Case Number: 2302569/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS N CHRISTOFI**
MS B BROWN

BETWEEN:

Mr M Salinas Lagos

Claimant

AND

Number One Bar Ltd

Respondent

ON: **18 and 19 December 2017**

Appearances:
For the Claimant: **Ms M Stanley, counsel**
For the Respondent: **Mr B Hendley, consultant**
Interpreter Spanish language: **Mr G Orlando**

JUDGMENT ON RECONSIDERATION

The unanimous Judgment of the Tribunal is that:

1. The original decision of 5 December 2016 is confirmed.
2. The respondent shall pay the claimant's costs summarily assessed in the sum of **£2,997.00.**

REASONS

1. This judgment was delivered orally on 19 December 2017. The respondent requested written reasons.

2. By a judgment delivered orally on 5 December 2016 and sent to the parties on 6 December 2016 (as the respondent was not in attendance at the hearing) the claims brought by Mr Marcelo Salinas Lagos for ordinary unfair dismissal, automatically unfair dismissal, race discrimination, unlawful deductions from wages, breach of contract, holiday pay, failure to provide written particulars of employment, wrongful dismissal and redundancy pay all succeeded.

3. The hearing went ahead and judgment was given for the claimant. On 16 December 2016 the respondent made an application for reconsideration. The respondent's representative said that they had only recently made contact with the relevant witness, who advised them that he could not attend on 5 December 2016. They contended that the difficulties with taking instructions were unique because of a change of ownership of the respondent and most of the staff had left. The respondent's representative said that they had subsequently been able to make contact with a number of witnesses and they wished to rely on fresh evidence being available.

The issue

4. The issue for the tribunal was whether under Rule 70 to confirm, vary or revoke the original decision of 5 December 2016.

The relevant background

5. The background to the respondent's non-attendance at the hearing is as follows. On Thursday 1 December 201 by email, the respondent applied for a postponement on grounds that its previous General Manager Mr Ricardo Medina no longer worked for the respondent and that he was not available to attend the tribunal on the dates listed for the hearing. We were told that he was available on 19 or 20 December 2016. We were not told that the respondent had difficulty in persuading him to attend, but that his availability was such that he could come on the dates given, two weeks later.

6. By consent there had been a previous postponement of this hearing from 23 May 2016. That application was dated 9 May 2016. It set down for a five day hearing at a Case Management Hearing on 29 October 2015 before Employment Judge Baron. The respondent was represented at that hearing by Mr Medina.

7. The new notice of hearing was sent to the parties on 13 May 2016 for a five day hearing commencing on 5 December 2016.

8. Mr Medina worked for the respondent for a period of ten years ending on 30 May 2016. Based on this date, which was set out in an unsigned witness statement on his behalf, we find that he was in the respondent's employment when the parties were notified of the hearing by the letter of 13 May 2016. The respondent was therefore aware of the December 2016 hearing dates before Mr Medina left their employment. Mr Medina returned to the respondent's employment in January 2017.

9. Under the terms of Judge Baron's Case Management Order, witness statements were due to be exchanged on 8 April 2016. When the joint application to postpone was made on 9 May, statements should already have been exchanged, but were not.

10. The respondent's 1 December 2016 postponement application was refused by Judge Baron who said that the application was made less than seven days before the start of the hearing and none of the conditions set out in Rule 30A(2) of the Employment Tribunal Rules of Procedure were met. The tribunal's decision was sent to the parties by email on 2 December 2016 at 16:56 hours.

11. Somewhere between 17:24 hours (the time shown on the email on the tribunal record) and 17:46 hours on 2 December (the time shown in the claimant's bundle page 103) Mr Hendley of Avensure for the respondent, said that they no longer represented the respondent in this case. The respondent's representative came off record within an hour of being notified of the tribunal's refusal of the postponement application.

12. On the morning of the hearing (5 December 2016) the respondent did not appear. We were told by our clerk that a General Manager named Andres Mendez had called the tribunal to say he "*thought they were being represented*" and that he would be calling his representative. Mr Mendez was informed by tribunal staff that the postponement application had been refused and the case was proceeding.

