Appeal No. UKEAT/0040/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 June 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

CITY COMMERCIAL INTERIORS LTD — APPELLANT

MR A MICHAELS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MANUS EGAN (of Counsel) Direct Public Access
For the Respondent	MR ANTHONY KORN (of Counsel) Instructed by: ELS Solicitors Ltd Unit A, 1 Fullers Parade Fullers Road London E18 2BF

SUMMARY

UNFAIR DISMISSAL - Compensation

Having found the Claimant had been unfairly dismissed from his employment, the ET proceeded to make an award for compensation for a 15-month period, following the effective date of termination. In so doing, it accepted the Claimant's claim that he was entitled to be compensated for loss of the benefit of 30 days' paid holiday entitlement (a benefit he had enjoyed when employed by the Respondent but did not receive in his self-employed work undertaken in mitigation). The ET proceeded to make separate awards for loss of earnings and for holiday pay but, in so doing, it wrongly assumed the sum claimed by the Claimant in respect of the former took no account of holiday pay. The Respondent appealed on the basis that this gave rise to double recovery for the loss of paid holiday entitlement.

Held: *allowing the appeal*

It was apparent that the loss of earnings claimed by the Claimant already took into account his loss of paid holiday entitlement. That being so, there was no need for the ET to make a separate award of compensation under this head; doing so double counted the Claimant's loss in this regard and given rise to an element of double recovery; the separate award for holiday pay would be set aside.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter raises the question whether an award for compensation made in an unfair dismissal case gave rise to an element of double recovery; specifically, whether the award in respect of holiday pay related to a period for which the ET had already awarded compensation for loss of earnings.

2. In this Judgment, I will refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal, from the Remedy Judgment of the London (East) Employment Tribunal (Employment Judge Goodrich sitting alone on 19 September 2017; ("the ET")) sent to the parties on 18 October 2017. Representation below was as it has been on this appeal.

3. Having previously upheld his complaint of unfair dismissal, in its Remedy Judgment the ET held that the Claimant was entitled to an award of compensation for a period of 15 months following his dismissal, calculated - so far as relevant for the purposes of this appeal - as follows:

- 17 days' loss of earnings at £91 per day from the effective date of termination of the Claimant's employment with the Respondent until the start of his new work on a self-employed basis: £1,551.25;
- loss of earnings thereafter, from the date the Claimant started his new work on a self-employed basis until the date of the ET Remedy Hearing, calculated as the difference between what he would have earned had he worked for the Respondent and the sums he had in fact received by way of mitigation: £6,756.88;

- loss of earnings from the Remedy Hearing for the remainder of the 15-month period the ET considered just and equitable, again calculated as the difference between what the Claimant would have earned had he worked for the Respondent and the sums he would in fact receive by way of mitigation in his new self-employed work: £2,156.25;
- earnings to reflect loss of holiday pay, £3,421.86.

The ET further found that there should be a 20% uplift to the award, given the Respondent's failure to comply with the provisions of the **ACAS Code** on discipline and grievance.

4. It is the Respondent's case that the additional award made in respect of holiday pay entitlement represents a double recovery for the Claimant. This is the sole point taken on the appeal.

The Relevant Facts and the ET's Decision

5. For present purposes, the relevant facts found by the ET can be stated shortly. The Claimant is a skilled and experienced joiner. He was aged 62 when he was dismissed. Initially, the Claimant was signed off work by his GP on health grounds but, not long after his dismissal, he then obtained work from another company, Ashview; this was, however, on a self-employed basis and overall paid less than the Claimant had previously earned with the Respondent. The ET accepted this was reasonable mitigation for a 15-month period, holding that the Claimant was entitled to be compensated by the Respondent for his losses over this time.

6. Given his self-employed status in his new work, the Claimant was no longer entitled to paid holiday. He had previously enjoyed the benefit of 30 days' paid leave entitlement when employed by the Respondent.

7. In advance of the Remedy Hearing, those acting for the Claimant had produced a schedule of loss, which included claims for both loss of earnings and loss of holiday pay entitlement. It stated, however, that in respect of compensation for paid holiday: "*In the event that this is awarded under 4 above, the Claimant is not seeking a double recovery and therefore this is not included in the total*". "4 above" referred to the Claimant's claim for loss of earnings.

8. The Claimant says that statement simply reflected an error in understanding between his representatives at the time. In any event, at the Remedy Hearing itself, it was made clear that the Claimant was claiming compensation for his loss of holiday pay entitlement over and above his net loss of earnings.

9. It was common ground that the Claimant's entitlement to paid holiday when employed by the Respondent had been 30 days' paid leave each year. On the ET's finding, he had reasonably mitigated his losses for the first 15 months after dismissal by taking work on a self-employed basis and it was accepted that, as such, he no longer enjoyed any entitlement to paid holiday. In the circumstances, the Claimant claimed he had lost the benefit of 30 days' paid leave each year.

