000) + £41,511.92 = £71,511.92$  which is below the compensation cap.

#### Calculation

Basic award: £3325

#### Compensatory award:

Loss of earnings from effective date of termination to 15 March 2015:	£3590
Loss of pension from effective date of termination to 5 October 2015 (3 x 255.77):	£767.31
Loss of earnings 6 October 2015 to 25 May 2016:	£8086.36

Future loss of earnings from 26 May 2016  
to 5 October 2019  
(156 x 278.84)

£43,499.04

Total:

£55942.71

Less:

Increase in temporary promotion 1 December 2015 to  
30 June 2016: 30 weeks @ 93.49

£2804.70

118 weeks @ 25% of £93.94 = £23.37

£2757.66

Less benefit from civil service pension:  
15 March 2015 to 5 October 2015

£1362.62

6 October 2015 to 5 October 2019:

£6856.56

Total to be deducted:

£13781.54

Total: (55942.71 – 13781.54)

£42161.17

Add:

Loss of statutory rights:

£300

Loss of long notice period:  
(13 x £184 net)

£2392.00

Total compensatory award: £44853.17

Add

Statutory uplift for the respondent's failure to comply with the  
ACAS code of 15% on 44853.17 = 6727.98

Grossing up

£24,907.15 divided by 0.6% = £41,511.92. The total compensation award is £3325  
+ £26675 (£30,000) + £41,511.92 = £71511.92 which is below the compensation  
cap.

**Total compensatory award: £51581.15**

**RESERVED JUDGMENT**

**Case No. 2403894/2015**

**Total award: £71511.92**

Employment Judge Shotter

22 March 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 March 2017

FOR THE TRIBUNAL OFFICE



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2403894/2015

Name of case: Mr P Waller-Flynn v Alternative Futures Group Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 27 March 2017

"the calculation day" is: 28 March 2018

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL  
For the Employment Tribunal Office