



EMPLOYMENT TRIBUNALS

REMEDY JUDGMENT

BETWEEN

CLAIMANT

MS S DAUD

V

RESPONDENT

LONDON NORTH EASTERN
RAILWAY LIMITED

HELD AT: LONDON CENTRAL
(BY VIDEO)

ON: 7 JULY 2023

EMPLOYMENT JUDGE: MR M EMERY

REPRESENTATION:

For the claimant: Mr P Powlesland (counsel)
For the respondent: Mr A Leonhardt (counsel)

REVISED REMEDY JUDGMENT

The respondent, having failed to reinstate the claimant, shall pay the following sums to the claimant

Basic award: £15,417

Compensatory award: £38,432,36

Addiational award: £25,124

Total:

Claimant's gross weekly salary:

Calcauation:

Basic award

The form ET1 states the Claimant's date of birth as 1 December 1958. The Respondent recognises that the Claimant's period of continuous employment was 20 years. Both parties agree that the EDT was 19 July 2022. For the purposes of the basic award, a weeks' pay is capped at £571. 10. The basic award calculation is 30 weeks' pay. $30 \times £571 = £17,130$. 11. In its liability judgment, the Employment Tribunal assessed the Claimant's contributory fault at 10%. $£17,130 \times 90\% = £15,417$. 12. The Claimant's basic award is therefore calculated at £15,417.

Compensatory award

13. The Respondent is willing to concede that the compensatory award should be made at the statutory cap of 52 weeks' gross pay. 14. $52 \times £739.08 = £38,432.36$. This is the statutory cap of the compensatory award. There is no scope to adjust the compensatory award above £38,432.36 (whether by grossing up or otherwise). 15. The Claimant's compensatory award is therefore calculated at £38,432.36.

Pin 3609

Hearing. 23 Oct 2023

C is not here as yet – C Counsel believes that she should be attending
Mr P Powlesland – C counsel
Mr G Welch – C witness

Mr A Leonhardt – R counsel

C not able to join – but C has done witness statement – but query whether required.

All is agreed – apart from the issue of the 26 v 52 week issue

R – that weeks pay for the additional award - £571 – subject to statutory cap.

Additional award – the non-compliance with reinstatement. Not subject to statutory cap on compensation award. But there is a statutory cap on the amount of the weeks pay should be capped. Statute states that it should be 'a weeks pay' –

Should be a weeks pay – not additional benefits - s220.

2nd point – a supposition - ? whether should be reduced to 'a weeks pay' - £571 – statutory cap; or £793.08.

2nd issue – number of weeks – purpose behind provisions – it's a wide discretion – not bound by the following principles – it's a punitive and not compensatory award.

It's either financial loss or injury to feelings award. Financial loss – UD remedy of 1 year. And arbitrary to disregard simply on

These are not case law – these are the issues which I consider you should use. Case law says that it should not be a precisely calculated substitute for financial loss. But what would be just is effectively to look at this as a punitive matter punishing for non-compliance. As compensated for financial loss in the same way – fact sought reinstatement not exposed her to financial losses above even if not reasonably practicable.

So not a compensatory purpose...

Another basis – 'compensation' for injury etc. resisted – there is no scope for injury to feelings award. So arbitrary and unfair.

So principle facts to consider is the conduct of R throughout. Always case that UD unfair and R wanted jona nd reasonably pracitcab;le to do so and Order not complied with. This is bare minimum – so no aggravating factor – not to extend – this is the bare minimum for any award. So little to justify more – as R not done more wrote.

Eg R's genuine belief in serious misconduct and C contributed – 10%. So not a case where dislissal was egregious or aggravated. And at remedy – that R ahd. Agenuine belief that not treasonably practicable. Albeit not unreasonable. What would justify higher award?

18 Julu note – reinstatement unliely – did not want C waiting for an unfavourable decision. And R acted tranpartently and witj ointention of awarding unnecessary upset.

No aggravatged dismissal, R has engaged throughout ET process. So 26 weeks is appropriate.

Judeg – lenth of losses- any bearing

Can't say no – but what would be just is it shold not – because none of this is affected by fact

Judeg 0 fact hta R would be in role and being paid if reinstated

R Shold give little eithight in comparison to reaonsabs for non-compliance ...

C –

weekly pay – agree – para 17.4 – IDS hanbdbook – s.220-29 ERA – current cap.

The number of weeks – disagree with R's suggestion that compensation not relevant. It's a blend of botih R's reasons and effect on C.

The compensatory award is aimed to when reinstatement shodl have taken palce. Compensatory award is up to reinstatement, and then no losses. And further losses (and distress) is erlevant to this matter as well as R's reasonsas.

Effect on C – it is more than average. C is genuine to have role back. Loved job. So huge emotional wrench, also a financial loss – age and job history means she will struggle to get another role. And has not done so. Likely she will not before retirement. Therefore failure to reinstate caused loss to retirtement. Had she been reinstated would be receiving wages to retirement. So effect o nC can be taken into account; plas age and jprob history so unkluely to get ananother role – again take this into account.

R's conduct – to reiterate findings of ET. Belief of witness put foperward was judged to be genuine, but not rationa beucase of location and nature of that witnessers role – she worted in another part of company and no day to day interactions for C. And no further evidence from r of anyone who would be a mangare of C should she return. This could have dealt with C's return, the staff petition, R failed to provide. So evidence they provided is not relevant or rational; R's failure to privude addit evidence gives some basis to find that a wilful failure to reinstate, when it was practicable.

Also another role is available – practically possible to put C back into role.

So we only have R's reasoning a genuine but irrational belief of someone unconnected to C.

Judge – this witness talking about company
?

