Neutral Citation Number: [2025] EAT 48

Case No: EA-2023-001338-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 March 2025

Before:

HIS HONOUR JUDGE TAYLER

- -

Between:

WEALMOOR LIMITED

Appellant

- and -

MR R PONIATOWSKI

Respondent

- -

Mr E McFarlane (Peninsula Business Legal Services Ltd) for the **Appellant**
Mr R Poniatowski the **Respondent** appeared **in Person**

Hearing date: 12 March 2025

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The Employment Tribunal erred in law in grossing up the totality of an award of injury to feelings without making an attribution between pre-dismissal conduct and the dismissal. The Employment Tribunal failed to explain why it concluded that the respondent had not established that the claimant had failed to mitigate his loss of earnings.

HIS HONOUR JUDGE TAYLER:

1. This is an appeal from a remedy judgment of Employment Judge Childe, sitting with members, after a hearing on 6 October 2023. The judgment was sent to the parties on 9 October 2023. The claimant succeeded in claims, including failure to make reasonable adjustments and discrimination because of something arising in consequence of disability in respect of his dismissal. The claimant also succeeded in a complaint of unfair dismissal for which was awarded a basic award and loss of statutory rights. The claimant succeeded in a claim of wrongful dismissal. The respondent accepts that the awards that have not been the subject of this appeal are payable to the claimant. I can see no good reason why those sums that are not challenged in this appeal should not be paid immediately.

2. The grounds of appeal challenge two facets of the remedy decision. Firstly, the award of injury to feelings was grossed up in its entirety. It seems likely that the award related to the failure to make reasonable adjustments prior to dismissal and to the dismissal itself. The relevant provisions that deal with taxation of payments on the termination of employment are the Income Tax (Earnings and Pensions) Act 2003, in particular, sections 401, 403 and 406. Section 406 provides that injury includes injured feelings. HMRC has provided guidance in respect of the taxation of termination payments that deals with this issue. The relevant guidance note is EIM12965. Awards of injury to feeling short of dismissal are not taxable, whereas those that relate to dismissal are.

3. I consider that the first ground of appeal is made out. The Employment Tribunal did not consider whether the totality of the award of injury to feelings would be subject to tax and so should be grossed up. The tribunal should have considered whether to apportion the award and only to gross up the element that related to dismissal.

4. The second ground of appeal relates to the approach that the Employment Tribunal adopted to loss of earnings and the contention on the part of the respondent that the claimant

had failed to mitigate his loss. The claimant states, and I accept, that this was a matter in respect of which the tribunal received a considerable amount of evidence in which he contends that he demonstrated that he had taken all reasonable steps to find employment but had not been able to do so. The claimant contends that the respondent had failed, the burden being on them, to establish that he had not mitigated his loss.

5. An Employment Tribunal must set out sufficient reasoning so that a party that has lost on an issue or claim knows why they have lost. The Employment Tribunal dealt with mitigation at paragraph 39, where it stated:

> Having regard to these factors, we find that the claimant has taken reasonable steps to mitigate his losses and the respondent has not established that he has failed to mitigate them. Accordingly, we award the claimant his full loss of earnings to date.

6. The Employment Tribunal also went on to award six months' future loss of earnings. The Employment 'Tribunal made a positive finding that the claimant had taken reasonable steps to mitigate his loss but said nothing whatsoever about what those steps were, what the evidence was, and whether the evidence was accepted. The Employment Tribunal referred to having regard to "these factors" but when one reads the judgment as a whole, it is impossible to know what factors the tribunal had regard to. I regretfully conclude that the Employment Tribunal's reasoning is so inadequate that the appeal on this ground must be allowed. Accordingly, I allow the appeal on both grounds.

7. The respondent contended that remission should be to a differently constituted Employment Tribunal because of the extent of the errors, it being contended that the decision was fundamentally flawed. While I consider that the reasoning in respect of the taxation of injury to feelings and mitigation of loss was inadequate, those are only some of the matters that were considered in the judgment. Having had regard to the relevant factors set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, I have concluded that it is appropriate to

remit the matter to the same Employment Tribunal. It is in accordance with the requirement for proportionality because the Employment Tribunal has already heard evidence about mitigation and may be able to deal with the matter solely on the basis of any further submissions. I consider that there is no reason to believe that the Employment Tribunal will not apply a professional approach to considering the matter on remission. The Employment Tribunal is likely to have a full note of the evidence that was given and so will be able to reach a decision in all likelihood without any requirement for further evidence.

8. Accordingly, the appeal is allowed. The matter is remitted to the same Employment Tribunal to deal with these two points in respect of apportionment of injury to feelings and consideration of mitigation of loss.