Appeal No. UKEAT/0301/18/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 20 June 2019

Before

HIS HONOUR DAVID RICHARDSON

MRS M V Mc ARTHUR BA FCIPD

MS V BRANNEY

MRS S UGRADAR APPELLANT

LANCASHIRE CARE NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DAVID CAMPION (of Counsel) Instructed by: Thompsons Solicitors LLP 88 - 94 Church Street Liverpool Merseyside L1 3AY
For the Respondent	DR DAVID MORGAN (of Counsel) Instructed by: Hempsons Solicitors The Exchange Station Parade Harrogate HG1 1DY

<u>SUMMARY</u>

REDUNDANCY – Contractual scheme

The Claimant was entitled to a contractual redundancy payment of £43,949.04 under provisions which described it as "an enhancement to an employee's statutory redundancy entitlement, the statutory payment being offset against any contractual entitlement". The ET found that the Claimant was entitled to the contractual redundancy payment, but capped at £25,000 by virtue of the statutory cap in the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994. It declined also to order a statutory redundancy payment.

Held: the ET erred in law: the Claimant was also entitled to a statutory redundancy payment in addition to the contractual redundancy payment. The Respondent was entitled to set off the statutory redundancy payment against the contractual redundancy payment – but the set off was against the sum of £43,949.04 not against the capped amount. An agreement based on **<u>Fraser v HLMAD</u>** [2006] ICR 1395 was rejected.

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HIS HONOUR DAVID RICHARDSON

1. This is an appeal by Mrs Sofiyah Ugradar ("the Claimant") against part of a Judgment of Employment Judge Ross sitting in the Manchester Employment Tribunal dated 5 September 2018, by which she upheld the Claimant's claim against the Lancashire Care NHS Foundation Trust ("the Respondent") for a contractual redundancy payment, capped at £25,000, but rejected her claim for a statutory redundancy payment. The Claimant appeals against this rejection.

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The Claimant's Contract of Employment

2. The Claimant was employed on "Agenda for Change" terms and conditions. Section 16 of those terms and conditions provided an entitlement to a contractual redundancy payment. The following are salient features of that entitlement.

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3. Firstly, the definition of redundancy and the conditions of qualification and entitlement broadly follow the statutory scheme set out in Part 11 of the **Employment Rights Act 1996** ("the ERA"). For example, the right to a redundancy payment is extinguished if an employee unreasonably refuses to accept or apply for suitable or alternative employment within the same or another NHS employer. In addition, the contract provides that "suitable alternative employment" is to be determined by reference to Sections 138 and 141 of the **ERA**.

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4. Secondly, however, the amount of redundancy payment is substantially higher than provided for by the statue. Paragraph 16.8 provides:

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> **"---16.8. The redundancy payment will take the form of a lump sum, dependent on the employer's reckonable service at the date of termination of employment. The lump sum will be calculated on the basis of one month's pay for each complete year of reckonable service, subject to a minimum of two year's continuous service and a maximum of 24 years' reckonable service being counted.**

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- **For those earning less than £23,000 per year (full time equivalent), the redundancy payment will be calculated using notional full-time annual of £23,000, pro-rated for employees working less than full time.**

- **For those earning over £80,000per year (full time equivalent) redundancy payment will be calculated using notional full-time annual earnings of £80,000, pro-rated for employees working less than full time. No redundancy payment will exceed "160,000 (pro-rata)."**

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5. Thirdly, there is an express provision governing the relationship between the contractual payment and the statutory payment. This provision is central to the appeal. It is contained in the last sentence of paragraph 16.1. Paragraph 16.1 reads as follows:

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> **16.1. This Section sets out the arrangements for redundancy pay for employees dismissed by reason of redundancy who, at the date of termination of their contract , have at least 2 years of continuous full-time or part-time service. These take effects from 1 April 2015. It also sets out the arrangements for early retirement on grounds of redundancy and in the interests of the service, for those who are members of the NHS Pension Scheme and have at least two years of continuous full-time service and two years of qualifying membership in the NHS Pension Scheme. NHS contractual redundancy is an enhancement to an employee's statutory redundancy entitlement, the statutory payment being offset against any contractual payment."**

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The Employment Tribunal Proceedings

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6. The Claimant was employed by the Respondent with effect from 10 January 2005. By 2017 she was employed in a Band 8A position combining a management role with a clinical setting. However, this post disappeared in a re-organisation.

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7. The Respondent put forward various alternative roles which the Claimant did not accept. When her employment terminated the Respondent declined to pay a redundancy payment alleging that she had unreasonably refused alternative employment. In due course the Claimant commenced Employment Tribunal ("ET") proceedings in which she claimed both the contractual redundancy payment and a statutory redundancy payment.

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8. The Respondent defended the proceedings on the basis that the Claimant had unreasonably refused suitable alternative employment. The matter came before Employment Judge Ross for hearing on 3 and 4 July 2018. She reserved Judgment.