13. At 12:29 hours on Monday 5 December (day 1 of the hearing) the tribunal was copied in to an email sent by Mr Hendley of Avensure to Mr Mendez of his client, copied to the client's HR email address and to other members of Avensure, saying:

> *Dear Andres*
> *We have just received the news the tribunal have refused the postponement request of both parties. You have informed us that Mr Medina will not attend tribunal next week at Croydon.*
> *Both my colleagues [names given] have warned you that we cannot defend the case without Mr Medina present as a witness, and that we would have to come off record if that situation arose.*
> *I am going to alert the tribunal that we cannot represent you at the tribunal on Monday.*
> *You or someone from the respondent should attend the tribunal on Monday, and explain that you will have to find a new representative as Avensure has gone off record. You should seek an adjournment of the case so that you can find a new representative.*

14. We find on a balance of probabilities that the respondent was fully aware from their representative's email sent on Friday, 2 December 2016 at 17:21 hours that they were not being represented at the hearing on Monday 5 December 2016. The respondent runs a bar which operates over the weekend.

The respondent's written application

15. As stated above, the judgment was sent to the parties on 6 December 2016. An application for reconsideration was made to the tribunal in

writing on 16 December 2016. The application came from Avensure. We asked the respondent's representative when Avensure was re-instructed and we were told that it was "*the following week*" i.e. the week commencing Monday 12 December 2016. We were told that Avensure was "*pressed by the respondent*" to go back on record.

16. The grounds for the application were firstly that the respondent had sought a postponement as they had "*only recently made contact with the relevant witness, who advised… that he could not attend on 5 December 2016*". We find that this witness was Mr Medina. The reason for his non-availability in the week of 5 December 2016 was never stated. They also said that other witnesses had been located but we were not told why they had only been located at such a late stage, given that the original date for exchange of witness statements was 8 April 2016.

17. The application stated that "*Since 5 December our witness has still maintained that he wants to give evidence*". There was no indication whatsoever that there were difficulties in compelling him to attend to give evidence because he was no longer in the respondent's employment. We find based on this representation and the representation that he was available on 19 and 20 December 2016, there was no unwillingness on Mr Medina's part to attend to give evidence, despite the fact that he was not in the respondent's employment at that time.

18. The second ground was that fresh evidence indicated a transfer of undertaking from the respondent to a second potential respondent, a Mr Rojas, who took over the running of a snack bar on renting the kitchen of the respondent. It was said that some of the liability in this case may pass from the respondent to Mr Rojas.

19. We find that this was not fresh evidence that had only come to light after 5 December 2016 and the existence of which could not have been reasonably known of or foreseen at the time. This finding is based on paragraph 22 of the Grounds of Resistance in the ET3 (described as the "Defense"). Paragraph 22 states:

> *…. our kitchen was closed for 3 weeks before being sub-let to Mr Jose Luis Rojas as the director of Number 1 Bar didn't want to deal with food operation any longer after losing money for so long with the failed restaurant.*

20. Based on this pleading we find that the facts giving rise to the possibility of a transfer to Mr Rojas was known when Mr Medina of the respondent filed the ET3 on 8 October 2015. This was not information that could not have been reasonably known of or foreseen at the time.

21. There was also a dispute between the parties relating to documents in Spanish which the claimant sought to introduce into the bundle on Friday 2 December 2016. The claimant's position was that these were documents which had been disclosed many months earlier but the

respondent had omitted to include them in the bundle. The respondent's position was that the documents were brand-new on 2 December 2016.

22. We also set out that the claimant consented to the postponement application of 2 December 2016 although this was not granted by the tribunal.

23. When making its reconsideration application on 16 December 2016 the respondent made no reference to these Spanish documents. The respondent's representative accepts that those from whom he takes his instructions at the respondent are all Spanish speakers. In any event, documents in Spanish which were not translated would have been of no assistance to the tribunal.

Documents and evidence

24. The respondent said it wished to rely on witness evidence. We were given a copy of a witness statement from Mr Ricardo Medina which was unsigned and undated and which amounted, by reference to paragraph numbers, to Mr Medina's critique or response to our judgment of 5 December 2016. This statement was served on the claimant at 17:35 hours on Friday 15 December 2017 (page 141 claimant's bundle).

25. This witness statement did not deal with Mr Medina's reasons for non-attendance on 5 December 2016. It referred to the kitchen being used after a break of three weeks for snacks only rather than a restaurant service and referred to Mr Rojas running the kitchen under the terms of an agreement dated 18 May 2015. This agreement was in the trial bundle and was signed by Mr Medina. This supports our finding that any potential TUPE situation was clearly known to the respondent well before December 2016. No mention was made in that statement of any further potential transfer to a Mr Miguel.

