Appeal No. UKEAT/0341/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 June 2017

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

UNIVERSITY OF SUNDERLAND — APPELLANT

MS K DROSSOU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES BOYD (of Counsel) Instructed by: Watson Burton LLP 1 St James Gate Newcastle Upon Tyne NE99 1YQ
For the Respondent	No appearance or representation by or on behalf of Respondent

SUMMARY

UNFAIR DISMISSAL - Reinstatement/re-engagement

UNFAIR DISMISSAL - Compensation

The amount of a week's pay for the purposes of calculating in accordance with **Employment Rights Act 1996** section 124(1ZA)(b) the upper limit of compensation which may be awarded under section 123, applying section 221(2), is the amount of remuneration payable under the contract of employment. This can include pension contributions paid by the employer to a pension fund. Section 221(2) is to be contrasted with section 27(1) which defines wages as any sums "payable to the worker" and therefore only applies to sums payable to a Claimant. Failing to make a reduction in the basic award under section 122(2) where the Claimant had been found to have contributed to her dismissal by her conduct and had her compensatory award reduced by 35 per cent was perverse. **RSPCA v Cruden** [1986] IRLR 83 applied.

THE HONOURABLE MRS JUSTICE SLADE DBE

Introduction

1. This appeal concerns the calculation of a week's pay for the purposes of calculating the maximum limit of a compensatory award under the **Employment Rights Act 1996** ("ERA"), section 124(1ZA)(b), and in particular whether it can include the employer's pension contributions. A ground of appeal raising the method of calculating the statutory limit when an additional award is made under **ERA** section 113(3)(b) and an Order under section 114 had been made is not pursued. The University of Sunderland, the Respondent, also challenges the decision of the Employment Tribunal not to make a reduction in the basic award made under **ERA** section 122(2) as they did of 35 per cent in awarding a compensatory award.

2. The decisions challenged on appeal were made in a Judgment of the Employment Tribunal - Employment Judge Garnon and members - sent to the parties on 8 August 2016 ("the second Remedy Judgment") on remedy for a dismissal that they held to be unfair in a Judgment sent to the parties on 18 January 2016 ("the Liability Judgment"), and for which the Employment Tribunal made an Order for reinstatement in a Judgment sent to the parties on 5 April 2016 ("the first Remedy Judgment"). The Appellant Respondent is represented by Mr James Boyd of counsel; the Claimant, Ms Drossou, is unrepresented and is not here.

Outline Facts

3. The Claimant commenced employment with the Respondent on 26 September 2003 as a Lecturer in Business Management. On 1 October 2007 she became a Senior Lecturer in the Faculty of Business and Law. The department was restructured in 2012. The Claimant was a Programme Leader of International Management and Human Resources Management

("HRM"). She was a Chartered Institute of Personnel and Development ("CIPD") Centre Leader and Programme Leader for the MSc HRM courses. On 23 January 2013 her supervisor, Ms Watson, convened a team meeting relating to the CIPD revalidation. The Claimant had to leave the meeting. When she was not there a decision was taken that the Programme Leader role should be given to a Ms Mearns.

4. Problems developed between the Claimant, and Ms Mearns and Ms Watson. On 1 August 2013 Ms Mearns was appointed Team Leader for the HRM Team and became the Claimant's line manager. Relations between the Claimant and Ms Mearns deteriorated to the extent that each brought a grievance complaint against the other. An inquiry and report followed. The Respondent reached the conclusion that not only was there an irretrievable breakdown in relations between the two of them - the Claimant and Ms Mearns - and the functionality of the HRM Team had been impaired, but also that the Claimant was the primary cause of the breakdown. The possibility of reorganising the team was discounted. It was considered that moving the Claimant to a different line manager was not practicable. As there was no other realistic opportunity for deployment the Claimant's dismissal was recommended.

5. The Claimant had been suspended from duty, and her suspension was continued. She was called to a formal meeting, and Ms Mearns was told that no action would be taken against her. The Claimant applied for posts outside the Faculty. At a later stage the Claimant asked for mediation to be considered and for redeployment within the Faculty. Both were refused.

