EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Sellers	**v**	**The British Council**

Heard at: London Central
On: 20 and 21 ~~September~~ December 2022[1]

Before: Employment Judge G Hodgson

Representation

For the Claimant: in person
For the Respondent: Mr S Keen, counsel.

DECISION

Section 117 Employment Rights Act 1996

1. Any consideration of remedy pursuant to section 117 Employment Rights Act 1996 is stayed.
    a. The stay will continue until **20 June 2023**.
    b. The parties must write to the tribunal no later than **16:00, 14 June 2023** confirming whether the order should be continued or lifted.
    c. Either party may apply at any time to lift the stay, and request an order pursuant to section 117.

Section 115 Employment Rights Act 1996

2. Further consideration of any order pursuant to section 115 Employment Rights Act 1996 is not stayed.

[1] Date amended pursuant to the slip rule on 10 May 2023 with the consent of the parties.

3. The claimant must on or before **16:00, 6 January 2023** serve on the respondent an updated schedule of any sums he believes owing and he should give full disclosure of, and account for, all sums which may reduce the employer's liability pursuant to section 115(3) Employment Rights Act 1996.

4. If the respondent has questions or matters on which it requires clarification it should serve those questions on the claimant on or before on or before **16:00, 20 January 2023.**

5. The claimant should provide answers to those questions on or before on or before **16:00, 3 February 2023.**

6. The respondent must serve a counter schedule on or before **16:00, 17 February 2023**. The respondent should give full disclosure of relevant documents.

7. If the calculation of any sum remains in issue both parties must serve statements, schedules, skeleton arguments, and documents in support by **16:00, 3 March 2022.**

8. If a party fails to serve witness evidence in accordance with this order, that party will not be permitted to rely on any witness evidence at any future remedy hearing, without permission of the tribunal.

9. The respondent shall be responsible for producing a pdf bundle of documents that are relevant to the resumed hearing. It shall be served on the claimant not later than **seven day before any future remedy or reconsideration hearing**.

10. There will be a further remedy hearing which will consider any amendments, additions, or variation of the section 115 order ("the further hearing"). For the removal of doubt, that hearing will proceed as a continuation of the remedy hearing and to the extent that that is impermissible, it will proceed as a reconsideration hearing either pursuant to the claimant's application for a hearing, or of the tribunal's own volition. To the extent it is necessary to explain the reason for a reconsideration hearing, it is set out in the reasons below.

11. A further hearing to consider the section 115 order will not be listed at this stage for the reasons set out below. Both parties must on or before **16:00, 24 February 2022** write to tribunal and confirm the status of the EAT proceedings, and in particular whether any hearing has been expedited. Thereafter, I will give further consideration to whether the hearing should be listed prior to the consideration of the current appeal.

<u>Anonymisation</u>

12. On or before **16:00, 3 February 2023** an party that wishes to continue or discharge he anonymity order relating to Ms ZZ must send an application to the tribunal.

13. On or before **16:00, 17 February 2023** the parties must file draft directions enabling the tribunal for further consider the anonymity of Ms ZZ.

REASONS

Introduction

14. This matter came before me on 20 December 2022 to consider the matters detailed in my order of 14 November 2022 being:

    a. The respondent's application for a stay.
    b. Any remedy matter that has not been agreed.

15. In addition, I noted the claimant had made an application of 17 October 2022 to continue the remedy hearing, pursuant to the rule 115 order following the September 2022 hearing.

16. It is necessary to summarise the background.

17. By a judgment sent to the parties on 22 December 2021, following a hearing in November 2021, I determined that the claimant had been unfairly dismissed. It was not possible to consider remedy at that hearing, albeit the parties should have prepared evidence on remedy.

18. I issued directions on 3 August 2022, which provided for the exchange of witness statement, the provision of schedules of loss, and the preparation of a complete paginated bundle. The order did not limit what matters would be considered during remedy. The parties were expected to file all relevant evidence. This was a further opportunity to file appropriate evidence to deal with remedy.

19. At the remedy hearing, both parties relied on witness evidence and filed schedules of loss. Neither party's statements dealt with financial loss adequately.

20. The remedy hearing came before me on 5 September 2022. At the liability hearing, I had reserved to the remedy hearing any question of contributory fault and any Polkey reduction.

21. The claimant confirmed that he wished to be reinstated or re-engaged, I made it clear, on the first day, that the parties should give consideration to the content and wording of any order which may be made pursuant to section 115 Employment Rights Act 1996. The need to deal with all

matters relevant to an order for re-engagement/reinstatements was raised several times during the hearing.

22. On 8 September 2022, after the hearing, when I was in chambers, the respondent sent an email. I should note the email alleged the tribunal confirmed no issue of quantum was to be determined at the hearing. However, I do not accept that assertion, as all matters relevant to re-engagement were in issue and both parties had filed schedules of loss. I do accept that future loss was not to be considered. When considering this decision, I have kept in mind that the possibility the respondent misunderstood the position.

