Appeal No. UKEAT/0208/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 February 2020
Judgement handed down on 01 May 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR D FOTHERINGHAME — APPELLANT

BARCLAYS SERVICES LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR D FOTHERINGHAME (The Appellant in Person)
For the Respondent	MR JAMES HATT (of Counsel) Instructed by: Clifford Chance LLP Solicitors 10 Upper Bank Street London E14 5JJ

SUMMARY

PRACTICE AND PROCEDURE

UNFAIR DISMISSAL

The Claimant was found to have been unfairly dismissed, and a re-engagement order was made in August 2018 which contained a formula for calculating the sum payable to the Claimant. The Claimant was not re-engaged, and at a subsequent remedy hearing in January he was awarded the sum of £947,585.20, less tax and National Insurance. The ET rejected his claim for interest on the sum which would have been payable under the August 2018 re-engagement Order. The Claimant appealed against that finding.

The EAT rejected the appeal. It held that, although the re-engagement order contained an order to pay the Claimant a sum of money, that sum was conditional upon re-engagement having been complied with, or more accurately, "taking place". "Non-compliance" suggests a breach, when in reality an order for re-engagement can legitimately be ignored, on pain of specified consequences. The monetary part of the August 2018 order was, in the words of s115(2) ERA 1996, part of *"the terms on which the re-engagement is to take place."* As it did not take place, section 117 became engaged. This provides for distinct orders to be made if a claimant is not re-engaged. That order was duly made in January 2019, whereupon the 2018 Award fell away. Interest is not payable on a conditional award, when the condition fails.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This appeal is narrow in scope and concerns the application of the **Employment Tribunals (Interest) Order 1990** to a Remedy Judgment given on 24th January 2019 by an ET (Employment Judge Brown sitting alone at the East London Hearing Centre) after a re-engagement order did not result in the Claimant being re-engaged. I shall refer to the parties as they were before the ET, and to the order made following the hearing as "the 2019 Award".

2. It is common ground that the background to the case is of no relevance to the point in issue – put shortly, the Claimant was found to have been unfairly dismissed from his senior and high-earning position with the Respondent.

3. By a Remedy Judgment sent to the parties on 9th August 2018 ("the 2018 Award") the Respondent was ordered to re-engage the Claimant into a certain role by 21st September 2018 on terms which were set out. Those terms included the following: (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 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."

4. Following the Remedy Hearing on 24th January 2019 the Claimant was awarded the sum of £947,585.20, less tax and national insurance.

5 The issues and rival contentions before the ET were set out in the Reasons from paras 2 to 11:

> **"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…

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(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.

6 Having identified the issues, the ET set out its conclusions in a commendably succinct way as follows:

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 reengagement 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 reengagement.

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.

7 From these findings the Claimant appeals. There are five grounds of appeal which are, summarised in my words:

1 The ET was wrong to hold that the ET's decision of 9th August 2018 was not a "relevant decision" by reference to Article 2 of the Interest Order (as I shall refer to it).

2 The ET erred in its interpretation of Article 2(2)(a) of the Interest Order in that the sum payable was specified as required by that Article.

3 The ET erred in its interpretation of Article 2(3),5,11,12 and 12(3) as the Remedy Judgment of 9th August recorded an award, and interest was payable on that sum from that day.

4 The ET erred in its interpretation of s117(3) and 124(4) ERA 1996 in holding (at para 19 of the judgment under appeal) that the result was not unjust.

5 The Remedy Judgment as a whole was "perverse" and punished the wrong party.

8 Although structured in five separate grounds, the Claimant's arguments were essentially the same as those which he advanced below. The Claimant represented himself at the hearing before the EAT and below. The Respondent was represented by Mr Hutt of Counsel, who did

not appear below. Each has prepared a helpful skeleton argument which has been augmented by oral submissions. I have had regard to these but need not address all points raised in them.

9 I should say at the outset that this is a point of pure construction. The Claimant considers that I should be swayed in my construction of the law because to uphold the ET's decision would (he contends) act as a disincentive for respondents to resolve such cases in a timely manner, and that its interpretation "punishes" claimants in respect of whom re-engagement orders are not acted on by respondents and is thus "unjust". Those are grounds 4 and 5. The fact that the point under appeal has not, so far as the parties have been able to discern, been the subject of a ruling by any Court or Tribunal suggests that it is not a common problem. Alternatively, that the point is so obvious that it has not been thought worth appealing.

10 It is settled law that the statutory scheme of employment protection is intended to be entirely self-contained and to fall within the exclusive jurisdiction of the Employment Tribunal. Underhill LJ so commented very recently in **Mackenzie v The Chancellor, Masters and Scholars of the University of Cambridge** 2019 4 All ER 289, CA at para 22. The case was an unusual one. A re-engagement order had been made in favour of the Claimant, which the Respondent university had failed to comply with (to use the Claimant's description). The Claimant sought a declaration in judicial review proceedings that the Respondent's failure to comply with the re-engagement order was unlawful. The Claimant contended unsuccessfully, that the re-engagement order was something that could be enforced by the High Court. The Respondent's case was that the effect of the Tribunal's order was not to impose an enforceable obligation on it actually to re-engage the claimant but only to render it liable for an additional award, under section 117 of the **Act**, if it did not do so. Although the decision was not entirely on point, the following summary given by Underhill LJ of the re-engagement / re-instatement provisions is of considerable assistance to an understanding of the relevant provisions:

"10. Sections 113-117 form a group of sections under the heading "Orders for Reinstatement or Re-engagement". Section 113 identifies the two orders between which a tribunal can decide – an order for reinstatement and an order for re-engagement, with the detailed provisions about such orders appearing in sections 114 and 115 respectively. I will refer to the two together as "section 113 orders".

