184 of the employment rights act 1996

EMPLOYMENT TRIBUNALS

Claimant: **Mr. M. Coombes**

Respondent: **Wiley Fox Europe Ltd (in liquidation)**

JUDGMENT

The judgment sent to the parties on 3 February 2020 has been reconsidered. A protective award of £35,506.84 is substituted for the award of £6,287.14.

REASONS

1. On 1 January 2020 there was a hearing of claims for protective awards made by six former employees of the respondent. The present claimant, Mr M. Coombes, did not attend the hearing.

2. The judgement and reasons were sent to the parties on 3 February. In the reasons for the judgement, at paragraph 19, I explain the difficulty of making an award to Mr Coomes because he had at no point supplied information about the amount of his pay when employed. Doing the best I could, I made an award based on the statutory cap for payments under the insolvency provisions. This seemed likely to achieve justice: as CEO he was likely to have been paid more than his colleagues, and I did have evidence of their earnings. Further, as the company is apparently insolvent, being currently in liquidation, likelihood that he would actually receive more than an award based on average earnings was most unlikely, given that the claimant was likely to be paid only by the redundancy payments office of the BEIS insolvency service.

3. On 4 February the claimant wrote asking for the judgment to be reconsidered. He provided copies of his last twelve months payslips, which also a gross monthly payment of £12,000. He said: “apologies

for not advising before. I will ill for some time, and with my young family and being the only breadwinner, I was distracted and missed the addition of this detail".

Relevant Law

4. Under the Employment Tribunal Rules of Procedure 2013 a request for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a Tribunal "may reconsider any judgment where it is necessary in the interest of justice to do so", and upon reconsideration the decision may be confirmed varied or revoked.

5. Rule 72 provides that an Employment Judge should consider the request to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the Tribunal that heard it.

6. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the same type as the other grounds, which were that a party did not receive notice of the hearing, or the decision was made in the absence of a party, or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. The Employment Appeal Tribunal confirmed in Outasight VB Ltd v Brown UKEAT/0253/14/LA that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).

Discussion and Conclusion - Amount of Protective Award

7. The claimant has not explained, either then or now, why he did not attend the hearing on 31 January at which he could have given evidence about his earnings. His short email does not say when he was ill, or for how long. It is not suggested that he did not receive the tribunal's various letters. On the other hand, on his claim form he did indicate that his pay was £12,000 gross per month, though uncertain of the figure. And although he did not respond to the tribunal's request to send in the calculation of his loss in June 2019, the tribunal service did write, at the direction of acting Regional Employment Judge Wade, to all claimants on 4 July 2019 acknowledging receipt of the claimants' schedules of loss, overlooking that Mr Coombes had not replied. This might just have misled Mr Coombes to think that he had in fact replied when he had not. He might also have been reminded that the tribunal is still waiting to hear from him.

8. On the basis that he may have been falsely reassured by an administrative error that he had provided the information needed, and as he has now provided it, and as a further hearing is not required, I am prepared, narrowly, to accept that it is in the interests of justice to reconsider the judgement to the extent of recalculating his protective award based on his actual weekly earnings, rather than the amount capped by the insolvency service.

9. In practice this is unlikely to make any difference to the amount he actually receives, unless the respondent finds unexpected funds.

Expenses Claim

10. The claimant added at the end of his email: “I also have personal expenses + receipts. Should these be added as well?”. I understand this to be a reference to the mention in his claim form of: “this excludes personal expenses owed for work related claims”.

11. If the claimant were able to demonstrate how they were incurred, and that his employer was legally obliged to refund him, he might have been able to make a claim in breach of contract. The claimant has never set out what these expenses are, or how incurred, or whether they were claimed ion the liquidation and accepted or rejected by the liquidator, and he does not do so even now. If he did, I would have to consider whether to allow an amendment of claim which is now out of time. There would have to be another hearing. The exercise, even if it resulted in an award, is likely to be futile, because expenses are not an employer payment which can be reimbursed by the insolvency service under section 184 of the Employment Rights Act. It is not in the interests of justice, having regard to expense and delay, to reconsider the judgement in respect of this claim.

Employment Judge GOODMAN

Date 11th March 2020

RECONSIDERATION JUDGMENT SENT TO THE PARTIES ON
27/3/2020

FOR THE TRIBUNAL OFFICE