23. As to the respondent's proposed approach to the practicability of reinstatement, and the subsequent orders, the email of 8 September 2022, in so far as it is material, stated the following:

> **…**
> **The Respondent submits that the Tribunal cannot fairly come to a final conclusion on reinstatement or re-engagement on the terms of the order that the Claimant is now proposing without holding a further hearing. The only way of dealing with this matter fairly is to proceed to determine the issue of the practicability of re-employment as a preliminary issue, having regard to only the issues that were before the Tribunal.**
>
> **The issues before the Tribunal at the hearing on the 5th to the 7th September were two issues of practicability – firstly, the Respondent's assertion that it is not practicable to re-employ the Claimant in *any* post because the Respondent has a genuine and rational belief in the Claimant's misconduct and has lost trust and confidence in him, and secondly the practicability of re-employing the Claimant in any of the posts in paragraph 2.17 of his witness statement because of their availability, the Claimant's suitability for the roles and the ongoing redundancy process / overstaffing. The Tribunal also asked for submissions on contribution which the Respondent has provided.**
>
> **The Respondent requests that the Tribunal proceed to determine the issues above on the preliminary issue of re-employment, as indicated at the start of the remedy hearing, and that the remaining matters be adjourned for consideration at a further hearing. The Respondent asks that the Claimant be refused permission, at this preliminary stage, from relying on any further submissions or evidence. In the present circumstances this is the only way of complying with the overriding objective to deal with cases justly and without any undue delay.**
>
> **The Tribunal can provide directions for the case management of the hearing of those additional matters after it hands down its findings of fact on the two preliminary issues of practicability set out above.**
> **…**

24. Paragraphs 140 and 141 of my decision, specifically dealt with the respondent's email of 8 September 2022.

25. It follows that the respondent was aware there were issues about the calculation of pay, about which it requested a further hearing and the provision of directions to achieve that.

26. The respondent specifically envisaged that two matters should be decided as preliminary issues with I can summarises as follows: whether it was impracticable to reinstate the claimant because of the loss of mutual trust and confidence; and whether he could be re-engaged to in specifically identified roles, having regard to a number of factors including his suitability and the ongoing reorganisation of the respondent. I had made it clear at the hearing that contributory fault remained in issue.

27. The respondent did not expand on what was meant by a preliminary issue. The respondent is represented and must be taken to understand what a preliminary issue is in the context of the Employment Tribunals Rules of Procedure 2013. Preliminary issues are defined by rule 53 (3) to include "any complaints, any substantive issue which may determine liability…" In this context the “liability” being determined was the principle of re-engagement or reinstatement in the context of the defences advanced. The determination of the final sum to be paid to the claimant was not determinative of the “liability” to re-engage, but is a necessary calculation following the determination of the point of principle.

28. No mechanism for recording the resolution of any preliminary issues was suggested by the respondent.

29. The respondent appears to suggest that what it terms a preliminary issue may lead to a simple finding of fact. I reject that submission. In principle, a preliminary issue must be capable of finally resolving a matter, and if it does so, it is not, in my view, a finding of fact, it gives rise to a judgment and it should be perfected by a formal decision. When a preliminary issue is resolved against the respondent that decision is likely to be a judgment affecting fundamental rights.

30. It follows the respondent invited me to finally determined liability to re-engage as a preliminary issues, whilst representing that further issues of the financial consequences could, and should, be subject to a further hearing.

31. As regards the matters which the respondent advanced as described as preliminary issues in the email of 8 September, my judgment determined those in favour of the claimant.

32. I observe that re-engagement is considered at a point in time. The practicability of employment is considered at that time. At the time I considered it, it was common ground that suitable positions were available. In the future these material facts may change. It follows that deciding the fact, absent an order, could be pointless. The finding of fact should lead to an order determining rights.

33. As for the format of the order, that is dictated by section Employment Rights Act 1996.

34. The matters said to be preliminary issues by the respondent go to the question of whether an order for re-engagement should be made. Determination of those issues was dealt with in my reasons. I dealt with the contention that there had been a loss of mutual trust and confidence making it impractical to re-engage. In the context of practicability, I considered, in detail, whether there was any available, suitable post to which the claimant could be re-engaged. It was common ground a number of posts existed which were available and were appropriate for the claimant. I dealt with this at paragraph 62.

35. My decision from 8 September set out the order for re-engagement. It identified the employer, the nature of employment, and, the basis for payment of pay and benefits. I confirmed the salary rate and the requirement to restore the claimant's pension.

36. The quantification of benefits could not be fully finalised, mainly because of the respondent's failure to comply with orders, or to engage with the claimant. Before me today, the respondent has confirmed that at no stage has it provided the relevant evidence. The respondent stated it will need to provide witness statements with the relevant evidence.

