Appeal No. UKEATS/0036/12/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 9 November 2012

Before

THE HONOURABLE LADY SMITH

MR M R SIBBALD

MR M SMITH OBE JP

OPTIMUM GROUP SERVICES PLC — APPELLANT

MR KENNETH WALTER MUIR — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR S HEALY (of Counsel) Instructed by: NatWest Mentor Services 250 St Vincent Street Glasgow G2 5SH
For the Respondent	MR T RIGBY (of Counsel) Instructed by: Stripes Solicitors 6th Floor Ship Canal House King Street Manchester M2 4WU

SUMMARY

UNFAIR DISMISSAL – Compensation

Unfair dismissal. Compensatory award. Whether or not sum due under settlement agreement with Second Respondent deductible from compensatory award under **Employment Rights Act** s.123 made against First Respondent. On appeal, Tribunal's finding that settlement sum was not deductible reversed. Tribunal's approach had been wrong in principle and had resulted in double recovery. They had failed to have regard to the "loss sustained", as s.123 required them to do. Tribunal had also erred in that (a) they had sought via the compensatory award to penalise the First Respondents for their treatment of the Claimant which, under s.123, they were not entitled to do; and (b) took account of irrelevant factors including that if the Claimant had not been successful in his claim against the First Respondent, the result for him may have been that he was under-compensated and that if the deduction was made then the First Respondent would receive a 'windfall benefit'.

THE HONOURABLE LADY SMITH

Introduction

1. This is an employer's appeal in a case in which Mr Muir was found to have been unfairly dismissed by Optimum Group Services plc. By judgment registered on 4 April 2012, an Employment Tribunal sitting at Glasgow, Employment Judge S Walker, awarded him compensation of £23,668.84, under s.123 of the **Employment Rights Act 1996** ("ERA"). This appeal is only in respect of the award of compensation.

2. We will continue to refer to parties as Claimant and Respondents.

3. The Claimant was represented by Mr Rigby, Barrister, before the Tribunal and before us. The Respondents were represented by Mr Healy, barrister, before the Tribunal and before us.

Background

4. The Respondents' business included providing a call response breakdown and maintenance service for electrical items to large organizations such as restaurant chains. The Claimant worked for the Respondent, initially as a "client manager" and subsequently as "technical manager". In November 2009, the Respondents lost the contract they had had with MRL, a major client, and their need for managers reduced. The Claimant's employment with the Respondents was, accordingly, terminated on 12 February 2010.

5. At the time, the Respondents believed that the contracts of employment of their Scottish employees, including the Claimant, were transferred by operation of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). The Claimant was told by the Respondents that his employment would transfer to a company called 'Thermotech' but Thermotech did not concede that TUPE applied. Nor did MRL. The Respondents

maintained their position however and told the Claimant to report to the departing client, MRL – on the basis that it was 'taking back responsibility for the contract' – at their London offices, on the Monday following the termination of his employment with them. The Tribunal concluded that there had been no TUPE transfer. The Respondents now, however, accept that that was the position.

6. One of the contractors with whom MRL contracted to carry out work which had previously been carried out by the Respondents was Beaumont Electrical Ltd ("Beaumont"). In his form ET1, the Claimant named nine companies as those to whom his employment had transferred. His case was that it had transferred to all or any one of them. One such potential transferee was Beaumont. There were, accordingly, originally ten respondents to the Claimant's claim namely the putative transferor and the nine putative transferees.

7. During a period of adjustment of the Claimant's claim, it narrowed so that the claims against all but two of the respondents were dismissed. Optimum – who were the Claimant's original employer – and Beaumont, a putative transferee, remained as the only respondents.