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9. By her Judgment she upheld the Claimant's case. She found that the employment which the Respondent had offered was unsuitable and that the Claimant acted reasonably in refusing it.

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10. There was however one other issue between the parties. I must explain how it arises. The Claimant's contractual claim had been brought under the **Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994**. The jurisdiction of the ET under that Order was subject to a cap of £25,000 on contractual claims: see Article 10 of the Order.

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11. The contractual redundancy payment to which the Claimant was entitled was substantially in excess of this sum: it was £43,949.04. Of that sum only £5,868.00 represented the statutory redundancy payment. Therefore, on any view the Claimant was forgoing more than £10,000 by proceeding in the ET. However, the Respondent went further. It argued that she could not claim the statutory redundancy payment at all - in which case the Claimant would be forgoing more than £18,000.

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12. The Employment Judge ("EJ") accepted this argument. Her reasoning appears principally in paragraphs 87 to 91 of her Reasons. She said:

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> **87. For the sake of completeness, I turn to the claimant for a statutory redundancy payment. The claimant's representative sought to argue the claimant was entitled to a statutory payment in addition to the contractual payment.**
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> **88. The definition for a contractual payment and statutory payment is almost identical except the contractual payment arguably having a more onerous further provision.**
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> **89. Having determined that the claimant is entitled to a contractual redundancy payment which includes a statutory redundancy payment, given the wording of the contractual scheme, I find the claimant is not additionally entitled to a statutory redundancy payment.**

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90. The introduction to the contractual redundancy payment scheme specifically states

> **"NHS contractual redundancy is an enhancement to an employee's statutory redundancy entitlement; the statutory payment being offset against any contractual payment."**

91. I find the statutory entitlement is subsumed into the contractual entitlement and that full entitlement is curtailed by the cap as described above."

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The Statutory Redundancy Payment

13. Part XI of the **ERA** sets out the scheme for statutory redundancy payments. Section 135 provides the rights in general terms. Sections 136 to 162 contain detailed provisions governing

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and qualifying the right. Section 163 provides for the ET to have exclusive jurisdiction in respect of any question relating to entitlement and amount. Section 164 provides the time limit.

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14. Two specific features of the **ERA** should be noted. Firstly, there is a general restriction on contracting out in section 203 of the **ERA**. Any provision in agreement is void insofar as it purports to exclude or limit the operation of any provision of the Act or preclude any person from bringing proceedings before an ET; see section 203(1).

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15. Secondly, however, there is an exception to this general restriction which applies to statutory redundancy claims; see section 203(2)(c) and Section 157. Section 157 permits the

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Secretary of State to make an exemption Order where there is a collective agreement making provision for termination payments. Some Orders have been made under this provision. None is applicable in this case.

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Submissions

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13 On behalf of the Claimant, Mr David Campion submits that the Claimant was entitled to a statutory redundancy payment. She met all the conditions for it, once granted that the EJ had

A decided the issue of suitable alternative employment in her favour. The Agenda for Change provisions did not purport to exclude the right; indeed in the absence of an Order under Section 157 the right could not be excluded by a contractual provision.

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14 Of course, the Claimant would have to permit it to be set off against the contractual redundancy payment, a point which Mr Campion tells us he conceded expressly below. Therefore, the Claimant's claim would have been limited to £38,081.04.

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15 However, the Claimant was entitled to the statutory payment. This conclusion had been reached in another ET case: **Eden v Skills and Works Solutions Limited** [2017]

D ET/2402683/2017. The cap did not apply to the claim for a redundancy payment.

16 On behalf of the Respondent, Dr David Morgan, who did not appear below, submits that

E the ET was correct to decide that the Claimant was not entitled to a statutory redundancy payment. He puts the case in the following way.

17 He argues that where a Claimant pursues a cause of action and obtains a Judgment, even

F a Judgment affected by statutory limits, the Claimant is therefore precluded from bringing any additional claim in respect of the same cause of action. For this proposition he relies on **Fraser v HLMAD Limited** [2006] ICR 1395 where a Claimant had brought a wrongful dismissal

G complaint to the ET and recovered capped damages was barred from pursuing a further complaint in the Civil Courts for damages over and above the cap. It was held that his cause of action had merged into the Judgment obtained in the ET.

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18 This principle, he submitted, applied in the present circumstances. The Claimant had claimed both the full contractual payment, which included the statutory element and the statutory payment. In the effect, however, there was only one cause of action. The notion of a cause of action was not limited to the strict legal basis of the claim but encompassed the overall context. In reality there was one claim for a redundancy payment with two elements. Since the the contract claim was pursued in full the determination of it in the Claimant's favour meant that the statutory cause of action merged into the judgment.

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19 Two points should be noted about this argument. Firstly, there was before us some discussion of the question of whether this argument depended on the fact that the Claimant claimed the whole sum of £43,949.04 as a contractual redundancy payment. What if the Claimant had limited the claim to £25,000 and also claimed the statutory redundancy payment? At one point, Dr Morgan seemed to accept that this would make all the difference and this merger argument would not then apply, but we think in the end that Dr Morgan kept his options open on that point.