37. I reject the suggestion that the respondent was not able to present evidence on the financial consequences at an earlier stage. It had had two opportunities to present the evidence on which it wished to rely, but had failed to do so. The respondent may have been confused as to how far it needed to cross examine the claimant, but this does not explain the respondent's failure to serve relevant documents or file evidence, particularly when it had filed its own counter schedule. The reality is the respondent has not served the relevant evidence, and now seeks discretion to do so.

38. The order for re-engagement recognised the practical difficulty of finalising any financial order. The principles for payment were set out, the parties were invited to consider whether they could agree the figures, and in the absence thereof, to serve further schedules and to apply for a further hearing to finally determine the sums payable. This was in accordance with the approach sought by the respondent on 8 September.

39. The claimant thereafter sought to engage with the respondent. In accordance with the order, he produced a schedule of loss. He requested a further hearing, when the respondent failed to cooperate (his application of 17 October 2022).

40. The respondent did not comply with my orders.

41. On 4 October 2022, the respondent's email to the claimant confirmed the respondent was applying for a stay pending the respondent's appeal. It stated "the council will not be progressing re-engagement as requested."

42. On 11 October, the respondent wrote to claimant confirming it was appealing the decision; it stated "the council does not intend to progress the directions relating to re-engagement before the appeal process has been completed."

43. The respondent applied to stay the proceedings by email of 4 October 2022. It said an appeal would be lodged, and stated "in accordance with rule 29 of the Employment Tribunals Rules of Procedure 2013 ("the Rules"), the respondent therefore applies for an order staying the current employment tribunal proceedings including implementation of the order, pending the outcome of the appeal."

44. On 14 November 2022, I directed that the respondent's application for a stay be considered at the hearing commencing 20 December 2022. I note that the tribunal delayed in sending this order, I understand the respondent received it on or around 2 December 2022.

45. On the evening of this hearing, I understand the claimant sent a counter schedule of loss, and a bundle of documents. On the morning of the hearing, the respondent submitted a skeleton argument and further authorities.

46. My order of 14 November contained orders with which the respondent did not comply. I accept the order may have been received late, by reason of the administration's failure to serve it.

47. If calculation of compensation remained in dispute, both parties were to serve statements, schedules, skeleton arguments and documents in support by 16:00, 13 December 22. This was a further opportunity to serve the relevant evidence. The respondent failed to comply. Delay in service of the order does not explain why the respondent failed to comply with the orders.

48. A PDF bundle was be filed by the respondent no later than, 16:00, 17 December 2022. The respondent delayed and the bundle was filed on the evening of the hearing. The claimant did not have sufficient time to consider it.

49. The skeleton argument filed by the respondent on the morning of the hearing failed to deal with the outstanding financial matters.

The respondent's submissions

50. As to section 117 Employment Rights Act 1996 the respondent submits any consideration of compensation pursuant to section 117 should be stayed pending resolution of the appeal challenging the order for re-engagement.

51. There is no dispute about the approach to section 117, and I deal with this below.

52. As to section 115 Employment Rights Act 1996, the respondent submits that, as the order provided for re-engagement by 26 October 2022,[2] and that date has now passed, there can be no alteration, amendment to, or addition to the order for reinstatement pursuant to section 115. The claimant states the tribunal has "no jurisdiction" and, therefore, it is no longer possible to consider any matter relevant to section 115(2)(b) and (d) or to make any further order.

53. The respondent accepts that there is an overlap between the evidence relevant to calculation of any compensation pursuant to section 117, and those matters relevant to any amount payable to the claimant in respect of benefits, as envisaged by section 115.

54. The respondent advanced a number of arguments for why any further consideration of section 115 should be delayed.

    a. It is said it will involve litigating the same issues twice, before the EAT and the ET.

    b. Costs may be increased because the respondent may wish to appeal any decision on the same or substantially the same grounds as already before the EAT.

    c. If the respondent is successful before the EAT in overturning the order for re-engagement, costs may be wasted.

    d. The tribunal should recognise there are two stages when practicability may be considered, and practicability for the purposes of section 117 must be considered separately.

    e. The respondent has had insufficient time to prepare for the hearing on 20 December in that it has not been able to complete disclosure, raise questions with the claimant, investigate the position in relation to the pension, or produce evidence.

    f. The respondent's main witnesses are on annual leave on 20 and 21 December 2022, and there been insufficient time for them to prepare, or for witness statements to be produced.

    g. The claimant's disclosure is inadequate: the claimant has failed to adequately explain his earnings, and documents have been produced in a foreign language; the respondent cannot identify the tax payable, particularly given the claimant appears to reside in a foreign country; and it will be necessary to assess pension loss "on the complex basis."

[2] The date of compliance was changed under the slip rule.

