



EMPLOYMENT TRIBUNALS

Claimant: Mr J Duxbury

Respondent: University of Huddersfield

HEARD: In Leeds **ON:** 4 January 2022

BEFORE: Employment Judge Wade
Mrs L Anderson-Coe
Mr K Smith

REPRESENTATION:

Claimant: Ms Hart (counsel)
Respondent: Mr Sillitoe (solicitor)

REMEDY JUDGMENT

- 1 The respondent has not satisfied the Tribunal that it was not practicable for it to comply with the reinstatement order sent to the parties on 28 July 2021.
- 2 The Tribunal makes an Additional Award of 52 weeks' pay and the respondent shall pay to the claimant the sum of £27,300.
- 3 The respondent makes a Compensatory Award of ***£67,469.78***.
- 4 The respondent shall further pay to the claimant a Basic Award of £11,025.
- 5 Recoupment may apply to these awards. The Prescribed Period is 16 January 2020 until 4 January 2022. The Prescribed Element is ***£67, 469.78***. The amount by which the total Judgment sums exceed the Prescribed Element is £38, 325.

REASONS

Introduction

1. The claimant's employment terminated on 16 January 2020, which the Tribunal found to be an unfair dismissal at a hearing in April 2021. At a remedy hearing in July of 2021 the Tribunal made a reinstatement order as follows:

- 1 *The respondent shall treat the claimant in all respects as if he had not been dismissed: it shall reinstate the claimant to his post of senior lecturer with all associated rights and privileges (including seniority and pension rights).*
- 2 *The respondent shall pay to the claimant the appropriate sum in arrears of pay from 16 January 2020 until the date of reinstatement, calculated by reference to the revised Schedule of Loss Part A details (see also the note below).*
- 3 *Reinstatement shall take place no later than 10 August 2021.*

Notes to the parties:

- 1 *The Tribunal has expressed the Order in the terms at paragraph 2 above for the reasons set out in O'Laoire and because restoring the claimant's Teachers' Pension Scheme rights in accordance with Order 1 may affect the calculation of the arrears sum such that it does not accord with the calculation in Part B of the schedule. This is not a matter discussed with the parties.*

2. On 30 July 2021 the respondent wrote in these terms:

"It is accepted that section 117(3) ERA 1996 applies.

The sum payable under paragraph 2 of the Judgment, based on a reinstatement date of 27 July 2021, was agreed at £65,678.20. A reinstatement date of 10 August 2021 (the latest date provided for in the Judgment) would incur an additional sum – 14 days at £127.97 per day – of £1,791.58, equating to a total of £67,469.78.

*Given the effect of section 124(4) ERA 1996 (as confirmed in *Malik v Selfridges* and *Parry v National Westminster Bank plc*), the compensatory award is limited to that sum, even after the imposition of any additional award under section 117(3)(b) ERA 1996.*

Mr Duxbury would also be entitled to a basic award, agreed as being £11,025.

My Duxbury is therefore due £78,494.78.

Please confirm Mr Duxbury's bank account details in order that my client University may transfer this sum to him.

Please also confirm that you agree to the matter then being disposed of by way of an order by consent reflecting the above."

3. Our reasons for our reinstatement order were sent to the parties in August of 2021.
4. In September the claimant sought reasons why he had not been reinstated. He also indicated a hearing was required, irrespective of the offer made. The respondent set out its reasons and the claimant applied for enforcement of the Order. This hearing was listed.
5. There was no bundle prepared but the parties were able to provide the schedule of loss and counter schedule considered at the July hearing when we adjourned for lunch.

6. The claimant had provided a written statement setting out his challenges to the respondent's reasons for not reinstating, attaching advertisements which he said were advertisements for his role.
7. At the start of the hearing the Tribunal indicated that it considered the parties might lead us into an error of law if the position on financial remedy set out in the respondent's letter was adopted.
8. The Tribunal provided the parties with the Employment Tribunal Remedies Handbook, which did not appear to adopt the approach in the respondent's letter concerning the statutory cap.
9. The advocates were given time to consider their position and made their submissions.
10. The respondent was given time to consider whether it wished to resile from its concession or adjourn the hearing to consider the likely effect of Parry and the handbook interpretations – it did not. The respondent further did not wish to ask any questions of the claimant, nor did it lead any evidence on the issue of practicability of reinstatement.
11. In proceeding with the hearing the issues appeared to be:
 - 11.1. Whether the respondent satisfied the Tribunal that it was not practicable to comply with the Order - this was conceded;
and
 - 11.2. What additional award (in terms of a week's pay) would the Tribunal make?
12. The Tribunal heard submissions on the basis of the maintained concession, what was the appropriate number of weeks' award. Ms Hart contended for 52 weeks and the respondent for 39.
13. We also heard submissions, the respondent maintaining that the effect of National Westminster Bank PLC v Frederick Wynne Parry [2004] EWCA Civ 1563, and equally the upheld decision of the Employment Appeal Tribunal, was that the claimant could not recover back pay in excess of the statutory cap without giving credit for the Additional Award – or at least that is how we understood the submission.
14. The Tribunal gave its decision in principle, which was an Additional Award of 52 weeks' pay, and announced the effect of that decision and the sums to be paid. Mr Sillitoe indicated he believed the Tribunal had fallen into error, and the Tribunal, in the interests of avoiding further proceedings, gave the parties the opportunity to discuss matters and see if they could agree any points to help us. They did agree the statutory cap. We then adjourned to consider matters over lunch, and on reconvening confirmed the decision above and that we would provide written

reasons explaining our application of Parry in the hope that the parties could accept that.