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20 Secondly, it is far from clear to us that this argument was raised below. The argument before the ET seems to have been less sophisticated and to have relied on the wording of the contract and perhaps also a submission that the set off was to be applied after the cap.

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Discussion and Conclusions

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21 In our judgment the Claimant was entitled to be paid a statutory redundancy payment in addition to the contractual redundancy payment which was capped at £25,000. Our reasons are as follows.

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22 Firstly, we do not accept that the doctrine of merger on which Dr Morgan relied has any application on the facts of this case. **Fraser v HMLAD** was concerned with a cause of action for wrongful dismissal. Mummery LJ said:

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> **"29. In my judgment, this was clearly a case of merger of Mr Fraser's cause of action for wrongful dismissal in the final judgment of the tribunal on the claim for wrongful dismissal as between the same parties as in the High Court proceedings. Merger was not prevented from taking place by the express statement in the ET1 that Mr Fraser expressly reserved his rights to bring High Court proceedings for the excess. The merger arose from the fact that the cause of action had been the subject of a final judgment of the tribunal. Once it had merged, Mr Fraser no longer had any cause of action which he could pursue in the High Court, even for the excess over £25,000. The claim for the excess is not a separate cause of action. The cause of action for wrongful dismissal could not be split into two causes of action, one for damages up to £25,000 and another for the balance. A claim in the High Court for the balance of the loss determined in the tribunal would have to be based on a single indivisible cause of action for wrongful dismissal."**

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23 In this case, however, there were two causes of action; a contractual cause of action and a statutory cause of action. Although they overlapped we do not accept that they were the same cause of action for the purposes of the doctrine of merger. Moreover, in this case, the claims were pursued together. The mischief which underlies the Decision in **Fraser** is the bringing of successive litigation over the same issue; see the judgment of Moore-Bick LJ at paragraph 35. In our judgment the task of the EJ at the conclusion of the present case was to give judgment in a way which best reflected the obligation to the parties in respect of both statue and contract.

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24 Secondly, as to statue, the Claimant met the conditions laid down in Part XI of the **ERA** for the payment of a statutory redundancy payment. No payment was made. He brought a complaint in time to the ET. It was the duty of the ET to determine this complaint; see section 163(1). We can see no basis on which the ET could legitimately decline to do so. Even if the contract had purported to restrict the Claimant's rights to a statutory redundancy payment, the

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provision would have been void by virtue of section 203 in the absence of an Order under Section 157.

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25 Thirdly, as to contract, we do not think that paragraph 16.1 of the "Agenda for Change" conditions reports to restrict the right to a statutory redundancy payment. It provides only that the statutory payment is to be set off against any contractual payment. In this case the contractual payment due was £43,949.04; but the Respondent was entitled to set off against that contractual liability any statutory redundancy payment made. Here, statutory redundancy payment was £5,868.00. Therefore, the net amount of the contractual payment would be £38,071.04. If it had not been for the cap on the ET's jurisdiction these are the two awards which ought to have been made. Given the cap, the contractual payment had to be limited to £25,000. However, the cap did not apply to the statutory payment. The Claimant was entitled to receive it as well.

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26 We note that in an ET case **Eden v Skills and Work Solutions Limited**, EJ Aspden reached the same result on similar facts. It may be that the argument before the ET was different to that deployed in this case certainly on appeal. It appears to have been suggested that the statutory payment should be offset against the capped figure.

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27 In rejecting that argument EJ Aspden correctly explained how the cap works:

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> **68. Paragraph 10 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides as follows: 'An [employment tribunal] shall not in proceedings in respect of a contract claim, or in respect of a number of contract claims relating to the same contract, order the payment of an amount exceeding 25,000.'**
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> **69. It is clear that this provision imposes a cap on the amount that can be awarded by a Tribunal. That is a cap that is imposed after the loss is assessed. It does not, as appeared to be suggested on the part of the Respondent, provide that in calculating the Claimant's loss, £25,000 is the starting point and the amount awarded to the Claimant must be further reduced. There is nothing in the provision that supports the submission made on behalf of the Respondent."**

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28 As we leave this case we would add the following comment. The statutory cap in the 1994 Order has remained unchanged for a quarter of a century. It seems only necessary to pass a statutory instrument to provide for a higher cap. The powers are now contained in Sections 3, 8 and 41 of the **Employment Tribunals Act 1996**. This case and the case of **Eden** to which we have referred, demonstrates that at its present level the cap is capable of producing real injustice. In order to bring the claim for a contractual redundancy payment before a Tribunal with relevant specialist experience, the two employees had to forego substantial parts of their contractual entitlement. If the statutory cap had been increased in line with inflation they would not have suffered these losses. The statutory cap is also out of step with the very much wider powers of the ET and in other areas of its jurisdiction.

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