The claimant submissions

55. The claimant submissions can be summarised as follows:

    a. The claimant has complied with the tribunal orders.

    b. He does not accept there can be no further orders pursuant to section 115. It was always envisaged that the order would need to be clarified.

    c. The respondent has failed to engage with him or to cooperate in any manner, but has instead refused to consider re-engagement and the practicalities.

    d. The respondent failed to raise with him any specific questions concerning his disclosure, schedule loss, or financial circumstances.

    e. The respondent has persistently failed to comply with tribunal orders. There is no good reason why the respondent has not prepared for hearings, either the original remedy hearing, or this hearing. By doing so the respondent has failed to produce the evidence needed to give further detail about the process, and as such, the respondent has frustrated the process.

    f. The respondent has failed to file evidence, and agree matters that could be agreed. Instead, it insists the respondent should be given further time to file evidence about his benefits.

    g. It is necessary for there to be further evidence because of the respondent's failure to engage with the process.

    h. The pension position is not complicated, in that it is envisaged he should be reinstated to the civil service pension, and therefore calculation of the pension on the "complex basis" is not a matter for consideration at this stage, as it is a simple question of reinstating him to the pension scheme. If there are issues relating to deductions for contributions, they cannot be calculated without involvement of the pension scheme.

    i. The claimant accepts consideration of section 117, and in particular practicability pursuant to that section, is not a matter before the tribunal at present.

Further submissions

56. During the hearing, I asked for further written submissions on three matters:

a. What is the nature of re-engagement order under section 115 Employment Rights Act 1996. In particular, is it a judgment?

b. How, and in what circumstances, is it appropriate for a tribunal to make further orders pursuant to section 115. I specifically asked for submissions on the case of **Electronic Data Processing v Wright** [1986] ICR 76.

c. What further direction should be given?

57. The claimant filed further written submissions, which reflected the submissions made before me at the hearing. His submissions are mainly concerned with the further directions to be given in relation to the section 115 claim. In brief, he contends that it is the action of the respondent which has frustrated the process, and that the respondent should not be permitted to benefit from its own failure to engage with him, it's breach of tribunal orders, and its frustration of the procedure. He points to the respondent's failure to engage with him, despite his meticulous compliance with tribunal orders, service of documents, and filing of evidence. He deals with each of the outstanding matters, and notes the respondent's failure to raise any difficulties with him prior to the hearing. He contends that he has made full disclosure, including disclosure of his income. He notes that his figures have not been challenged by the respondent on the counter schedule. He notes the respondent had previously accepted it would be necessary to have a further hearing in order to finalise matters, such as grossing up.

58. He states:

> **[The Respondent's] email communications of 4th and 11th October 2022 demonstrate that at no point did they have the intention of proceeding with the re-engagement order. This has the effect of subverting the question of practicability through wilful delay.[3]**

He states further:

> **In order to rectify the Respondent's failure to comply with any direction so far in the matter, I oppose a stay on proceeding towards the execution of section 115 (2d). I suggest that a revised remedy timetable be established in order to determine the financial remedy at the point of the final appeal decision. Whilst I recognise that there may be cost implications with this suggestion, I contend that any cost implications are outweighed by the impact on me of further delay to justice.[4]**

59. In the further written submissions of 21 December 2022, the respondent addresses the three matter I raised.

[3] Para 3 of his submissions of 21 December 2022.
[4] Para 7 of his submissions of 21 December 2022.

60. The respondent submits an order under section 115 Employment Rights Act 1996 is a judgment.

61. The respondent submits Section 115 orders can be revisited, but only by way of reconsideration; the tribunal should inform the parties of the reasons why the decision is being reconsidered. The respondent also says that "prior to the date on which we engagement was ordered to take place, the tribunal could conceivably have supplemented its previous order under section 115 (2) (d)." However, the rationale for that assertion is not set out.

62. The respondent asserts there should be no directions on the section 115 order, and the only possible further direction would relate to section 117, which should not be considered, in any event, until after the appeal.

The law

63. Section 115 Employment Rights Act 1996 - order for re-engagement – says, in so far as it is applicable-

> **(1) 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.**
>
> **(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—**
>
> > **(a) the identity of the employer,**
> > **(b) the nature of the employment,**
> > **(c) the remuneration for the employment,**
> > **(d) 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,**
> > **(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and**
> > **(f) the date by which the order must be complied with.**
>
> **(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of--**
>
> > **(a) wages in lieu of notice or ex gratia payments paid by the employer, or**
> > **(b) remuneration paid in respect of employment with another employer,**
>
> **and such other benefits as the tribunal thinks appropriate in the circumstances.**
> **(4) ...**

64. Section 116 Employment Rights Act 1996 - choice of order and its terms – says, in so far as it is applicable -

> **(1) …**
>
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
>
> **(3) In so doing the tribunal shall take into account--**
>
> > **(*a*) any wish expressed by the complainant as to the nature of the order to be made,**
> > **(*b*) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> > **(*c*) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
>
> **(4) ...**

65. Section 117 Employment Rights Act 1996 - enforcement of order and compensation – says, in so far as it is applicable -

> **(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) There shall be deducted from any award under subsection (1) the amount of any award made under section 112(5) at the time of the order under section 113.**
> **(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 and not 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, ...**
> >
> > **…**

66. The Employment Tribunals Rules of Procedure 2013 provide -

> **1(3) An order or other decision of the Tribunal is either--**
>
> **(a) a 'case management order', being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment;**
> **(b) a 'judgment', being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines--**
> **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or**
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);**
> …

And at Rule 53

> **53(3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).**

67. The respondent has filed a number of authorities, I discussed with the respondent the principles of law, if any, raised in those cases. I have regard to that discussion in this hearing.