10. The ET agreed, explaining its reasoning as follows:

> **"48. As regards the claim for holiday pay I uphold that claim for the reasons given by Mr Korn in his closing submissions. Holiday pay is a benefit that he would have received had he continued to be employed by the Respondent and does not receive on the basis in which he works and has been working since last October. …"**

11. In referring to Mr Korn's submissions on behalf of the Claimant, it seems the ET was persuaded by the following observations:

> **"5. As is clear from the Schedule of loss, the Claimant suffers continuing loss and continues to do so. He has also lost the benefit of the Respondent's pension contributions and enhanced holiday entitlement." (Claimant's skeleton argument below)**

12. For the Claimant, Mr Korn observes that an ET, when giving its reasons, may permissibly adopt the submission made orally or in writing by one of the parties; here, the ET had incorporated his closing submission and had then gone on to adopt the calculations agreed by the parties, albeit the decision on principle was that of the ET.

The Relevant Legal Principles

13. By section 123(1) **Employment Rights Act 1996** ("ERA"), it is provided as follows:

> **"(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."**

14. Although, therefore, the ET has a broad discretion to make such award as it considers just and equitable in the circumstances, it is common ground that a Claimant is not entitled to recover twice for the same loss: it is neither just nor equitable to allow for double recovery; the object is to compensate, not award a bonus, see **Optimum Group Services plc v Muir** [2013] IRLR 339 and **Norton Tool Co Ltd v Tewson** [1972] ICR 501 NIRC.

15. Equally, however, it is not in dispute that a Claimant can recover compensation for loss of holiday pay as part of a compensatory award under section 123(1) **ERA**, see **Tradewinds Airways Ltd v Fletcher** [1981] IRLR 272.

Application of Legal Principle to the Present Case: Discussion and Conclusions

16. The question at the heart of this appeal is whether the ET's award meant that the Claimant was compensated twice for the same period of loss.

17. As well as the loss of earnings he suffered when he was unfairly dismissed, it is right that the Claimant lost a valuable benefit - the right to 30 days' paid holiday per year. For the 15-month period for which the ET found the Claimant is entitled to be compensated, that amounted to 37.5 days. It is also clear that the sums the Claimant had received, and would go on to receive, by way of mitigation did not include any sums for paid leave, because he no longer had such an entitlement.

18. The question is whether the sums claimed by the Claimant as loss of earnings from the Respondent included such sums as would have been paid for holiday entitlement (the 37.5 days for the entirety of the period in question). If that entitlement was already included in the loss of earnings claim, awarding a total sum for loss of earnings would include compensation for paid holiday leave and there would be no need for a separate head of loss in this regard; the ET's finding in principle - that the Claimant was entitled to be compensated for loss of paid holiday entitlement - would have been met by its award for compensation for loss of earnings.

19. That was certainly the position in the Claimant's schedule of loss before the ET: the loss of earnings set out in the schedule included such sums as would have been received from the Respondent by way of paid leave. No sums were included for this benefit in terms of mitigation because none were received in this respect. When, therefore, the ET stated, "*About two days after starting work the Claimant discovered that he was to be treated as self-employed. He has to date received no holiday pay from Ashview. The schedule of loss gives*

credit to the Respondent for his earnings but takes no account of holiday pay" (see the ET at paragraph 34), that was based upon a fundamental misunderstanding of the schedule of loss and the claim there made for loss of earnings.

20. I did wonder whether that apparent error might have been corrected by the parties when carrying out the calculations necessary after the ET had given its decision in principle. I am, however, informed that was not the case. The sums calculated for loss of earnings from the Respondent, which I have set out at the beginning of this Judgment, included those sums that would have been paid for any periods of annual leave up to 30 days. The sums deducted by way of earnings received in mitigation did not include any amounts for paid holiday entitlement because none had been received. Therefore, the ET's decision in principle - to ensure that the Claimant should be compensated for loss of a paid holiday entitlement - was made good by the awards made under the headings of loss of compensation for loss of earnings.

21. In the circumstances, there was no need for the ET to go on to make a separate award for loss of paid holiday entitlement. To the extent it did, that resulted in a double recovery for the Claimant and I therefore allow this appeal.

22. In terms of disposal, given this understanding as to how the sums were calculated, it is common ground that there is no need to remit this matter. In light of my Judgment, the additional award made by ET for holiday pay is to be set aside. The award in that regard was in the sum of £3,421.86. That was subject to the ACAS uplift of 20% (£684.37), giving a total of £4,106.23. Accordingly, I allow the appeal and set aside the ET's award of compensation insofar as it relates to holiday pay, in the sum of £4,106.23.