Yes, but this witness should be given less weight – this opinion was wrong – a more convincing explanation would be a LM manager who would be dealing with C day to day. Eg cogent if complainant still in place = 16 weeks may be reasonable. A genuine belief that C not appropriate should not be weighted as a reasonable excuse of R to not comply with Order.

And it's not 26 weeks unless you can show differently. It's a discretion that ET has – between 26 and 52. Should be towards 52.

Mr L – if reinstated, would get award if not gets a compensatory award.
And 2nd witness Ms Davidson.

In deciding what award to make, it is now well established that the tribunal has a wide discretion (see *Mabirizi v National Hospital for Nervous Diseases* [1990] IRLR 133, [1990] ICR 281, EAT; *Morganite Electrical Carbon Ltd v Donne* [1987] IRLR 363, [1988] ICR 18, EAT, and *Motherwell Railway Club v McQueen* [1989] ICR 418, EAT). In *Mabirizi* the EAT (Knox J presiding) stated that the purpose of the additional award is not to provide a 'precisely calculated substitute for financial loss' but rather to provide a general solatium to be fixed depending upon the merits of the case.

In *Donne* it was held that in fixing the amount of the additional award, a proper assessment and balancing must take place. The conduct of the employer in refusing to comply with the tribunal's order and the employee's losses are particularly material.

[2436]

Notwithstanding the scope of the discretion, however, the following principles emerge from the cases. First, the award is not intended to cover something which is adequately and properly covered by the compensatory award. Second, the award is not intended merely to cover any additional loss suffered by the failure to reinstate or re-engage. Third, an important factor to consider is the employer's conduct: a deliberate refusal to comply will justify a payment at the top end of the scale whereas if the employer genuinely believes that there is a good reason for refusing to comply, this is likely to count in his favour notwithstanding that the tribunal does not accept that it was impracticable to comply with the order. So, in the *Mabirizi* case the EAT held that the employment tribunal were entitled to take into account the fact that the employers refused to reinstate because they genuinely believed that trust and confidence had broken down (though in many cases this will be sufficient in any event for the employers to establish that it was not practicable to reinstate). Finally, the tribunal is entitled to take into account the extent to which the claimant has failed to mitigate his loss, at least provided it is used as a general factor going to the merits of the case rather than as a precise factor producing a quantifiable reduction (see the *Mabirizi* case). It was also held in *Mabirizi* that the employee may not ask for a renewed order that they be reinstated or re-engaged. However, the tribunal should not pitch the award at a high rate in order to effectively compel compliance with the re-employment order (*Morganite*).

Noted evidence of Ms Davidson

Q so respect but ignore.

A and no acknowledgement and understanding of impact, do not know how we would help her alleviate her back. Bullying and harassment. There are procedural implications of GM, but there is also the whole picture...

Q so main reason why not think C could be reengaged is 5 a-c.

A and one more – but also incredible because no indication from C that she agrees with anything that we have said – so no understanding – so for us to facilitate her back – given what she has said this morning, is not an

Q so that no admitted to wrongdoing

A yes

Q but a – c not obj to reengaging given they go against judgment –

A my views remain the same. Then matter

...

Award – 44 weeks pay $44 \times 571 = £25,124$

Reasons – clear claimant suffered losses and will do to retirement age. Not the only reason can award –

Also considered reasons of R is saying not practicable. And find that R was demonstrating what it said C was guilty of. No view that it may take some effort, but it was practicable, and petition etc – and must consider that the reasons are irreconcilable held...

So award is £53 k plus £25k.

The respondent is ordered to reinstate the claimant on or before **15 September 2023**.

The respondent is ordered to pay to the claimant back pay, benefits and pension contributions in the sum of **£50,894.64**

Summary Reasons

1. At the remedy hearing I provided reasons for the Order for Reinstatement. The outstanding issues were the calculation on salary and benefits, whether a date for reinstatement could be agreed between the parties.
2. The respondent has indicated it does not agree with the Order for reinstatement and may challenge it. It has provided salary, benefit and pension figures and calculation. The claimant was invited to comment on the figures, her representative says it does not agree with them but has provided no alternative figures or sums.
3. The respondent provided a suggested date for reinstatement. Unfortunately, that date has now passed and the revised date is above.
4. The figures presupposes that no pay award has been made for any period as stated by the respondent in its submission. If that is now wrong, the parties are expected to agree the revised figures.

The law

5. *Employment Rights Act 1996 .s114 - Order for reinstatement*

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) 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 reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) 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 reinstatement 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.

The calculation

6. The salary & benefits calculation

- a. Date of dismissal 19 July 2022; Date of reinstatement 15 September 2023 = 424 days
- b. Gross salary at dismissal £28,510 per annum
- c. Attendance allowance of £4,506 pa
- d. London allowance of £3,348 pa
- e. Travel pass, rail leisure card etc. £4,000 pa

- f. Gross salary and benefits - **£40,364**
- g. Daily salary rate $40,364/365 = £110.59$
- h. $£110.59 \times 424 =$ **£46,890.16**
- i. The sum at (h) to be subject to the deduction of tax and national insurance as though the claimant was an employee throughout the relevant period.

7. Pension calculation

- a. Figures provided by pension fund on 17 July 2023 (363 days):
Employee contribution: £1,371.33
Employer contribution: £2,057.03
- b. Total annual contributions $£3,428.36 / 363 \times 365 = £3,447.25$
- c. $£3,447.25 / 365 \times 424 =$ **£4,004.48**

EMPLOYMENT JUDGE EMERY

Dated: 1 September 2023

Judgment sent to the parties

On
17/11/2023

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For the staff of the Tribunal office

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Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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