8. On the last business day prior to the start of the full hearing of the Claimant's claim, the Claimant entered into an agreement with Beaumont in terms of which Beaumont undertook to pay him a sum of money. The agreement was, it is said, recorded in a form COT3. In the skeleton argument for the Claimant, it is stated that "the risk that Beaumont bought off was the totality of the claimant's claims" which, on his calculation, amounted to £85,138.60. That sum included an allowance of £68,400 which he asserted would have been due by Beaumont, in the event of their being found liable, as "compensatory award". The sum which Beaumont agreed to pay to the Claimant was not disclosed to the Employment Tribunal nor was it disclosed to this Tribunal prior to the hearing of the appeal. When Mr Rigby began his submissions, he

advised us that he was astonished that the Tribunal had not directed him to disclose the amount paid to the Claimant by Beaumont. He said that the agreement with Beaumont was confidential and the Claimant could not disclose the sum other than in accordance with the law; thus, if directed to do so by a court or tribunal, he would do so. We have not seen the agreement but, in the circumstances, considered that we should direct the Claimant to disclose the amount for which his claim against Beaumont was settled. Mr Rigby advised us of the sum; it was substantial. It was £20,000.

9. Accordingly, if the Claimant is right in his contention that the Beaumont settlement sum did not require to be deducted, although the Tribunal considered the full value of his claim for unfair dismissal was £30,858.34 (compensatory award of £23,668.84, basic award of £5,130 and holiday pay of £2,059.50), he will benefit not simply to the extent of that sum but in the sum of £50,858.34.

The Issue on Appeal

10. The only issue for us was that of whether or not the settlement that Beaumont agreed to pay the Claimant ought to have been deducted from the compensatory award made to the Claimant.

The Tribunal's Judgment

11. The Tribunal deal with the issue at paragraphs 81 and 82:

> **"Set off of sums paid under COT3**
>
> **81. The tribunal considered Mr Healy's submission that any amount that the claimant had received from Beaumont under the COT3 should be deducted from any compensatory award. It also considered Mr Rigby's supplementary submissions provided in opposition and the respondent's further submissions received on 9 March 2012. The tribunal considered that the *Steele* case was merely authority, as Mr Rigby submitted, that a tribunal was entitled to deduct such a payment in an appropriate case, not that it was bound to do so. The tribunal considered carefully the wording of section 123(1) of the ERA. The amount to be awarded by way of compensatory award is what the tribunal considers to be *"just and equitable in all the***

> ***circumstances having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".*** **The tribunal concluded on balance any sum paid by Beaumont under the COT3 should not be deducted.**
>
> **82. The tribunal accepted that it had to have regard to the loss sustained by the claimant. However that is not conclusive. The tribunal has to consider what is just and equitable in all the circumstances. The tribunal considered that the claimant and Beaumont had made a commercial agreement. The claimant might have lost out, had the tribunal decided that there was a transfer to Beaumont. In those circumstances, he could not have gone back to Beaumont and sought more compensation. The tribunal did consider carefully Mr Healy's submissions that it was not fair that the claimant could recover twice for the same loss. However the tribunal was not convinced by this. Equally it could be argued that Optimum should not be allowed to benefit when an unrelated company had opted to pay some money rather than come to the tribunal to defend itself. One of the parties is going to get a windfall. The tribunal considered that it would not be just and equitable that it should be Optimum. They have been found to have unfairly dismissed the claimant. The tribunal accepted that Optimum genuinely believed the employees, including the claimant, were transferring to Thermotech and that they received very late notification that this was not the case. However the tribunal considered that to merely say to their employees that they should turn up at MRL's premises in London was quite unacceptable. Even if the employees had transferred, Optimum should have taken further steps to assist them until the position became clearer and not to just wash their hands of them."**

12. We have seen the written submissions tendered to the Tribunal on this issue and we note that Mr Healy's submission on the rule against double recovery was not simply that it would not be fair to allow it; rather, it seems to us that he was arguing that it was a matter of fundamental principle. It was not, in his submission, open to the Tribunal to allow double recovery to occur.

13. The reasons why the Tribunal refused to reduce the award to take account of the sums due under the settlement agreement with Beaumont thus appear to have been:

- **Steele v Boston** did not require them to deduct the Beaumont money;
- the Claimant had made a "commercial agreement" with Beaumont;
- they were 'not convinced' by the argument that if the Beaumont money was not deducted the result would be double recovery;
- there would be a windfall benefit to the Respondents if the Beaumont money was deducted;

- the Claimant might not have succeeded in his claim against the First Respondents and the result for him could then have been that he was under-compensated by Beaumont;
- the First Respondents had treated the Claimant particularly badly at the time of his dismissal; and
- s.123 of the 1996 Act affords the Employment Tribunal a wide general discretion.