26. We explained to the parties that we would not normally expect to hear witness evidence on a Rule 70 application. In any event Mr Medina did not arrive at the tribunal until 11:30am when we had heard from the respondent and were in the process of hearing the claimant's submissions. There was an HR representative for the respondent present in the tribunal from about 10:30am. As we have stated above the draft witness statement for Mr Medina consisted of a critique of and disagreement with the tribunal's decision of 5 December 2016. There was nothing in that statement that went to the grounds relied upon in the respondent's reconsideration application.

27. We had a bundle of documents from the respondent indexed at 300 pages (although a number of pages were missing) and a bundle of documents from the claimant of about 140 pages. There was some duplication between these two bundles.

28. We had a detailed written submission from the claimant to which Counsel

spoke together with copies of the authorities relied upon by the claimant.

29. We had oral submissions only from the respondent who relied upon case law and references set out in the IDS Handbook on Employment Tribunal Practice and Procedure published in May 2014. Copies were not provided for the tribunal or the claimant. Due to its publication date it did not contain the most up-to-date summary of the law on reconsideration.

30. The submissions are not replicated in their entirety below. All submissions were fully considered together with any authorities relied upon even if not expressly referred to below.

The parties' submissions

The respondent's submissions

31. The respondent submitted that as the representative had difficulties in contacting Mr Medina they had "*no choice but to come off record*". It was submitted that the representatives were trying to find out what happened between the closure of the restaurant and the outsourcing to Mr Rojas and an alleged further transferred to a Mr Miguel. We were told that this alleged TUPE transfer took place in May 2015.

32. The respondent relied upon ***Fforde v Black EAT 68/80*** referred to below. We were not given a copy of the decision which predates the publication online of EAT judgments. The narrative in the IDS Handbook states in relation to the interests of justice, that this gives the tribunal a wide discretion but does not mean that in every case where a litigant is unsuccessful he is automatically entitled to a reconsideration: virtually every unsuccessful litigant thinks that the interests of justice require the decided outcome to be reconsidered. The case of ***Fforde v Black*** is cited in the Handbook in support of the proposition that this ground only applies where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order.

33. The respondent submitted that the tribunal should take into account that they had to arrange for someone who was no longer an employee of the respondent to attend the tribunal. We asked the respondent whether an application for a witness order had been considered and we were told that this could set up a difficult situation with a hostile witness.

34. In relation to the late disclosed documents in Spanish, the respondent relied upon the decision of the EAT in ***Mahmood v Barker (t/a Derby Transit Ltd) 2001 All ER (D) 194*** a case in which an unrepresented claimant was given a 30 page bundle at the door of the tribunal. It was found in that case that the claimant did not appreciate that he could ask for an adjournment as he was unrepresented and had not been invited to think about whether he should ask for an adjournment. The EAT held that the claimant should have been given the opportunity of a review hearing.

35. The respondent relied upon the decision of the EAT in ***Wileman v Minilec Engineering Ltd 1988 ICR 318*** which holds that unless new evidence is likely to influence the decision, then "*a great deal of time will be taken up by sending cases back to an [employment] tribunal for no purpose*". It was submitted that the potential TUPE transfer had an important bearing on the case. We asked the respondent to say why and we were told that it was necessary to see who was responsible for the unfair dismissal when responsibility passes across. It was submitted by the respondent that they found out from Mr Medina about the potential outsourcing with waiters no longer waiting at tables, full hot meals not being provided and a snack menu being available.

The claimant's submissions

36. As we had the benefit of a written submission from the claimant and we spend less time within these Reasons setting out the claimant's submissions.

37. The claimant relied upon the decision of the Court of Appeal in ***Ministry of Justice v Burton 2016 ICR 1128*** which sets out a review of the earlier authorities. The claimant also relied upon the three-limbed ***Ladd v Marshall*** test and submitted, rightly in our view, that the law has not changed under the 2013 Rules.

The illegality argument raised in reply

38. In reply to the claimant's submission the respondent raised for the first time an illegality argument. At paragraph 37 of the Reasons to our decision of 5 December 2016 we found that certain service charge payments were given to the claimant in cash. It was submitted that income tax was not deducted. The payment of cash was commented upon in the draft statement of Mr Medina although with no reference to an illegality argument. This was not a ground relied upon in the reconsideration application of 16 December 2016 or subsequently until the day of this reconsideration hearing.