6. On 24 October 2014 the Respondent made the decision that the Claimant was to be dismissed due to an irretrievable breakdown in the working relationship with Ms Mearns, for

A which the Claimant was primarily responsible and which had a significant impact on the operation of the faculty. An appeal by the Claimant from the decision was dismissed.

B 7. The Employment Tribunal concluded that the principal reason for dismissal was not the irretrievable breakdown in itself but the conclusion that the Claimant was the primary cause of the breakdown in relations between her and Ms Mearns. The Employment Tribunal held in the Liability Judgment at paragraphs 4.4.3 to 4.4.5 as follows:

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> (1) that the Respondent did not have reasonable grounds for that belief because no reasonable investigation complying with the principles set out in **British Home Stores Ltd v Burchell** [1978] IRLR 379 and **A v B** [2003] IRLR 405 took place;
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> D (2) that it did not follow a fair procedure, in that the Claimant was not told with any particularity what act she was accused of or given a fair opportunity to defend herself; and
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> E (3) that the decision to dismiss rather than redeploy within the Faculty or warn was pre-determined and well outside the band of reasonable responses.

F 8. The Employment Tribunal considered contributory fault on the part of the Claimant and made a reduction in the compensatory award. In the Liability Judgment the Employment Tribunal referred to section 123(6), regarding reducing the compensatory award for contributory fault, and in the course of their considerations at paragraph 4.8 they held:

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> **"4.8. … We accept, as did Mr Gibson [representative for the Claimant below], the e-mails show the claimant was not blameless. … We feel [such conduct] is midway between "partly" and "equally" and, if we make any reduction, it would be about 35%. …"**

H 9. The Employment Tribunal dismissed claims that had been made of race and disability discrimination but upheld the claim for unfair dismissal.

10. In the first Remedy Judgment the Employment Tribunal ordered reinstatement of the Claimant as Senior Lecturer at grade F33 to take place by 18 April 2016. They also ordered the Respondent to pay the Claimant her salary from 24 October 2014 and to restore seniority and pension rights. At paragraph 1.14 of the first Remedy Judgment the Employment Tribunal held as follows:

> **"1.14. In the liability reasons we gave some preliminary indications on remedy which we now confirm as our judgment. We said in paragraphs 4.5 and 4.6 why, if we made an award of compensation, we would make no "*Polkey* [*v A E Dayton Services Ltd* [1987] IRLR 503] reduction". In paragraph 4.8 we said the claimant was somewhere between "partly to blame", which should attract a 25% reduction, and "equally to blame" which should attract a 50% reduction and, if we made any reduction, it would be about 35%. Mr Gibson submitted today the reduction should be no more than 25% but we were not persuaded. …"**

The compensatory award was to be reduced by 35 per cent for contributory fault.

11. On failure to reinstate the Claimant the Employment Tribunal made a basic award of £6,032, a compensatory award of £54,069 and an additional award under section 117(3)(b) of 52 weeks' pay amounting to £24,128.

12. Considering the issues relevant to this appeal in the order that they were presented in this appeal, the Employment Tribunal in the second Remedy Judgment identified as a fourth issue what is now the subject of the first ground of appeal. They dealt with the fourth issue starting at paragraph 3.6 of the second Remedy Judgment. The question raised by this ground of appeal is whether a week's pay for the purposes of the limit on the compensatory award imposed by the **ERA**, section 124(1ZA)(b), included the employer's pension contributions. The Employment Tribunal answered that question in the affirmative: that it should include such contributions.

The Relevant Statutory Provisions

13. Employment Rights Act 1996

Part II, Protection of Wages

"13. *Right not to suffer unauthorised deductions*

(1) An employer shall not make a deduction from wages of a worker employed by him …"

"27. *Meaning of "wages" etc*

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including -

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,

(ca) statutory paternity pay under Part 12ZA of that Act,

(cb) statutory adoption pay under Part 12ZB of that Act,

(cc) statutory shared parental pay under Part 12ZC of that Act,

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 ["TULR(C)A"] (payment for time off for carrying out trade union duties etc),

(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,

(fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act,

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of [TULR(C)A], and

(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2)."