68. I referred the parties to the case of **Electronic Data Processing Ltd v Wright** [1986] IRLR 8. I am satisfied that it provides some authority for the proposition that the terms of section 115 order may be revisited by a tribunal, if it is necessary, and if it is in the interests of justice. However, **Wright** does not establish the mechanism. I have been directed to no authority which specifically deals with this point.

Conclusions

69. It is common ground that any order pursuant to section 117 is the second stage of the re-engagement process, which comes into effect when there has been a failure to re-engage. I do not need to consider the respondent's submissions on this in detail. It was agreed at the hearing that, pending resolution of the appeal, neither party is arguing that there has been a failure of re-engagement such as to engage section 117. Neither party seeks an order pursuant to 117 this stage.

70. I do not consider it appropriate to list a hearing to consider section 117.

71. It is accepted that there must be a determination of whether my approach to practicability for the purpose of section 115/116 was correct. This is a point under appeal. At this stage the respondent has not refused to re-engage. As it has not argued that there has been a refusal to re-engage, consideration of section 117 would be premature.

72. If at some point section 117 is engaged, it may be necessary to submit further evidence on the question of practicability; that is inevitable given

that the process has two distinct stages. The evidence on pensions may be different for section 117, as the claimant would not have been reinstated into the pension, and calculation on a complex basis may be needed.

73. It is arguable there is no need for a stay, as on neither party's case is consideration of section 117 before me.

74. It has been agreed, by consent, any potential application pursuant to section 117 should be subject to a stay. It follows that the respondent's application for a stay in relation to this part of the claim was discussed in detail, and ultimately agreed by the claimant, and accepted by the tribunal.

75. The stay will continue until 20 June 2023. The parties must write to the tribunal no later than 16:00, 14 June 2023 confirming whether the order should be continued or lifted. Either party may apply at any time to lift the stay, and request an order pursuant to section 117.

76. Should there be further consideration, at this stage, of the section 115 order? This raises, broadly, two issues. The first is whether there is a jurisdictional bar as envisaged by the respondent. The second is whether I should exercise my discretion to make any further order to proceed, and to relist the matter for further consideration.

77. When making an order pursuant to section 115, there are, broadly, two matters to consider. First, the tribunal must decide a point of principle, which is whether there should be re-engagement (having resolved there should be no order for reinstatement). In doing so, the tribunal must have regard to section 116(2).

78. Second, if the section 116 consideration is resolved in favour of the claimant, the tribunal must set out the terms of the order reflecting the matters set out in section 115(2)(a) – (f).

79. As noted above, the respondent invited the tribunal to consider resolution of the first point as a preliminary issue. It was envisaged by all that there could only be limited engagement with the detailed financial matters in the terms of the order. They were to be decided at a later date.

80. In my first remedy decision, when deciding re-engagement in principle, I had regard to section 116. I considered the question of practicability, which must be decided, on the evidence, but on a provisional basis. I considered contributory fault, and whether it was just to order re-engagement. I considered the availability of employment. I resolved this issue in the claimant's favour, for the reasons given in my decision.

81. It was necessary to record the decisions in an order. I do not accept that the "preliminary issue" was simply a resolution of fact. That was never raised at, on envisioned at, the hearing.

82. The decision was taken pursuant to section 115, that section provides for an order to be made. If the respondent envisaged that the issue, could be resolved, or recorded, in any different matter, it has failed to give any adequate submission on the point. I have no reason to revisit my decision on the principle of re-engagement, nor has any party asked me to do so.

83. For the purposes of section 115, the questions of practicability and whether it is just to re-engage have been resolved. I accept if there is a section 117 consideration in due course, practicability is considered further.

84. The second stage of a section 115 consideration requires me to consider section 115(2).

85. The respondent alleges that there can be no further consideration and no further orders can be made. The first question is whether there is a jurisdictional bar, as alleged by the respondent.

86. The respondents main concern appears to revolve around section 115(d). It appears to be respondent's case that I can no longer make any order clarifying what amount may be payable by the employer in respect of any benefit.

87. Is it possible to make a further order clarifying matter which could not be clarified at the first remedy hearing, and in particular to give further detail of the benefits payable, and the calculation of them, pursuant to section 115 (d)?

