EMPLOYMENT TRIBUNALS

Claimant: **Ms E Sumner**
Respondent: **Virgin Holidays Limited**

Heard at: **Ashford** **On:** **9 October & 4 December 2020**

Before: **EMPLOYMENT JUDGE CORRIGAN**
Sitting Alone

Representation
Claimant: In person
Respondent: Ms C McCann, Counsel

Remedy Judgment

Under S117 Employment Rights Act 1996

1. The Claimant was awarded compensation for unfair dismissal of £10,471.04.

2. This consisted of:

basic award	£1471.14 (£1730.75 reduced by 15%)
compensatory award	nil
additional award	£8,999.90 (26 weeks' pay)

3. Recoupment does not apply to the award.

4. The Claimant's application for costs for the preliminary hearing dated 26 November 2018 was refused.

Reasons

1. It was agreed that the Respondent had failed to re-engage the Claimant following the Re-engagement Order dated 10 January 2020. The Respondent

did comply with the order in respect of payment of the arrears ordered under s115(2) (d), though they were not paid through the payroll meaning the Claimant had the benefit of at least part of the award tax-free.

2. This was therefore a somewhat unusual situation. Neither I nor the Respondent's Representative had come across such a situation before.

3. It was agreed I had to consider an award of compensation for unfair dismissal in the usual way and to consider whether to award an additional award of not less than 26 weeks' and not more than 52 weeks' pay under s117(3) Employment Rights Act 1996. Such an award is not made where the employer satisfies the Tribunal that it was not practicable to comply with the re-engagement order. S123 provides that the amount of a compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained as a result of the dismissal in so far as that loss is attributable to action taken by the employer. S124 applies to the compensatory award. Instead of the usual cap of 52 weeks' pay (£23,288.88 in this case) the cap is increased to such extent that the compensatory award and additional award combined can fully reflect the arrears ordered to be paid as part of the re-engagement order.

4. Initially I had considered with the parties that the payment of arrears was potentially an ex gratia payment (as the statute only envisages it be paid in the event of compliance with the re-engagement, so in a sense the payment was made voluntarily by the Respondent despite the decision not to re-engage) and should be deducted from the compensatory award prior to application of the statutory cap, meaning the Claimant's substantial claim for the loss of free flights and similar which were not part of the s115(2) (d) order could be considered.

5. However at the resumed hearing the Respondent's Representative produced the case of *Parry v National Westminster Bank plc* [2005] ICR 396 in which it was held by the Court of Appeal that the compensatory award under s 117 (3) included any amount awarded to cover arrears of pay as part of the re-employment order [in that case it was a reinstatement order and the amount was awarded under s114(2)] and was subject to the statutory cap, as extended by section 124 referred to above. The case of *Selfridges Ltd v Malik* [1998] ICR 268 was cited and the principle set out there that the section [115] loss is not a free-standing head to be awarded whether or not re-employment is complied with and "in the event of non- compliance, it forms part of the compensatory award made under section 117(3) (a). That award, calculated in accordance with s123, will include the [s115] loss and any future loss post the date ordered for [re-employment]. However the gross loss ...is limited to the maximum provided for in section 124(4)....". In *Parry* the Court of Appeal clarified that s 124 allows an extension of the cap to ensure a Claimant receives the amount ordered under s114 (2) (or s115 (2)) but, where the cap is reached, other elements of the compensatory award will be irrecoverable, including any future loss as a result of the failure to compy with the order. As a result of *Parry* I was satisfied that the sum paid by the Respondent should not be treated as an ex gratia payment and should not be deducted from the compensatory award prior to application of the cap.

6. It was agreed by the Respondent that the Claimant was entitled to a basic award of £1471.14 (£1730.75 minus a 15% reduction for contribution).

7. The Respondent having already paid £30,351.49, which exceeded the statutory cap and equalled the amount due unde s115(2), I found that, whether or not I was bound by the case of *Parry* not to make any further compensatory award in circumstances where the amount under s115(2) had already been paid, in any event it was not just and equitable to make any further award and the compensatory award in these circumstances should be nil.

8. With respect to the additional award, the Respondent did not satisfy me that it was not practicable to re-engage the Claimant as ordered. It was practicable and the Respondent did not genuinely consider it, but sought advice about avoiding it. There was no intention to reinstate and the Respondent decided to take the statutory consequences. I was not asked to provide written reasons for this aspect of my decision.

9. I was therefore obliged to make an additional award. I was referred to *Mabirizi v National Hospital for Nervous Diseases* [1990] ICR 281 where there was reference to general principles in respect of additional awards, including that the Tribunal has a wide discretion in respect of what additional award should be made within the parameters set down in the statute. It was said in *Mabirizi* that the award is not intended to equate to financial loss, but to be a "solatium" for the failure to re-engage, with the most obvious factor to take into account being the employer's conduct in the refusal to re-engage, notwithstanding that it was practicable. In *Mabirizi* it was observed that a finding of a deliberate refusal without any reasoned justification to support it will "doubtless in most cases warrant an award at or near the top of the scale".

10. I considered the starting point in this case should be well within the top half of the range of the additional award due to the fact the failure to re-engage was intentional and the Respondent had not given any real consideration to compliance. However, I also considered credit should be given to the Respondent for minimising the impact on the Claimant, including ensuring she was informed that the Respondent was not going to re-engage prior to her giving notice in her existing employment, and nevertheless paying her the arrears so that she received the compensation more promptly than if she had waited for this further remedy hearing. The Respondent was not obliged to pay the arrears in the event that there was no re-engagement. The Claimant also received the gross sum (which exceeded the statutory cap) outside of the payroll, so received more than if she had been awarded a compensatory award at this hearing. As a result I considered the lowest additional award appropriate in all the circumstances (26 weeks' pay).

11. I considered this to be the appropriate way to give the Respondent credit for paying the arrears, rather than making any deduction from the additional award to reflect the amounts the Respondent had paid.

12. The Claimant made an application for costs in respect of the Preliminary hearing dated 26 November 2018 but I agreed with the Respondent that it was not appropriate to award costs, as it was the Claimant who did not concede that the Respondent was the correct employer and wanted the Tribunal to

adjudicate on the correct employer. The application was decided in the Respondent's favour.

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Employment Judge Corrigan
18 June 2021

Note:

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