Part X, Unfair Dismissal

"113. *The orders*

An order under this section may be -

(a) an order for reinstatement (in accordance with section 114), …"

"117. ***Enforcement of order and compensation***

…

(3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make -

> **(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and**
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> **(b) except where this paragraph does not apply, an additional award of compensation of an amount not less than twenty-six nor more than fifty-two weeks' pay,**

to be paid by the employer to the employee."

"122. ***Basic award: reductions***

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(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

"123. ***Compensatory award***

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

"124. ***Limit of compensatory award etc***

(1) The amount of -

> **…**
>
> **(b) a compensatory award to a person calculated in accordance with section 123,**

shall not exceed the amount specified in subsection (1ZA).

(1ZA) The amount specified in this subsection is the lower of -

> **(a) £78,962, and**
>
> **(b) 52 multiplied by a week's pay of the person concerned."**

"221. ***General***

…

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work

done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week."

Grounds of Appeal

14. Under ground 1 Mr Boyd contends that the Employment Tribunal erred in calculating a week's pay for the purposes of the limit imposed by the **ERA**, section 124(1ZA)(b), as including the employer's pension contributions. The Employment Tribunal referred at paragraph 3.6 of their second Remedy Judgment to the case of **Port of London Authority v Payne** [1994] IRLR 9, in which an Employment Tribunal held that an employer's pension contributions were excluded from the calculation of a week's pay. The Employment Tribunal observed that this was apparently on the basis that such payments were not received directly by the employee but paid into the pension fund. The Employment Tribunal in this case stated that **Payne** represents the conventional approach to a week's pay adopted by Employment Tribunals over a considerable period of time and accordingly pension contributions have been excluded from the calculation of a week's pay. The Employment Tribunal also referred to the increasing importance of pension contributions in calculating compensatory awards. For week's pay purposes it is of importance only for an employee earning less than the statutory cap.

15. The Employment Tribunal then turned to the wording of the **ERA** and in particular to section 221(2). Having set out the provisions of that section the Employment Tribunal observed at paragraph 3.10, *"It does not say payable "to the employee""*. The Employment Tribunal referred to the term "remuneration" set out in the definition of a week's pay and concluded that remuneration was a reward in return for services. They concluded that pension contributions are no less a reward for service than basic pay. Also, at paragraph 3.11 the Employment Tribunal observed that since pension contributions are taken into account in

making a compensatory award, it is not logical to omit them when calculating the cap on the compensatory award.

16. In the course of the hearing of this appeal it was drawn to the attention of Mr Boyd that whereas in the **ERA**, section 27(1), wages in relation to a worker mean "any sums payable to the worker in connection with his employment" and in the same Act a different term, "a week's pay", is given a different meaning by section 222(2), which provides:

> **"(2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours …"**

Unlike the definition of wages in section 27(1), that in section 222(2) does not specify to whom the remuneration is to be paid in order to fall within the provision. Mr Boyd recognised that difference.

17. The only argument he advanced in support of ground 1 of his appeal was based on pay and the conventional approach adopted by Employment Tribunals that pension contributions are not included in a week's pay. Mr Boyd relied upon paragraph 66 in the judgment of **Payne**. In that paragraph the Court of Appeal set out the passage of the Employment Tribunal in that case, which included a point on pension contributions. The issue of whether pension contributions should be included in calculating a week's pay was not the subject of any appeal from the Employment Tribunal and was not therefore considered by the Employment Appeal Tribunal in that case or in the Court of Appeal. However, in that case the Employment Tribunal held, as set out by the Court of Appeal at paragraph 66, quoting paragraph 14 of the judgment of the Employment Tribunal in that case:

> **"14. It seems to us that the ordinary meaning of a "week's pay" is the amount which an employee is entitled to receive under his contract of employment; that is, the gross amount before the deduction of tax and national insurance contributions. … Payments made by the employer to a pension fund on the applicant's behalf should not be counted as part of the week's pay."**

18. The Employment Tribunal in **Payne** considering the predecessor legislation to the **ERA** did not refer to the relevant statutory provision in that Act. They predicated their views on whether or not a week's pay includes pension contributions by the words "*It seems to us*". Neither was there any reference in the passage quoted from the Employment Tribunal's decision to any predecessor to section 13 **ERA**, the claim which may be brought for a deduction from wages, nor was there a reference to any definition of wages as sums payable to the employee, which, in my judgment, are relevant to this issue.