88. In general, it is possible to give judgment in relation to part of a claim. In this case, there has been a judgment on liability, and remedy was left to be decided. There may be judgments on preliminary issues, e.g., as whether an individual has a disability.

89. It follows the fact that there is a judgment, does not preclude all further consideration.

90. The scope is not unlimited. Where there has been judgment on a part of a claim, that is final, subject to appeal or reconsideration.

91. Section 115 refers to “an order for re-engagement.” Under the employment tribunal rules, decisions are either case management orders or judgments.[5] However, it is not clear to me that a section 115 order can neatly be characterised as a case management order or a judgment. Arguably, it has elements of both. I accept it does appear to resolve part of the claim “as regards liability”. However, whether it finally resolves all points, is open to question. Practicability must be resolved for the purposes of section 115. Viewed one way, it is final, at least for the purpose of section 115. If the respondent refuses to re-engage, the

[5] Employment Tribunals Rules of Procedure 2013 1(3)

question of practicability, a matter which is intrinsic to the initial order in relation to section 115, can, and must be, revisited. This lack of finality is not easily reconcilable with the employment tribunal rules. This is not a matter I need to resolve.

92. Further reconsideration of the terms of section 115 and whether they have been breached is envisaged by section 117. Where there has been re-engagement, there can be an award for the balance of the compensation envisaged under section 115, by an application pursuant to section 117(1)(b).

93. The finality of a section 115 order was considered in by the EAT in **Wrigh**t. Mr Justice Popplewell had not doubt that there could be further consideration. At paragraph 18 he stated:

> **… it is open to an Industrial Tribunal, if the terms of their order are not sufficiently clear, thereafter to remedy that fact. The function of an Industrial Tribunal is to seek to do justice in a practical way between employer and employee. It would be perfectly ludicrous if this order could not be interpreted, for instance, as preventing the appellants from re-engaging the respondent in Australia. In our judgment, it is open to an Industrial Tribunal to give effect to their intentions by filling out the terms of the order, if the terms of the order are either ambiguous or silent as to an important point. It would have been wiser no doubt for the Industrial Tribunal to have specified the area of work, but it is quite clear from their decision that they had no sort of notion that Manchester was a place where the appellants would re-engage the respondent…**

94. I do not read **Wright** as limiting those terms which may be considered further or clarified by way of further order. It is permissible for an order to be made knowing that there are matters still to be resolved.

95. It follows that it is arguable that there are times when a section 115 order can be made but be expressly subject to detail to be provided in relation to a number of matters. That position was expressly embraced by the respondent at the end of the first remedy hearing. The respondent's position has now changed. Had it raised the concerns that it now does, it may have been that the claimant would have made different submissions, or the tribunal could have taken a different approach, and even decided the financial matters on the claimant's evidence, given the respondent's failure to file evidence.

96. If the respondent is right that there is some form of jurisdictional bar, it would be inappropriate for me to ignore the assumptions made at the hearing, and the representations of 8 September 2022 made by the respondent. To do so may allow the respondent to either benefit from its own breach of order, which prevented full consideration of the benefits at the original remedy hearing, or treat as final an order when that was not the respondent's position at the hearing.

97. Whilst **Wright** was clear as to principle, it did not set out the mechanisms by which the order could be clarified or added to. It seems to me there are two possibilities. First, if the section 115 order contains elements of

judgment and direction, the directions may be capable of addition or variation either as further judgments or as case management orders. Second, if the entirety is a judgment, it may be possible to reconsider it.

98. If variation of a section 115 requires reconsideration of a judgment, it is the respondent's position that there is a mechanism to do so. Reconsideration can occur on the application of either party or via the tribunal on its own initiative.

99. It is arguable that the claimant's request of 17 October 2022, to further resolve the quantum of the benefits, is an application for reconsideration. I do not need to engage with the technicalities of this at this stage. Reconsideration can take place were "it is necessary in the interests of justice to do so." On reconsideration, the original decision may be varied, revoked, or confirmed. Therefore, variation is open to the tribunal. As to whether reconsideration would be in the interests of justice, I think there can be little doubt: I certainly could not reject the claimant's application as having no reasonable prospect of success.

100. The primary reason why the financial matters could not be addressed earlier, was the position adopted by the respondent, and its failure to file evidence, in breach of order. Moreover, the respondent represented that there could, and should, be further consideration of the benefits at a hearing, once it had filed evidence.

101. On the respondent's current position, the claimant has been denied a remedy, and the judgment must be treated as final. Moreover, as that order is unclear, the respondent says it must be set aside, as it cannot comply with the order.

102. In the circumstances where the respondent envisaged that there must be another hearing, if the only mechanism is reconsideration, it is likely to be necessary in the interests of justice. The purpose of a reconsideration hearing would be to consider if the section 115 order should be varied. In particular it would deal with outstanding financial matters, but it may also deal with any other points that require clarification as envisaged by **Wright**.

