EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Mr J Sursock **AND** eClerx Ltd

Heard at: London Central **On**: 13 March 2017

Before: Employment Judge D A Pearl (sitting alone)

Representation
For the Claimant: Mr M Bradley (Counsel)
For the Respondent: Ms L McNair-Wilson (Counsel)

JUDGMENT ON APPLICATION FOR RECONSIDERATION

1 The Judgment of 16 November 2016 is amended as follows:

(1) By the addition of paragraph "6A. The Respondent shall additionally pay £5,454.13 to the Claimant."
(2) By the addition of paragraph "6B. The Respondent shall reimburse tribunal fees to the Claimant in the sum of £1,200."
(3) The total in paragraph 7 shall now read £68,270.63, excluding tribunal fees.

2 The Respondent's further application for a further decrease in the amount of the compensatory award is dismissed.

REASONS

1 The Claimant's application to reconsider the judgment in this matter was made in respect of (a) reimbursement of Tribunal fees and (b) a grossing up calculation. This latter was not part of his original submissions and is an attempt to correct the judgment in monetary terms so that the correct figures appear. Ms McNair-Wilson accepts that an additional £5,454.13 should be added to the current figure and that is the case if it is to be grossed up. She convincingly persuades me that any further adjustment to deal with any over-paid or over-deducted tax (because the Respondent has already paid pursuant to the judgment) has to be made between the Claimant and HMRC.

2 What has occupied me rather longer is a submission that she makes in which she fastens on to what I have said in my short reasons in December. I said that a potential performance improvement plan might possibly have taken up to nine months. The Respondent contends that if the Claimant had not been dismissed he would have possibly been dismissed on performance grounds. Ms McNair-Wilson is inclined to accept that the nine month period is a proper estimate but she points out that this leaves two months remaining of that period for which the Claimant was compensated in the judgment, subject to a 40% deduction for contribution by him. I ought also to add that towards the end of her submissions Ms McNair-Wilson also asked me to look at the matter more broadly, and in particular, on the basis that the performance improvement plan might take less than nine months.

3 This application is made rather ingeniously, in my view, on the basis that the grossing-up reconsideration is being done as a matter of justice and the Respondent, therefore, feels that I should entertain this submission in the same spirit. No fee has been paid and no notice had been given of the point to the Claimant. Nevertheless, Mr Bradley is not inclined to object to my looking again at this topic, as he seeks finality in the litigation. I have therefore set aside my initial misgivings on procedural grounds and have agreed to do so. I also ought to say that I have attempted to put on one side the fact that I have already reached a decision which is adverse on the point to the Respondent. If I consider that I should adjust that in the interests of justice than it is my duty to do so and I would not shrink from taking that course.

4 The evidence is not substantial and it is also disputed. The mid-2015 appraisal was not agreed. Page 226 (3 July 2015) shows that Mr Houchin was linking the question of the appraisal in the Claimant's performance to "your future at eClerx". However, this was not the first reference in the emails to a possible termination. On 12 June, ie about three weeks earlier, the Claimant raised with Ms Jun his concerns about the fairness of the appraisal. He sent a detailed critique to her. Ten days later, on 22 June, Mr Houchin said that he was very unhappy about how the Claimant had handled this by going over his head. He asked HR what were the potential routes that the Claimant might take and he asked what options the Respondent had; settlement was specifically mentioned by him.

5 Looking again at the evidence I consider that there is therefore some force in the Claimant's contention that the continued performance "concern" was being linked by the Respondent to a settlement that would end with his departure. On 20 July a settlement proposal was presented to the Claimant. On 10 September he was told that a performance improvement plan would be progressed. In the event this was of course overtaken by his dismissal.

6 This is the background to the Respondent's submission and Ms McNair-Wilson says that speculation and broad assessment of probabilities are no bar to compensation being decreased if such a decrease is required in order to ensure that an award is just and equitable and comports this section 123(1). Mr Bradley

points out that the Respondent has not addressed the question in evidence either at the remedy hearing or earlier at the liability stage.

7 This last point is of concern to me. True, the performance improvement plan was threatened on 10 September and would in different circumstances have probably been implemented, if only to further the aim I have referred to that the Claimant might be persuaded to leave. However, the Respondent knew that the Claimant objected to the appraisal and to the allegation of under-performance. The emails suggest, to put it no higher, that the Respondent was not mindless of the possibility of using the issue of performance as leverage to secure his departure. What else is missing in terms of evidence?

8 First, there is no evidence about the performance of the desk or the business overall. In my view this is relevant because the Claimant at paragraph 51 of his statement says that his book of business was 20% ahead of plan/forecast by late 2015 and that he had a good pipeline as well as leads he had been working on over the summer. Second, there is no evidence about the progress of PIPs within the business and what generally happens in similar cases. Third, it is difficult entirely to divorce the potential improvement plan from the broader aim that I have referred to of persuading the Claimant that he may be better off leaving. When I ask whether I have a sufficient basis for decreasing compensation for the last two months, or on any other wider basis, I have come to a clear conclusion. I could do so only as a matter of untutored speculation. It would be dangerous in my opinion to take this course in these circumstances and I do not consider that the pull of either justice or equity demands that I should do so. The overall circumstances in which the performance improvement plan has emerged do not give me confidence that it was not a tactical weapon that was being employed; but even if that assessment is an over-cynical interpretation of the evidence I cannot see how any proper decrease in compensation could be made that would depart the realm of guesswork and enter into the sphere of proper and justifiable judicial assessment. I have therefore after some considerable thought declined to further adjust the figure downwards.

Employment Judge Pearl
14 March 2017