19. In my judgment, a "conventional" approach cannot outweigh the statutory language when deciding whether a week's pay for the purposes of the **ERA** includes pension contributions made by an employer on the employee's behalf. In construing section 222 it is material to look at other provisions in the same Act as an aid. In my judgment, the use of the words "sums paid to the worker" in the section 27 definition of wages for the purposes of Part II of the **ERA** and their absence from section 221(2) in referring to a week's pay in Part X for the purposes of the upper limit on a compensatory award for unfair dismissal is conclusive against construing a week's pay in that provision as requiring payment to the employee. The legislature has shown by the wording of section 27 that where it has intended remuneration to be restricted to amounts paid directly to the employee the words "to the employee" have been inserted.

20. In my judgment, the Employment Tribunal's analysis at paragraph 3.10 of the second Remedy Judgment is correct. In that paragraph they say, in reference to section 221(2):

> **"3.10. It does not say payable "*to the employee*", so the fact it is paid to Trustees of a pension scheme who hold it for the benefit of members of that scheme including the employee, matters not in our view. "Remuneration" is derived from the Latin "munus" meaning a "reward". The Oxford dictionary definition says it is especially used to apply to a reward in return for service. …"**

21. Accordingly, the Employment Tribunal concluded, having regard to the absence of a requirement that remuneration be paid to the employee, that pension contributions paid by the employer in respect of the employee fall within the scope of section 221. A definition of wages as remuneration as a reward for work done is apposite to be applied to the employer's contributions to a pension scheme in respect of the employee for his or her work. That is the basis of the Employment Tribunal's decision.

22. With respect to the Employment Tribunal, however, I differ from them in their observations at paragraph 3.11 that it would be illogical if one would take the employee's loss of pension contributions into account when calculating a compensatory award and irrational to omit it in calculating the cap on that award. Both matters are of governed by statute. The compensatory award under section 123 has regard to loss sustained in consequence of the dismissal insofar as it is attributable to action by the employer. That includes non-contractual loss. However, a week's pay under section 221 on which the cap on the compensatory award in section 124(1ZA) is determined is calculated not on loss but on entitlement under the contract. Benefits included in a compensatory award do not necessarily fall to be included in a week's pay. Pension contributions are included in both because they fall within the section 221 calculation of a week's pay. Accordingly, I depart from the Employment Tribunal in their observations at paragraph 3.11. However, as previously explained, the Judgment of the Employment Tribunal that pension contributions should be included in a week's pay and their reasons set out at paragraph 3.10, are, in my view, correct and unassailable. Ground 1 of the appeal is dismissed.

23. As ground 2 is not pursued. By ground 3 of the Notice of Appeal, it is contended that:

> **"The Tribunal failed to adequately explain its decision to make no reduction for contributory fault to the basic award and/or such decision was perverse."**

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24. This ground of appeal has given me some concern, as it could be said not to comply with the **Employment Appeal Tribunal Practice Direction** paragraph 3.8. The **Practice Direction** states that an Appellant may not state as a ground of appeal simply that the Judgment or Order was one that no reasonable Tribunal could have reached and was perverse unless the Notice of Appeal also sets out full Particulars of the matters relied upon in support of those general grounds. Mr Boyd recognises that the ground of appeal in support of ground 3 does not strictly comply with the **Practice Direction**, and he asks me to read the Notice of Appeal with his skeleton argument, where it is said that it was perverse of the Employment Tribunal not to apply the same 35 per cent reduction to the basic award as was made to the compensatory award. Mr Boyd also refers and relies upon the case in the Court of Appeal of **RSPCA v Cruden** [1986] IRLR 83 in which Hutchison J and members in the Employment Appeal Tribunal held at paragraph 35, having referred to the reduction for contributory fault respectively to the compensatory award and the basic award:

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> **"35. Plainly both subsections involve the exercise of a discretion, and the wording of each, whilst sufficiently different to admit of differentiation in cases where the Tribunal finds on the facts that it is justified, is sufficiently similar to lead us to conclude that it is only exceptionally that such a differentiation will be justified. …"**

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25. In this case, Mr Boyd contends that such differentiation is not justified. Mr Boyd submits that the conclusion reached at paragraph 4.8 of the Liability Judgment as to contributory fault should have been read over into the decision on whether there should be a reduction in the basic award. Accordingly the Employment Tribunal erred by making no reduction in the basic award.

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26. I have given anxious consideration as to whether it would be right for this Tribunal to entertain a perversity ground of appeal that has not been particularised. This is so, particularly as the Claimant is not represented at this hearing nor has she heard how this ground of appeal is

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being advanced. Mr Boyd says that there is nothing in the Answer that would indicate that the Claimant would have had anything to say in particular other than relying on the grounds advanced or relied upon by the Employment Tribunal. Further, Mr Boyd says that the Claimant made no reply to the skeleton argument that had been served on her solicitors. I am conscious that in accordance with the overriding objective this Tribunal must do justice between the parties. I have concluded that paragraph 7(c) of the grounds of appeal, which is a paragraph setting out what the Appellant Respondent wishes the Employment Appeal Tribunal to do, does save the ground of appeal from being objectionable on the basis it gives no particularity of perversity. At paragraph 7 it is said:

> **"7. The Appellant invites the Employment Appeal Tribunal to substitute a conclusion … (c) that a 35% reduction for contributory fault should be made to the basic award and make a revised award accordingly."**

Accordingly, by the skin of its teeth this Notice of Appeal just about satisfies the requirements of the **Employment Appeal Tribunal Practice Direction** for particularity to be given of a perversity ground of appeal. Accordingly, that ground will be and is considered.

27. The statutory provisions for the deduction for contributory fault of the basic award and of the compensatory award are different. Section 123(6) **ERA** provides:

> **"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

Section 122(2) provides:

> **"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

28. In making a compensatory award where there is a finding of contributory fault that contributed to the dismissal, the Employment Tribunal shall reduce or further reduce the

amount of the award. Where in the case of a basic award the complainant's conduct before the dismissal is such that the award should be reduced, the Employment Tribunal is required to reduce the award. The amount by which the awards are to be reduced is at the discretion of the Employment Tribunal. The Employment Tribunal can assess that reduction at zero if it thinks it is appropriate in all the circumstances. However, where, as here, the Employment Tribunal found that the conduct of the Claimant caused or contributed to her dismissal it is difficult to see how that is not also to be regarded as conduct falling within section 122(2) attracting a consideration of an amount or percentage by which a basic award should be reduced. As at paragraph 35 of the **RSPCA** case, which was considered, amongst other cases, in **Charles Robertson (Developments) Ltd v White and Anor** [1995] ICR 349, it is difficult to see that there is a differentiation to be made between the conduct if the same conduct is asserted in support of a reduction of the basic award as well as the compensatory award. In this case, the Employment Tribunal did not identify any differentiation in the conduct that, in their view, attracted a reduction in the compensatory award but not in the basic award. In the absence of an explanation as to why the conduct of the Claimant for the purposes of the compensatory award was regarded as blameworthy attracting a reduction but attracted no reduction to the basic award, in my judgment the challenge made to the failure to reduce the basic award by 35 per cent is well founded. Ground 3 of the Notice of Appeal succeeds.

Disposal

29. Ground 1 of the Notice of Appeal does not succeed and is dismissed. Ground 2 is withdrawn and dismissed on withdrawal. Ground 3 succeeds. The original basic award shall be set aside and be substituted by an award that is to be reduced by £2,128, giving a figure that results of a basic award to be paid to the Claimant of £3,904.