103. It follows that I find it is possible to make further orders, albeit the mechanism may be unclear.

104. For clarity, I should record and consider the individual terms of the section 115 order and the parties' positions.

105. It is respondent's position that the section 115 order fails to adequately identify the nature of the re-engagement, and the benefits payable.

106. As to the nature of the re-engagement, it is the claimant's position that the nature of the re-engagement is clear and properly set out. At the remedy hearing, the respondent accepted that there were positions to which the

claimant could be appointed, which were suitable for him, and which reflected the position and status he held with the respondent organisation. At least four specific current positions were identified, which were suitable for the claimant, and at the same level at which he was engaged. I dealt with this in particular paragraph 62 of my decision.

107. It is the claimant's case that the order is sufficient to identify the nature of the employment. I observe it may be an error of law to order re-engagement to a specific post. Further, no party asked me to specify a post for re-engagement.

108. In relation to the nature of the employment, neither party asked me to expand on or vary my original order. I am conscious that this aspect may be subject to appeal. It would be inappropriate for me to vary my order as to the nature of employment at this stage. If clarification is needed, this may be a matter that can be clarified in due course, as envisaged in **Wright**.

109. It is not clear to me that the respondent alleges that I failed to set out the relevant remuneration, or to set out any rights and privileges which must be preserved. Neither party has asked for further clarification.

110. At the time the order was made, it was common ground that there could be no final resolution of any amount payable. The respondent specifically invited the tribunal to leave the matter to a further hearing. The order envisaged resolution by the tribunal, should the parties be unable to agree. The parties did not agree, largely because the respondent refused to engage at all, and subsequently failed to comply with the tribunal's orders.

111. It seems to me that it was always envisaged that the order would have to be silent on the exact sums to be paid for the period from dismissal to re-engagement. It was impossible to do otherwise. It will be necessary to consider the yearly salary, the effect of any subsequent earnings, the treatment of tax, particularly given the claimant may be abroad, and the issue of grossing up.

112. In addition, questions may arise concerning the pension. Calculation of pension losses on a complex basis does not arise until consideration under section 117, which is not before me. There may be issues in relation to tax and or contributions. These may require evidence. It may not be possible to resolve them until after he has been reinstated into the scheme, and there is evidence from the scheme as to how that will be achieved.

113. Whether the failure to deal with these matters initially leads to the order being defective, such that it must be set aside, is not a matter for me. That is a matter on appeal. For the reasons given, I am not precluded from making further orders, and there should be a further hearing to resolve relevant disputes.

114. Having decided that I can and should make further orders to clarify the section 115 judgment the final question is what directions I should now give. In doing so, I must have regard to the fact that the order is under appeal.

115. I should consider in particular the submissions the respondent advances for delaying further consideration. I consider those now.

116. The respondent submits it will involve litigating the same issues twice, before the EAT and the ET. This submission is unclear. If there are matters which are unclear, or on which I have not received evidence, it is appropriate that this matter should be considered and finalised. That is a matter for the tribunal. I observe that that, on the respondent's case, variation would require reconsideration. Parties may come under a duty to consider applying for reconsideration when contemplating appeal. There are occasion when the EAT will invite the ET to address reconsideration. Where there are matters that have not been resolved, and therefore, are not directly appealed, their resolution may be appropriate.

117. The respondent submits costs may be increased because the respondent may wish to appeal any decision on the same or substantially the same grounds as already before the EAT. I am not persuaded by this argument. Appealing a matter on substantially the same grounds, may produce a saving of cost, as compared to appealling it at a later date. In any event, the further matters to be decided, as envisaged in these reasons, involve new evidence. It cannot be assumed that there would be any appeal, or that any appeal would be on the same grounds. There may be a saving in costs, if there is a further appeal, and if it can be considered at the same time as the current appeal.

118. The respondent submits that if it is successful before the EAT in overturning the order for re-engagement, costs may be wasted. I am not convinced by this submission. Consideration of financial loss is relevant to section 115, section 117, section 123. Liability is not in dispute. Some form of compensatory award will need to be considered. It is likely that there will be a substantial overlap of evidence, and therefore the scope for wasted costs is limited.

119. The respondent submits there are two stages when practicability may be considered, and practicability for the purposes of section 117 must be considered separately. I agree with this. This is not a good reason to not engage with the financial aspects under section 115.

120. The respondent submits it has had insufficient time to prepare for the hearing on 20 December in that it has not been able to complete disclosure, raise questions with the claimant, investigate the position in relation to the pension, or produce evidence. I do not accept this submission. The respondent could have produced evidence at the liability hearing, the first remedy hearing, and the second remedy hearing. The

respondent chose not to comply with orders. I accept that the respondent's contention that it has not prepared for this hearing. I accept that the respondent has not put forward its evidence. However, this failure has not occurred as a result of there being insufficient time. It is essentially the respondent's choice.