11. We are concerned with re-engagement. Section 115 (1) provides:

> **"An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment."**

Sub-section (2) requires the tribunal to specify the terms on which re-engagement is to take place and identifies certain matters which must be included. The only one to which I need specifically refer is (d), which reads:

> **"any amount payable by the employer in respect of any benefit which the complainant might reasonably be 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".**

It was in accordance with that provision that the tribunal included in its Reasons the finding referred to at the end of para. 1 (5) above.

12. Section 116 contains provisions relating to the exercise by the tribunal of its discretion under section 113. I need only note that one of the factors which it must take into account is whether it is practicable for the employer to comply with an order for reinstatement or re-engagement.

13. Section 117 is headed "Enforcement of order and compensation". It reads (so far as material):

> **"(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if —**
>
> **(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but**
>
> **(b) the terms of the order are not fully complied with.**
>
> **(2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.**
>
> **(2A) …**
>
> **(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**
>
> **(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.**
>
> **(4) Subsection (3) (b) does not apply where —**
>
> **(a) the employer satisfies the tribunal that it was not practicable to comply with the order,**
>
> **(b) …**
>
> **(5)-(8) …"**

14. It will be seen that section 117 covers two situations – first, where an order is made under section 113 and is not "fully" complied with (sub-sections (1) and (2)); and secondly where such

> **an order is made but the complainant is not reinstated or re-engaged, in other words where the order is not complied with at all (sub-section (3)). We are concerned with the latter scenario. What the Act provides for in that case is:**
>
> **(a) a compensatory award "calculated in accordance with sections 118 to 126", i.e. an ordinary compensatory award such as would have been made initially if no section 113 order had been made;**
>
> **(b) an "additional award" of between 26 and 52 weeks' pay – *unless* the employer shows that it was not practicable to comply with the order (this being a separate exercise from any assessment of practicability conducted at the time the order was made)."**

11 At paragraph 20 of the Judgment Underhill LJ held that the effect of sections 115 and 117 was that "an order for re-engagement":

> **"20. … is not intended to impose an absolute and indefeasible obligation on the employer to re-engage the employee, or a correlative right in the employee to be re-engaged. Rather, it creates a situation in which the employer must *either* re-engage the employee *or* become liable for the awards specified by section 117 (3), which include an additional award on top of what it would have had to pay if no re-engagement order had been made…."**

12 Applying these principles, the flaw in the Claimant's argument, as I see it, is that, although the re-engagement order contained an order to pay a sum of money, that sum was conditional upon re-engagement having been complied with, or more accurately, "taking place". I say that because "non-compliance" suggests a breach, when in reality an order for re-engagement can legitimately be ignored, on pain of specified consequences. So, the monetary part of the 2018 order was, in the words of s115(2), part of *"the terms on which the re-engagement is to take place."* As it did not take place, section 117 became engaged, which specifically provides for distinct orders to be made if a claimant is not re-engaged. That order was duly made and is the 2019 Award. The 2018 Award then fell away. It would be a logical nonsense for interest to be payable on a conditional award, when the condition failed.

13 Consequently, I uphold the ET's decision that the Interest Order does not apply to the 2018 award. That deals with grounds 1 and 3. Grounds 4 and 5 take the matter no further.

14 In case I am wrong in this conclusion, I go on to consider Ground 2. This is the point rejected by the ET at paras 16 to 18 of the reasons.

15 An order of re-engagement will always contain a formula to enable a calculation to be carried out when the date of re-engagement is known. It is not possible for the ET to know in advance when that date is. If the proper interpretation of Article 2(2)(b) is that an amount of money to be paid "solely by reference to the terms of an award or determination" excludes (as the ET held) an order requiring reference to non-discretionary contractual pay and benefits, then no such order would ever fall within the terms of the Interest Order. Even the exercise of establishing the rate of pay must involve "looking outside the terms of the Judgment" to use the ET's language, unless all relevant figures were contained in the order.

16 Article 2(2)(a) concerns amounts of money "specified" in an award. "Ascertainable" in Article 2(2)(b) must mean something else: a sum which is to be found *by reference* to the terms of the order in question. So, the monetary amount of a term providing for "six weeks net pay" could be *ascertained"* by looking at a Claimant's contract of employment. Such a calculation would, in my judgment, be "by reference to the terms" of the order. The Claimant contends that the only matter in dispute regarding the calculation until the January hearing was whether he was entitled to "Service Credits". He says, and it was not challenged, that the issue was not one of calculation, but the Respondent's refusal (until the last minute) to accept that they were contractually due.

17 Given my finding on the main issue in the appeal, the issue is moot. However, I would hold that, were the only issue whether Service Credits fell within the Claimant's non-

discretionary contractual pay and benefits, that is something that is ascertainable by reference to the terms of the Order, in precisely the same way as pay and other benefits which were agreed.

18 However, the appeal fails.