39. It was asserted in submissions that the claimant asked the respondent to pay his service charge in cash. This was not set out in the draft statement of Mr Medina. The claimant resisted reliance on this argument at such a late stage.

The law

40. Rule 70 of the Employment respondent. Tribunal Rules of Prcedure 2013 provides that a tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, 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. If it is revoked it may be taken again.

41. Rule 70 gives the tribunal a wider discretion than under Rule 34(3) of the Employment Tribunal Rules of Procedure 2004, but the case law under the old Rule 34 is still considered relevant. Whilst the discretion is wide, it has been held not to be boundless; it must be exercised judicially and with regard, not just to the interests of the party seeking the review, but also to the interests of the other party and to the public interest requirement that there should, as far as possible, be finality of litigation - ***Flint v Eastern Electricity Board 1975 ICR 395 at 401***, per Phillips J. As with the exercise of any other power, tribunals must seek to give effect to the overriding objective in Rule 2 of the 2013 Rules.

42. Under the old Rule 34(3)(c) under the 2004 Rules, one of the grounds upon which a judgement could be reviewed was that it was made in the absence of the party. This did not mean that a party could simply decline to attend the hearing and then apply for a reconsideration of the decision was unfavourable. To succeed on this ground the party had to have a good reason for his or her absence from the hearing. A party who makes a conscious decision not to appear must take the consequences of that decision – ***Fforde v Black EAT 68/80*.** However if a party makes a genuine mistake, the tribunal must give due weight to this.

43. The old Rule 34(3)(d) included as a ground for review that new evidence had become available since the conclusion of the hearing to which the decision related, provided that its existence could not have been reasonably known of or foreseen at the time.

44. One of the leading cases on the introduction of new evidence is ***Ladd v Marshall 1954 3 All ER 745, CA.*** The test in that case has three limbs which are: (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing; (b) that it is relevant and would probably have had an important influence on the hearing; and (c) that it is apparently credible.

45. The authorities, including ***Ladd v Marshall,*** were reviewed by Eady J in the EAT in ***Outasight VB Ltd v Brown UKEAT/0253/14*** in which she held that the case law under the 2004 Rules remained relevant. In ***Outasight*** the employment tribunal revoked its decision on a reconsideration and allowed the claimant to introduce new evidence of the fact that the respondent's director and sole witness had previous convictions for dishonesty. The EAT set aside the revocation and restored the tribunal's original decision holding that not only had the tribunal been wrong to admit the new evidence when the test for admissibility had not been met, but also that the claimant had sufficient knowledge of the matters which were relevant to the issue of the director's credibility. Even though the claimant was unrepresented at the original hearing, there were no grounds for the tribunal bypassing the ***Ladd v Marshall*** test and interfering with the original decision.

46. The most recent restatement of the law on reconsideration comes from

the decision of the Court of Appeal in ***Ministry of Justice v Burton 2016 ICR 1128*** with the decision of Lord Justice Elias. This provides a review of all the leading authorities and confirms, following ***Newcastle upon Tyne City Council v Marsden 2010 ICR 743,*** that 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.

Conclusions

47. Apart from being told that it was important for the tribunal to see who was responsible following the alleged TUPE transfer, there was no new evidence put before us to assist us with understanding what that might be. We saw the agreement between the respondent and Mr Rojas dated 18 May 2015 and from this we find that the facts and matters surrounding any TUPE transfer was not new, but was known to the respondent well before the issue of these proceedings. This information could have been ascertained with due diligence well before 5 December 2016.

48. Avensure for the respondent first came on record on 13 April 2016.

49. It was suggested in the respondent's submissions that it was only found out from Mr Medina after 5 December 2016 that there had been a closure of the kitchen and the transfer to Mr Rojas. The Agreement of 18 May 2015 at page 265 of the trial bundle can only have come from the respondent's disclosure. Evidence was in front of the tribunal in December 2016 and is referred to from paragraphs 55 to 58 of our Reasons and is information within the respondent's knowledge in October 2015 when it filed its ET3, as set out at paragraph 22. As we have set out above this was not information that could not have been reasonably known of or foreseen at the time.