14. The Tribunal held that the Claimant had lost earnings from 27 May 2010 to the date that the Respondents' Glasgow operation closed (ten weeks after 31 October 2011), and that he would have earned £47,087.68 during that period. The Tribunal also found that there was a 50% chance that he would have been made redundant prior to May 2010, in any event. Hence the compensatory award of 50% of the figure for loss of earnings: £23,668.84.

The Appeal

15. There were two principal grounds of appeal. The first was that the Tribunal had made a clear error of law in failing to apply the principle that there should be no double recovery. The second was that, if the Tribunal had a discretion as to whether or not the Beaumont money had to be deducted when assessing the extent of the Claimant's loss, the Tribunal had erred in law in respect that they had taken into account irrelevant considerations.

16. Regarding the first ground, Mr Healy, under reference to his clear and helpful skeleton argument, submitted that the principle against double recovery was that the Claimant could not recover twice for the same loss: **Clark v Urquhart** [1930] AC 28; **Townsend and Another v Stone Toms** [1984] 27 BLR 26. The Tribunal had, however, summarily rejected the Respondents' submissions on double recovery and had thereby erred in law.

17. The Tribunal had, he submitted, failed to appreciate that s.123 required a loss based approach which, in turn, in the present case, required them to deduct the Beaumont settlement from the Claimant's loss.

18. Further, the Tribunal had failed to follow the case of **Steele v Boston Borough Council** UKEAT/1083/01 which was binding on them and showed that they required to deduct the full amount received from Beaumont when calculating loss; **Steele** was not merely authority for the proposition that a tribunal was entitled to make such a deduction. In any event, even if the Tribunal was correct to interpret **Steele** in that way, it was in error in failing to treat the continuous sequence of events from the Claimant's dismissal to the compromise agreement with Beaumont as sufficient reason for making the deduction.

19. Mr Healy also referred to the case of **Morgans v Alpha Plus Security Ltd** [2005] IRLR 234, accepting that he did not rely on it in his submissions to the Tribunal. Nonetheless, it supported his argument regarding the requirement to deduct the Beaumont money.

20. Turning to the second aspect of his appeal, Mr Healy submitted that if it was a discretionary exercise that the Tribunal had to carry out then they had erred in law in taking account of irrelevant factors namely the possibility of the Claimant losing out if he had not been successful in his claim against Optimum, the benefit that would flow to the Respondents if the deduction was made, that the Claimant had been unfairly dismissed and that the manner of his dismissal was open to criticism. None of these factors were relevant.

21. The Tribunal had also, he submitted, failed to have regard to the fact that as regards loss, the burden of proof lay on the Claimant. Given the fact of recovery from Beaumont, the Claimant had not proved that his loss was as the Tribunal had found it to be.

22. Mr Healy invited us to dispose of the appeal by ourselves making the deduction that ought to have been made by the Employment Tribunal and amending the award accordingly.

23. For the Claimant, Mr Rigby submitted that this was a perversity appeal and ought to be dismissed. Whilst **Steele** involved similar facts, there were some differences such as that the claimant, an in house lawyer, had been in a position to try and arrange matters so as to avoid the transfer of his employment. The Tribunal had not erred in its approach to **Steele**.

24. Mr Rigby submitted that s.123 gave the Tribunal a discretion but also seemed to accept that common law principles were relevant. He said that the risks for Beaumont were not the same as those for these Respondents. Beaumont's risk was greater because the **Polkey** factors and the impact for compensation purposes of the closure of the Respondents' Glasgow operation would have had no part to play in the claim against them. He referred to the Claimant's valuation of his claim against Beaumont as being £85,138.60 in total, including allowance for a compensatory award of £68,400. It was not entirely clear how, as a matter of law, Mr Rigby considered that these considerations affected matters.

25. Mr Rigby advised that the £20,000 settlement with Beaumont was not attributed to any particular head of claim. He suggested that an appropriate way forward, if any part of it was to be deducted, would be to restrict the deduction to 20/85 of £20,000 since part of the sum must have been intended to cover matters other than the compensatory award. He referred to no authority in support of that suggestion.