121. The respondent states its main witnesses are on annual leave on 20 and 21 December 2022, and there has been insufficient time for them to prepare, or for witness statements to be produced. I received no adequate detail of this. However, it is not a reason to delay a further hearing.

122. The respondent alleges the claimant's disclosure is inadequate: the claimant has failed to adequately explain his earnings, and documents have been produced in a foreign language; the respondent cannot identify the tax payable, particularly given the claimant appears to reside in a foreign country; and it will be necessary to assess pension loss "on the complex basis." I note that this is disputed by the claimant. I accept the claimant's admission that he has provided evidence and disclosure. I am unconvinced that there is a difficulty caused by disclosure of documents in a foreign language. Particularly in the context of this employer. I accept the claimant's submissions that the respondent has done nothing to engage with his schedule of loss, or to seek clarification by way of questions or otherwise. The respondent's submissions is not a good reason for delaying a further hearing.

123. The respondent has made representations about the difficulty calculating the pension loss. As I have noted, the questions pursuant to section 115 may be different to those questions which be relevant to section 117. I do not see this as a good reason for delaying the hearing.

124. I accept the claimant has, essentially, complied with all directions. He has provided his schedule of loss. He has provided information in relation to his current earnings and has given witness evidence. He has, essentially, sought to do all that he should in order to put the evidence before the tribunal on which the benefits payable can be quantified.

125. During oral submissions, Mr Kean confirmed that the respondent has not prepared, and it needs more time to prepare. It wishes to explore many issues including following: issues relating to pension; calculation of any pension loss in a complex basis; availability of employment; the rates applicable to individual job; the total sums received by the claimant; issues relating to taxation, including foreign taxation. There is no reason why respondent could not explore these matters earlier. The respondent now seeks further time to produce that evidence, should it be necessary. This is a recognition the failure of the respondent to produce that evidence initially.

126. I am conscious that the claimant was dismissed for some 3 and a half years ago. There is force in his argument that delay been occasioned by

the respondent's approach, whether that delay has been intentional or not. The argument that costs may be wasted is limited in this case, because much of the evidence will be needed regardless of the type of remedy hearing.

127. The claimant is, rightly, concerned about delay, and puts the reason for delay largely at the respondent's door. There is considerable force in the claimant's argument. I do have regard to the overriding objective. The case should be dealt with fairly and justly. I should have regard to saving the expense. I should have regard to avoiding delay. The balance is not easy to resolve in this case

128. The parties should already have exchanged schedules of loss, relevant documents, relevant evidence, and skeleton arguments. Much of that evidence will be needed, regardless of the form the remedy hearing may ultimately take place. The parties should now comply with the directions to prepare. As noted, breach an order is not itself a good reason to extend time. I will in this case extend time for the respondent to comply. That is an exercise of discretion as I consider, despite the breaches, it is possible for there to be a fair hearing and the respondent should be given a final chance to comply; however, if the respondent fails to comply on this occasion there should be consequences and the respondent should be debarred from relying on the evidence without leave.

129. There is possibility that the nature of the next hearing will depend in part, but not wholly, on the appeal. The respondent is seeking an expedited appeal hearing. If the appeal hearing is expedited, it may be that the next remedy hearing can take place without undue delay. If it is not expedited, there is a risk that there will be further serious delay, and that is not in the interests of justice. Moreover, if the EAT hearing is not expedited, and if there is a possibility of further appeals in this matter, there could be significant further delay. That delay is not in the interests of justice and undermines the right to a fair hearing.

130. If there are possibilities of further appeals, which may cause delay and further expense, it may be better for all relevant decisions before the employment tribunal to have been dealt with. This gives the best chance of delay occasioned by future appeals being avoided, and the cost of the appeals may be ameliorated, to some extent, if the appeal can be co-joined.

131. I will delay the decision as to whether to list a further remedy hearing (whether that hearing proceed simply as adjourned hearing, or as a reconsideration application) until the parties have had a reasonable opportunity to ascertain whether the appeal will be expedited. Both parties must write to me informing me the position in accordance with the orders given. If it appears that the appeal is not expedited, it is likely that I will list the matter for a further hearing. I do not consider that to be a good

reason to delay preparation of matters that are substantially common to all the possible types of future remedy hearings.

132. Finally, I note that I am yet to consider whether there should be continuing anonymisation of Ms ZZ. I shall direct that the parties must make representations, as to how it should be resolved, and to set out their proposal for directions. It is unclear to me whether Ms ZZ has been contacted. The respondent should clarify whether it is in contact with Ms ZZ. If so, it is appropriate that she should be informed of her right to make an application for an order for anonymisation. My finding of fact on contributory fault may be relevant and that should be brought to her attention.

133. The respondent should endeavour to be in a position where it can inform me whether Ms ZZ has been told of her right to seek anonymisation.

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Employment Judge Hodgson

Dated: 23 December 2022

Sent to the parties on:

10/05/2023

For the Tribunal Office