50. There was no postponement application based on the late service of the documents in Spanish. In any event even if those documents had been before the tribunal on 5 December 2016, they would not have assisted as they were not in English. So far as any late disclosure of Spanish documents was concerned, both parties would be equally disadvantaged. They could not be relied upon in this tribunal if they were not translated. We find that it was not a good reason for non-attendance at the hearing.

51. The respondent's representative made clear to the respondent the importance of attending on Monday 5 December 2016 as set out in Mr Hendley's email to his client of 2 December 2016 at 17:21 set out above. Quite properly, Mr Hendley informed his client of the importance of attending the hearing and they chose not to attend. There was nothing in the draft witness statement of Mr Medina suggesting that the respondent did not know about the hearing.

52. We find that ***Mahmood v Barker*** is distinguishable because this is a respondent who at all material times was represented, was aware of the

right to apply for a postponement, had done so and been refused and the respondent was told of the importance of attending the hearing on Monday 5 December 2016.

53. As we have set out above, there was no suggestion in early December 2016 that Mr Medina was unwilling to attend. There was no application for a witness order and the suggestion that there was unwillingness on the part of Mr Medina to attend is contradicted by the application dated 16 December 2016 stating: "*Since 5 December our witness has still maintained that he wants to give evidence*". We find that there was no unwillingness and no risk of a hostile witness; it was a question of his unavailability, the reason for which has never been explained.

54. There was no explanation as to why a witness statement had not been taken from Mr Medina prior to his departure on 30 May 2016. He represented the respondent at the case management hearing on 29 October 2015 when directions were given the statements to be exchanged by 8 April 2016. It was incumbent upon the respondent to make preparations for the hearing with Mr Medina prior to his departure if this was likely to cause difficulty. In any event we have found that he was not unwilling to attend he was simply unavailable for reasons which are unexplained.

55. On the ***Ladd v Marshall*** test we find that any evidence upon which the respondent now seeks to rely could have been obtained with reasonable diligence for use at the original hearing. We cannot find that any such evidence is relevant and would probably have had an important influence on the hearing because we have not been told exactly what this evidence is other than we need to look at the TUPE situation to see who is responsible. Similarly we cannot assess the credibility of evidence we have not seen. We have seen the draft witness statement of Mr Medina but this does no more than give his critique and disagreement with our original decision.

56. In reply to the claimant's submission the respondent raised for the first time an illegality argument. This is despite the respondent's representative having been reinstructed for the last 12 months. This assertion was not set out in the draft statement of Mr Medina served on the claimant on 15 December 2017.

57. We considered it unfair on the claimant to have this argument advanced for the very first time at the close of submissions. There was no explanation as to why this was not raised in the application letter of 16 December 2016 or at any point prior to this hearing. We would have wished to have detailed submissions on the point from both parties had it been properly raised. Discrimination claims may be treated differently on the question of illegality, to claims for unfair dismissal. There would need to be an examination of whether the claimant actively participated in any alleged defrauding of the Revenue, it being the respondent's obligation with a PAYE employee, to account to the Revenue. The

payslips in the trial bundle show that the claimant was a PAYE employee.

58. We also take account of the respondent's pleaded case at paragraph 21 of their ET3 which states "*False, he was not given any cash payment".*

59. Furthermore, if cash payments were being made by the respondent this is evidence which could reasonably have been known and foreseen at the time and should have been made at the time. It does not support the respondent's application for reconsideration.

60. When a party fails to attend the hearing we have to consider whether there is a good reason for that party's absence from the hearing, such as illness or accident or lack of knowledge of the hearing date. Following ***Fforde v Black*** a party who makes a conscious decision not to appear must take the consequences of that decision. We do not accept the submission that Mr Medina was unwilling to attend the hearing because his willingness is specifically referred to in the reconsideration application of 16 December 2016. He was not likely to be a hostile witness and there was no application for a witness order. We were told that he was unavailable but we were not told why. In the absence of a reason, we find that there was no good reason for his non-attendance and the respondent must take the consequence of that decision.

61. It would greatly undermine respect for the Employment Tribunal Rules of Procedure if a party could simply make a decision not to attend and then rely on their non-attendance to have the decision revoked.

62. We have considered the interests of justice from both sides. There is an interest in the finality of litigation. This was not a default judgment; evidence was before the tribunal together with documents and findings of fact were made. The respondent is a corporate body and could have attended on 5 December 2016 to make an application for a postponement in person and if that was refused, defended the claim as best it could.