26. Mr Rigby submitted that the Tribunal had given clear and careful consideration to its exercise of discretion and that was apparent from paragraphs 81-2.

27. Regarding **Morgans**, Mr Rigby invited us to hold that it was wrong to state that the maximum recoverable would be the loss actually suffered and prayed in aid of that submission the examples of notice pay retainable under the **Norton Tool** principle even if substitute employment is obtained within the notice period, the proceeds of insurance policies which are not taken into account, and charitable payments which also do not fall to be taken into account. The task for the Tribunal was not one of straightforward maths. We pause to observe that notice pay is a special case and if applicable, is awarded separately from the compensatory award; it does not, we consider, assist in the determination of the present issue. Insurance policy proceeds do not assist either; they are *res inter alios* and have been purchased by the insured. Further, they arise because an insured risk occurs, not directly on account of dismissal. As for charitable payments, again, they do not arise directly from the dismissal; rather those which we understand Mr Rigby to have in mind would arise due to individual need and are not dependent on the donee having been dismissed. Moreover, in any event, the payment under consideration in this case did not fall into any of these categories; it was a payment made to the Claimant by a Respondent who was in the 'firing line' for being held responsible for the Claimant having been unfairly dismissed.

28. Overall, what mattered, according to Mr Rigby, was that this was a case of there having been a commercial settlement with a third party and the Tribunal were entitled to refuse to take it into account.

Discussion

29. Section 118 of the **Employment Rights Act 1996** provides that where a tribunal makes an award for unfair dismissal, the award is to include a compensatory award calculated in accordance with other provisions which include s.123. Insofar as relevant, s.123 provides:

> **"(1)...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."**

30. The award under s.123 is, accordingly, not only called a compensatory award but is plainly intended to be compensatory in nature. That is, it should not over compensate the claimant. To do so could hardly be said to be just or equitable. Loss is the governing principle and we consider that Mr Healy was correct to focus on loss as being key to an understanding of these statutory provisions. Considerations of justice and equity arise only when determining what, of the loss actually suffered, should be awarded in compensation. Such considerations may, for instance, operate so as to limit the award if the claimant suffers supervening incapacity which would, in any event, have prevented him from working, or a *novus actus interveniens* occurs or if the claimant himself caused or contributed to his own dismissal (a matter which the tribunal is, in terms of s.123(6) ERA, specifically directed to consider when fixing the award) or to exclude a head of loss which is too remote. That, however, is not to exercise a wide general discretion to allow the claimant to profit at the respondent's expense; the object of an award under s.123(1) is to compensate, not to award a bonus (as observed by Sir John Donaldson at p.87 in **Norton Tool Co Ltd v Tewson** [1972] IRLR 86, an observation which was cited with apparent approval by Lord Steyn in **Dunnachie v Kingston Upon Hull City Council** [2004] IRLR 727, at paragraph 4, in turn relied on by Burton J in **Morgans**). The task for the tribunal is to compensate in respect of loss, not to award a sum which exceeds the loss actually suffered.

31. Were s.123(1) to be applied so as to allow for compensation to be awarded which exceeded the actual loss suffered, that would conflict with the fundamental principle that the same loss cannot be recovered twice. That principle means that where a claimant/pursuer seeks

compensation from more than one respondent/defender, sums already received from one of them must be deducted when assessing what, if anything, is the remaining loss which he is seeking to lay at the door of the others. As Lord Atkin put it in **Clark v Urquhart** at p.66:

> **"...damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors the cause of action is destroyed."**

32. Similarly, in **Townsend and Another v Stone Toms & Partners**, at p.38, Oliver LJ said:

> **"The starting point, and one on which there is a good deal of clear authority is that where a plaintiff with concurrent claims against two persons has actually recovered part or all of his loss from another, that recovery goes in diminution of the damages which will be awarded against the defendant."**

and Purchas LJ , at p.49, said:

> **"Where a plaintiff has received a benefit before action is brought, that is payment arising out of the events giving rise to the cause of action and not collateral thereto, he must give credit for this when formulating his claim for damages…**
>
> **…**
>
> **It follows that if in the first action a plaintiff recovers all that he is entitled to, then there is nothing left to recover in the second action. The law, now embracing equity, will not permit a plaintiff, by whatever procedural device he employs, to recover more than the damage that he has suffered, whether he claims in contract, tort or both."**

33. For Parliament to have intended to sanction a departure from the rule against double recovery would have been surprising to say the least; had that been the intention, we would have expected there to be express provision to that effect.

