Neutral Citation Number: [2023] EAT 72

Case No: EA-2022-000541-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 May 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

UNIVERSITY OF HUDDERSFIELD **Appellant**

- and –

MR J DUXBURY **Respondent**

- -
- -

David Sillitoe (of Robinson Ralph Solicitors) for the **Appellant**
No attendance or representation for the **Respondent**

Hearing date: 25 April 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 16 May 2023 on 10:30am

SUMMARY

Unfair Dismissal – Non-Compliance with Reinstatement Order – Compensatory Award – Application of the Statutory Cap – Section 124 ***Employment Rights Act 1996***

The respondent having failed to comply with a reinstatement order, the Employment Tribunal ("ET") proceeded to make basic, compensatory and additional awards; in so doing, it disapplied the statutory cap that would otherwise apply to the compensatory award, to make an award equal to the sum that would (had the claimant been reinstated) have been payable under section 114(2) of the **Employment Rights Act 1996** ("ERA"), namely £67,469.78. The respondent appealed.

Held: *allowing the appeal*

In the present case, aggregating the compensatory award with the additional award produced a total sum of £90,832.81, which was considerably in excess of the amount that would have been payable pursuant to section 114(2) **ERA**. In the circumstances, the adjustment to the statutory cap on the compensatory award (in this case, one year's pay (£63,532.81), pursuant to section 124(1) and (1AZ) **ERA**), allowed under section 124(4) **ERA**, was not "*necessary*" to ensure that the aggregate of that award and the additional award fully reflected the sum payable under section 114(2). The appeal would therefore be allowed and the ET's compensatory award of £67,469.78 set aside and substituted by a compensatory award of £63,532.81.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal concerns the calculation of the compensatory award due in circumstances in which there has been a failure to comply with an order for reinstatement; in particular, as to the application of the statutory cap under section 124 **Employment Rights Act 1996** ("ERA").

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the respondent's appeal against the judgment of the Employment Tribunal sitting at Leeds on 4 January 2022 (Employment Judge sitting with lay members Mrs Anderson-Cole and Mr Smith; "the ET"), sent to the parties on 21 January 2022. By that judgment, the ET made a compensatory award to the claimant in the sum of £67,469.78. The respondent appeals against that award, arguing that it should in fact have been limited to £63,532.81. The difference in calculation represents a difference in the approach taken to the statutory cap that is imposed on compensatory awards under section 124 **ERA**.

3. Both parties were represented before the ET; the respondent's interests at the 4 January 2022 hearing were represented by Mr Sillitoe, as today, and the claimant appeared by counsel. Although those acting for the claimant have entered a respondent's answer, formally resisting the appeal, the claimant does not seek to advance a positive case on the appeal and has not attended today or made any written submissions.

The Background and the ET's Decision and Reasoning

4. From 1 July 2005 until his dismissal on 16 January 2020, the claimant had been employed by the respondent as a senior lecturer. Following his dismissal, the claimant pursued ET proceedings and, after a hearing in April 2021, he was found to have been unfairly dismissed. An initial remedy hearing took place on 27 July 2021, when the ET made a reinstatement order, under section 113(a) **ERA**, requiring that reinstatement should take place no later than 10 August 2021. Pursuant to section 114(2) **ERA**, the ET further specified that the respondent was to pay to the claimant the appropriate

sum that he might otherwise have expected to receive but for his dismissal, for the period between the date of termination of employment and the date of reinstatement. On the agreed calculation, the amount thus ordered under section 114(2) came to £67,469.78.

5. On 30 July 2021, the respondent wrote to the claimant's solicitors confirming that it would not reinstate the claimant. The claimant sought enforcement of the ET's order and this matter duly returned to the ET for a further remedy hearing on 4 January 2022.

6. The ET did not accept that it had not been practicable to reinstate the claimant and proceeded to make the following awards: (i) a basic award of £11,025; (ii) a compensatory award of £67,469.78; (iii) an additional award of £27,300 (52 weeks' pay).