63. For the above reasons we confirm our original decision of 5 December 2016.

The claimant's costs application

64. Following the delivery of our decision set out above, the claimant made an application for costs under Rule 76(1)(a) of the Employment Tribunal Rules of Procedure set out below. The claimant's submission was that the respondent had acted unreasonably in the conduct of the proceedings by failing to attend the original hearing in December 2016 was no good reason and pursuing this reconsideration application when it had no reasonable prospect of success.

65. The claimant submitted that it should have been obvious to the respondent that they needed to provide a reason for non-attendance and

one which amounted to a good reason. The claimant also submitted that it should have been obvious at that there were no reasonable prospects when the fresh evidence was not identified or provided. The claimant informed the tribunal, when asked, that there had been no costs warning letter.

66. The respondent said that the difficulty they faced was that most of the staff who had left and that the manager dealing with the matter in December 2016, Mr Mendez, was "not on the ball" and was dismissed following the situation which took place on 5 December 2016.

67. The reason for Mr Medina's non-attendance emerged during the response to the costs application. We were told that he was working for another employer who had a new restaurant opening on 5 December 2016 and they did not wish Mr Medina to attend the tribunal. Mr Hendley apologised on behalf of the respondent. He submitted that it was unfair to "lumber" the respondent with costs in addition to the unfavourable decision on reconsideration and that it was an unfortunate situation.

68. We were unanimous in making the decision that the threshold for a decision to award costs was crossed. We accepted the claimant's submissions that it was unreasonable conduct to fail to attend in December 2016 and in the absence of any fresh evidence it was unreasonable to pursue and conduct the reconsideration application.

69. We made a decision to award costs and heard from the parties on the figures as set out below.

The relevant law on costs

70. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

71. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success*

72. The Court of Appeal held in ***Yerrakalva*** (above) that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify

the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

73. There is no general principle that there should be a costs warning letter in advance of a costs application - ***Peat and others v Birmingham City Council EAT/0503/11***.

74. Rule 84 provides that in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to a paying party's ability to pay. In ***Vaughan v London Borough of Lewisham No2. 2013 IRLR 713*** the EAT (Underhill P) said that affordability is not the sole criterion for the exercise of the discretion on costs. The paying party in this case is a corporate body.

75. The EAT in ***Raggett v John Lewis plc 2012 IRLR 906*** holds that where a party is registered for VAT and able to recover VAT on its counsel's fees and solicitors' costs as input tax, to award costs including VAT would represent a bonus to that party compensating over and above the costs incurred and would represent a penalty to the paying party. The claimant told the tribunal that he is not VAT registered.

Conclusions on costs

76. The claimant produced a costs schedule showing a total sum claimed of £4,027.80 inclusive of VAT. As the claimant is not registered for VAT, this forms part of the award.

77. The charging rates were substantially within the hourly rates specified in the Solicitors' Hourly Guideline Rates 2010. The case was dealt with by a category A fee earner together with a trainee/paralegal (category D). The category A fee earner, based in central London, charges an hourly rate of £205 plus VAT which is comparable to a category C fee earner.

78. Having heard from the respondent, we disallowed two items in the costs schedule. The first was time spent of 2 hours reviewing evidence and preparing a witness statement for the claimant. The claimant was not called to give evidence and his witness statement was not relied upon. We accepted the respondent's submission that we should not award this.

79. The second was for interpreter's fees inclusive of VAT in the sum of £538.80. On day 1 of this reconsideration hearing the claimant was accompanied by an interpreter instructed by the claimant's solicitors. This interpreter did not attend on day 2 (19 December 2017) as the parties were aware that the purpose of day 2 was for us to deliver an oral judgment. The tribunal had the assistance of Mr Orlando, an interpreter booked through the Court Service. His role was to assist the tribunal, not to provide assistance to the claimant. It was submitted by the claimant's counsel that it was reasonable to have the attendance of an interpreter instructed by the claimant's solicitors to assist counsel in taking

80. instructions from her client. Whilst we had some sympathy with this argument, we noted that no such solicitor's interpreter was present for the claimant on day 1 of the hearing on 5 December 2016. We therefore disallowed this amount.

81. Having disallowed 2 hours of solicitor's time plus VAT and the private interpreter's fee plus VAT, the total award of costs reduced to the sum of £2,997. We awarded this sum to the claimant.

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Employment Judge Elliott
Date: 19 December 2017