34. A clear parallel exists between the s.123 award and damages that would be payable at common law in respect of the wrongdoing of another; they should seek to put the pursuer in the same position as he would have been in had it not been for the wrongdoing, insofar as money is able to do so, subject to those constraints which the law regards as fair and reasonable

(causation, mitigation and remoteness). Damages are not intended to provide the pursuer with a profit.

35. This means that if a claimant comes to the tribunal not with empty pockets – or, in the case of a woman, an empty purse – but with pockets or purse partially filled with money already paid by reason of his having been dismissed, that amount falls to be deducted when assessing the amount of his total loss[1]. As Mummery P stated in the case of **Puglia v C James & Sons** [1996] IRLR 70, where the deductibility of invalidity benefit was in issue (also relied on by Burton P in the case of **Morgans**):

> **"If no deduction were made for invalidity benefit, the result would be that an employee receiving compensation for unfair dismissal would find himself in a better position than if he had never been dismissed. Regard must be had under [what is now s.123] to loss sustained by the employee." (paragraph 39)**

36. It is, we consider, also clear that Parliament did not intend the compensatory award under s.123 ERA to operate as a penalty. The provisions of that section can, for instance, be contrasted with the 'protective award' provisions of s.189 of the **Trade Union and Labour Relations (Consolidation) Act 1992** which expressly direct the employment tribunal to have regard, when calculating the award, to the seriousness of the employer's default (see: s.189(4)(b)). There is no such statutory direction in the case of awards under s.123 of ERA.

37. The deductibility of sums already received was explored by Burton P, in **Morgans** where the issue was whether or not sums received by way of incapacity benefit during the claimant's absence from work after dismissal, should be deducted from the compensatory award. At paragraph 25, he said:

> **"25. We agree with the propositions in the respondent's skeleton, at paragraphs 21 and 25 in particular, which we have set out above: 'The actual pecuniary loss suffered must be the**

[1] Subject of course, to the rule in **Norton Tool** relating to notice pay.

> **maximum sum which a complainant might be awarded'. Whether by reference to the so called (but now as it turns out superseded) practice in personal injury claims, or by reference to *Norton Tool*, there is in our judgment no jurisdiction to disregard receipts, or to claim and recover a sum in excess of the actual loss, or the fundamental purpose of s.123 would be evaded. The applicant has suffered a lesser loss, by virtue of his receipt of benefits which would not have been paid had he remained employed, and must give credit for them. The concept of justice and equity does not lead to recovery of a greater sum than the actual loss suffered and neither by way of penalizing an employer for an unfair industrial practice nor by way of adopting some broad brush just and equitable approach is there any basis in our judgment for treating a loss which has not occurred as having occurred."**

We reject Mr Rigby's submission that **Morgans** is not good authority for the proposition that the loss suffered is the maximum that a tribunal can order to be paid as the compensatory award. We refer to our observations above regarding the matters referred to by him in support of his submission. To the contrary, we agree that, as a matter of principle, it is not open to an employment tribunal to treat a loss which has not in fact occurred as having occurred.

38. The matter of deductibility of sums already received arose in circumstances very similar to those in the present case in **Steele v Boston**. There, the claimant in a TUPE case had received the sum of £18,000 in settlement of his claim against the putative transferee and continued his case against his original employer, the putative transferor; that claim was successful and the loss he had sustained was found to have been £28,000. The tribunal deducted the £18,000 from the loss of £28,000 and awarded £10,000 under s.123 of the 1996 Act. At paragraphs 19 and 24, HHJ McMullen QC said:

> **"19. What was just and what was equitable appear, in our view, to be classic statements of what is a matter of fact and factual determination by the Employment Tribunal *having regard only to one matter, that is to the loss sustained* (our emphasis). In ordinary terms, the loss sustained by this Applicant was £28,000 of which he already had an up front payment of £18,000. It remains to be seen whether that view is sustainable as a matter of law. But certainly as a matter of fact the Employment Tribunal was, in our judgment, entitled to balance the issues of loss...**
>
> **…**
>
> **24. As we see it, the payment of the £18,000 under the compromise scheme was part of a continuous transaction, the inception of which was the unfair dismissal of the Applicant by the Respondent. We see nothing unfair in, as it was put to us, the Respondent gaining the benefit, in that it need not pay £18,000 it would otherwise be required to pay, because of the transaction with BM. That, after all, as Mr Sheldon puts it, is an incident of the rule on mitigation. If the Applicant had gone out and got a job immediately, then all his earnings would have been offset against the loss which the Tribunal would assess, and the Respondent would benefit."**

39. The appeal in **Steele** appears to have been presented as a perversity appeal but it seems that this Tribunal took the opportunity to determine that, as a matter of law, the settlement sum received from the putative transferee was deductible when determining what loss had been sustained by the Claimant. If we are wrong about that it is, in any event, clear that this Tribunal were in no doubt that the Tribunal had not erred in law by doing so.

Decision

40. We are satisfied that the Tribunal fell into error. As explained in the 'Discussion' section above, s.123 awards are compensatory in nature, not a means by which the claimant is to be enabled to make a profit. Thus, if a claimant's loss arising from his dismissal has already been made good to any extent, that must be taken into account. Just as any sums earned by him in the relevant post dismissal period have to be deducted, so must any sum paid to him by one of the respondents in respect of his claim for unfair dismissal. We accordingly agree with Mr Healy that the Tribunal were wrong to dismiss his submissions on the rule against double recovery summarily as, at paragraph 82, they did. They determined that this was a case where the Claimant was entitled to a compensatory award and by failing to provide for deduction of the Beaumont money, they paved the way for the Claimant to make a profit. We do not consider that they had a discretion in this matter. They were wrong in principle not to make the deduction.

41. The Tribunal were not aware of the amount of the Beaumont settlement but that ought not to have caused difficulty. The onus was on the Claimant to demonstrate the nature and extent of his loss and if, as we were advised, the settlement agreement prevented him from volunteering the figure, it would, we consider, have been a simple matter for his counsel to have invited the Tribunal to direct him to disclose it.

42. Separately, even if the Tribunal did have a discretion in the matter, we are satisfied that they proceeded by exercising it on the basis of factors which were simply not relevant. The fact that the Claimant took a risk in settling his claim against one respondent at less than what he perceived to be full value was not relevant. Nor was the extent to which the employer was worthy of censure for his treatment of the Claimant employee at the time of dismissal; section 123 awards are not intended to operate as penalties. Nor was it relevant that the Respondent may, due to the earlier settlement with Beaumont, have received a windfall benefit; there are various circumstances in which respondents - or indeed, claimants - receive windfall benefits ranging from the operation of time bar provisions to benefit to one party arising from the non availability of a witness. Windfall benefits are a fact of litigation. The award in this case was, however, the result of the Tribunal taking account of all these factors and for that reason also, cannot stand. We are, further, satisfied that once those factors are left out of account, there was no other justification on the facts for awarding the Claimant anything more than his actual loss, arrived at after deducting the full amount of the Beaumont payment of £20,000.

Disposal

43. We will accordingly issue an order upholding the appeal, setting aside the judgment of the Employment Tribunal and substituting for it one which is in the following terms:

> **"JUDGMENT OF THE EMPLOYMENT TRIBUNAL**
>
> **The unanimous judgment of the Tribunal is that:**
>
> **(1) the Claimant was unfairly dismissed by the First Respondent who is ordered to pay to the Claimant a basic award of £5,130;**
>
> **(2) the First Respondent is ordered to pay a compensatory award to the Claimant of £3,668.84;**
>
> **(3) the First Respondent is ordered to pay £2,059.50 in respect of pay for holidays accrued but not taken as at the date of dismissal."**

We will then remit the case to the same Employment Tribunal to recalculate and restate the certification which they require to issue under and in terms of the **Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996**.