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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Fotheringhame**

Respondent: **Barclays Services Ltd**

Heard at: **East London Hearing Centre**

On: **24 January 2019**

Before: **Employment Judge Brown (sitting alone)**

REMEDY JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The Respondent shall pay to the Claimant compensation pursuant to *s117(3) Employment Rights Act 1996* in the sum of £947,585.20 subject to any deductions for income tax and employee national insurance contributions that the Respondent is required to make.

(2) The Claimant's claim for interest following the Remedy Judgment sent to the parties on 9 August 2018 is dismissed.

REASONS

1. By a Remedy Judgment sent to the parties on 9 August 2018 I ordered the Respondent to re-engage the Clamant into the role of Director Data Commercialisation by 21 September 2018. I specified the terms upon which the re-engagement was to take effect. These included:

> **"(iv) The Respondent shall pay the Claimant in respect of any benefit which the Claimant might reasonably be expected to have had but for the dismissal from the date of his dismissal to the date of re-engagement. The Respondent shall pay the Claimant arrears of pay on the basis that his loss of earnings and benefits are calculated according to the non-**

discretionary compensation and benefits (including pension benefits) he would have continued to receive in his pre-dismissal role, had he not been dismissed, during that period."

2. The Respondent did not re-engage the Claimant.

3. The parties have agreed that the Respondent shall pay the Claimant £947,585.20 compensation, less tax and national insurance, pursuant to the re-engagement order and the Respondent's failure to re-engage him.

4. The only outstanding matter of dispute between them is whether interest is payable by the Respondent on the amount I ordered the Respondent to pay in the 9 August 2018 Remedy Judgment, set out at paragraph 1 above.

5. Both parties provided written submissions on the issue. The Claimant contends, amongst other things, that the 9 August 2018 Remedy Judgment required the Respondent to pay a sum of money which was ascertainable solely by reference to the terms of that judgment. The Claimant contends that the judgment was clear and comprehensive, going to some length to specify the amount due to the Claimant. He contends that, if interest is not payable on a sum ordered to be paid under the terms of a re-engagement order, a Respondent would be able to ignore the court order, delay payment and benefit from their non-compliance. He contends that the purpose of the statutory provisions in relation to interest is that the receiving party should not be disadvantaged, and the paying party should not be advantaged, by a delay in payment.

6. The Respondent contends that the 9 August 2018 Remedy Judgment did not require a party to pay a sum of money; it was a re-engagement order, which specified the terms on which the re-engagement was to take place. It also contends that the sum of money required to be paid by the re-engagement order was neither specified in the terms of the order, nor was it ascertainable solely by reference to the terms of the order. The Respondent further contends that interest could not possibly be payable on the judgment, calculated from 10 August 2018, as the statutory provisions would require, when earnings payable from 9 August to the 21 September were not yet payable on 10 August – and so could not logically attract interest.

Relevant Statutory Provisions

7. By *s115(2) Employment Rights Act 1996,*

"On making an order for re-engagement the tribunal shall specify the terms on which the re-engagement is to take place, including –
…..
(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably have been expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

…

(f) the date by which the order must be complied with."

8. By *s117(3) Employment Rights Act 1996,*

"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

(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."

9. It is not in dispute between the parties that *s124 ERA 1996* permits the limit of the unfair dismissal compensatory award to be exceeded, so that total of the unfair dismissal compensatory and additional awards properly reflects the amount I specified as payable in this case under *s115(2)(d) ERA 1996.*

10. *Articles 2 & 3 Employment Tribunals (Interest) Order 1990* provide:

Article 2
"(1) In this Order, except in so far as the context otherwise requires –

…

"the calculation day" in relation to a relevant decision day means the day immediately following the relevant decision day.
….
"relevant decision" in relation to a tribunal means any award or other determination of the tribunal by virtue of which one party to proceedings before the tribunal is required to pay a sum of money, excluding a sum representing costs or expenses, to another party to those proceedings;

…

(2) For the purposes of this Order a sum of money is required to be paid by one party to proceedings to another such party if, and only if, an amount of money required to be so paid is –

(a) specified in an award or other determination of a tribunal or, as the case may be, in an order or decision of an appellate court; or

(b) otherwise ascertainable solely by reference to the terms of such an award or determination or, as the case may be, solely by reference to the terms of such an order or decision…

(3) In this Order, except in so far as the context otherwise requires, "decision day" means the day signified by the date recording the sending of the document which is sent to the parties recording an award or other determination of a tribunal and "relevant decision day", subject to Article 5, 6 and 7 below, means the day so signified in relation to a relevant decision.

Article 3

"…. where the whole or any part of a sum of money payable by virtue of a relevant decision of a tribunal remains unpaid on the calculation day the sum of money remaining unpaid on the calculation day shall carry interest at the stipulated rate of interest from the calculation day (including that day)."

11. Article 3(4) provides that no interest is payable if payment of the full amount of the award is made within 14 days after the relevant decision day.

Discussion and Decision

12. I have accepted the Respondent's contentions regarding the proper construction of *Articles 2 & 3 Employment Tribunals (Interest) Order 1990*, as applied to *s115 & 117 Employment Rights Act 1996*

13. I have decided that the 9 August 2018 Remedy Judgment was not a "relevant decision" under *Article 2 Employment Tribunals (Interest) Order 1990* - it was not an award or other determination of the tribunal by virtue of which one party to proceedings was required to pay a sum of money. The 9 August 2018 Remedy Judgment made a re-engagement order, which specified the terms on which the re-engagement was to take place, including a basis for calculating the compensation to be paid to the Claimant between the date of dismissal and the date on which re-engagement was to take effect.

14. The terms of a re-engagement order are prospective – they specify the terms upon which the re-engagement "is to take place," *s115(2) ERA 1996.* The money to be paid, therefore, is to be paid if and when the re-engagement takes effect. A re-engagement order does not require payment of a sum of money on the date that the order is made.

15. That being the case, *Article 3 Employment Tribunals (Interest) Order 1990* did not apply to the 9 August Remedy Judgment, which was an order for future re-engagement.

16. Furthermore, I accepted the Respondent's contention that the sum of money required to be paid by the 9 August Remedy Judgment was neither specified in the terms of the order, nor was it ascertainable solely by reference to the terms of the order.

17. The Remedy Judgment, clearly, did not set out a specific sum of money to be paid to the Claimant.

18. While the Remedy Judgment did set out the basis for calculation of the amount to

be paid to the Claimant, it was necessary to look outside the terms of the Judgment, to the Claimant's non-discretionary contractual pay and benefits, to determine the sum payable. Thus, the Remedy Judgment did not come within the terms of *Article 2(2) Employment Tribunals (Interest) Order 1990*, so that *Article 3 Employment Tribunals (Interest) Order 1990* did not apply to it.

19. I did not consider that this result was unjust to the Claimant. The *Employment Rights Act 1996* makes specific provision in *s117(3) ERA 1996* for an additional award of compensation to be paid to an employee if s/he is not re-engaged in accordance with a re-engagement order (unless the employer proves that it was not practicable to comply with the order). This means that a Respondent should not profit from deliberately delaying compliance with a re-engagement order.

20. I therefore do not award interest to the Claimant on the sums referred to in the 9 August Remedy Judgment.

21. I do order the Respondent to pay to the Claimant compensation pursuant to *s117(3) Employment Rights Act 1996* in the sum of £947,585.20, subject to any deductions for income tax and employee national insurance contributions that the Respondent is required to make. This judgment will attract interest if it is unpaid by the Respondent within 14 days after the relevant decision day.

Employment Judge Brown

24 January 2019