Reasons

15. This was a case in which the respondent accepted before the last remedy hearing, in its counter schedule, that any Compensatory Award was to be awarded at the statutory cap. It did not abandon that position today. That was in circumstances that the cap was agreed today at its calculation of £63, 532.80. The claimant's proven losses to the 27 July 2021 were £65,678.20. His future loss to his 60th birthday on 16 October 2023, brought his total claimed financial loss claimed to just over £171,000, before grossing up.
16. In its reinstatement decision, the Tribunal, having made findings that the claimant would not have secured alternative employment in a recent appointment exercise, found, "in all likelihood, even with compensation at the cap, Mr Duxbury will suffer financial hardship well into the future as a result of his unfair dismissal... at a time when he could and should have been enjoying congenial and secure employment...".
17. In those circumstances, while we acknowledge that the respondent sought to settle remedy promptly, having decided within days it was not going to comply with the Tribunal's order, this is the paradigm case where an award at the maximum is just.
18. There is no sense in which this will provide a windfall for the claimant. It will simply go to reduce the extent to which the claimant has unremedied loss. It is also in the context of unchallenged evidence that one of the two recently advertised posts was the claimant's post. The respondent, has for its own reasons, decided not to comply with the Order. On the last occasion, difficulty in managing the claimant was wholeheartedly rejected by the Tribunal as a reason indicating impracticability. We included findings about the claimant's integrity and conduct throughout.
19. The Tribunal therefore makes the maximum additional award, of 52 weeks' pay, at the capped rate of £525, (the capped weekly multiplier being agreed by the advocates), producing an award of £27,300.
20. In a case of non-compliance, applying Selfridges Ltd v Malek [1998] ICR 268, we calculate a Compensatory Award (and Basic Award). In this case the Basic Award was agreed as it appears above.
21. As we have indicated the cap figure was agreed at £63,532.80. The Section 114(2) amount was agreed to be ***£67,569.78***. The relevant cap provision discussed in Selfridges and Parry is Section 124 (4) of the Employment Rights Act 1996:

Where -

- (a) a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and
- (b) an additional award falls to be made under paragraph (b) of that

subsection,

the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) ..."

22. On further examination, this was not a case in which the worked examples in the remedy handbook, in the end, assisted the Tribunal greatly with the particular point of dispute. This is a case in which the 114(2) amount exceeds the statutory cap in itself, but if the cap figure and additional awards are totalled, they are greater than the Section 114(2) arrears. We are in the territory set out by Lord Justice Kay at paragraphs 17 and 18 of his Judgment.

"17 At one point it seemed to me that the words of section 124(4) might work in favour of Mr Parry. I was concerned as to whether a compensatory award could be said "fully to reflect" an amount specified under section 114(2) if, in effect, the amount specified under 114(2) was being lost as a result of the statutory cap. This led me to pose the questions: (1) What if the amount specified under section 114(2) in itself exceeds the statutory cap? (2) How can the compensatory award "fully reflect" it if the cap applies?"

18. I am now satisfied by the answers given to these questions by Mr Napier on behalf of the Bank. If the figure under section 114(2) in itself exceeds the statutory cap, then the statutory cap will be exceeded so as to permit "full reflection", albeit that any other elements of the compensatory award will be irrecoverable because of the statutory cap. I also accept Mr Napier's argument that section 124 specifically and comprehensively provides for situations in which the statutory cap is disapplied. First, there are the public interest exceptions set out in section 124(1)(a) (which refer to health and safety and trade union factors and the like); secondly, there is the additional award against a recalcitrant employer under section 117(3)(d); thirdly, there is the amount under section 114(2), which is itself in excess of the statutory cap."

23. It seems to this Tribunal that if Lord Justice Kay could be satisfied with the submissions by Mr Napier, in support of the correct application in such a case (which was not Mr Parry's situation), then that is a safe path for us. We do not seek to award both the statutory cap and the 114(2) figure as the original Tribunal in Parry had done.

24. "Full reflection" in this case means awarding to the claimant as his Compensatory Award the sum previously awarded - ***£67, 469.78***, referred to above at 18: "thirdly there is the amount under section 114(2), which in itself is in excess of the statutory cap". In doing so we recognise that nonetheless the claimant does not receive any sum, for instance, for the loss of his statutory rights, or future loss. The cap on the compensatory loss may be exceeded by us so as to permit full reflection (see paragraph 18 above).

25. As to the additional award, that is not a Compensatory Award and no cap applies to it.

Employment Judge JM Wade

4 January 2022

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