7. It was the respondent's case that, pursuant to section 124(1ZA)(b) **ERA**, the compensatory award should be capped at one year's gross pay, which came to £63,532.81. The ET disagreed, setting out its reasoning (so far as relevant) as follows:

> "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, … 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.
> …
> 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 ...
> 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 [v National Westminster Bank [2004] EWCA Civ 1563] is Section 124 (4) of the Employment Rights Act 1996…

> 22. … 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 [in Parry]. …
>
> > "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."

8. The respondent applied for a reconsideration of the ET's decision on this question but that was refused by a further judgment of 1 March 2022.

The Challenge on Appeal and the Respondent's Submissions in Support

9. The respondent's sole ground of appeal relates to the ET's approach to the application of the statutory cap in the circumstances of this case. It is the respondent's submission that the ET erred in

law in applying a statutory cap to the compensatory award by reference to the sum awarded under section 114(2) **ERA** 1996 rather than by reference to section 124(1ZA)(b) **ERA** 1996. This was a case where the aggregate of the statutory maximum compensatory award and the additional award (£63,532.81 + £27,300, totalling £90,832.81) already exceeded the amount that had been specified as payable under section 114(2)(a) (£67,469.78) and, therefore, section 124(4) **ERA** did not apply: it was not necessary for the limit otherwise imposed by section 124 to be exceeded.

10. The respondent submits that the approach it contends is consistent with the relevant case law: see **Selfridges Ltd v Malik** [1997] IRLR 577 EAT and **Parry v National Westminster Bank plc** [2004] EWCA Civ 1563. Moreover, it was in keeping with the language of the statute, which made clear that section 124(4) **ERA** was not applicable in these circumstances.

Discussion and Conclusions

11. Having found the claimant's claim of unfair dismissal to be well-founded, the ET had proceeded to make an order for reinstatement under section 113(a) **Employment Rights Act 1996** ("ERA"). As provided by section 114 **ERA**:

> "(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.
> …"

12. Pursuant to section 114(2), it was common ground that the amount payable for the relevant period would have been £67,469.78.

13. Where an employer does not comply with the ET's order for reinstatement, section 117 **ERA** provides:

> "…

> (3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated … 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, …
> …"

14. On an employer's failure to comply with a reinstatement order, the ET should then proceed to make an award of compensation and (where the employer cannot show that reinstatement had not been practicable) an additional award. The additional award will be subject to the statutory limitation set out at section 117(3)(b). As for the compensatory award, the ET is required to calculate the sum due in accordance with sections 118 to 126 **ERA**.

15. Section 118 provides:

> "(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(*a*) the award shall consist of—
> …
> (*b*) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

16. By section 123, it is then stated (relevantly):

> "(1) Subject to the provisions of this section and sections 124, 124A and 126 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
> …"

17. The ET's discretion in determining the amount of the compensatory award (as otherwise provided by section 123) is thus subject to section 124 **ERA**, which provides for a limit (or cap) on the compensatory award, as follows:

> "(1) The amount of—
> (*a*) any compensation awarded to a person under section 117(1) and (2), or
> (*b*) a compensatory award to a person calculated in accordance with section 123,

> shall not exceed the amount specified in subsection (1ZA).
> (1ZA) The amount specified in this subsection is the lower of –
> (a) £93,878, and
> (b) 52 multiplied by a week's pay of the person concerned.
> (1A) Subsection (1) shall not apply to compensation awarded, or a compensatory award made, to a person in a case where he is regarded as unfairly dismissed by virtue of section 100, 103A, 104H, 105(3) or 105(6A).
> (2) …
> (3) …
> (4) 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*) or section 115(2)(*d*).
> ..."

18. Section 124 **ERA** was the subject of consideration by the EAT (HHJ Clark presiding) **Selfridges Ltd v Malik** [1997] IRLR 577. In that case, on the employer's failure to comply with an order for reinstatement, the ET made the following awards: (i) a basic award of £1,845; (ii) compensation in the sum of £25,042.89 pursuant to section 114(2) **ERA**; (iii) a compensatory award to the maximum then allowed, £11,300, to compensate the employee for future losses arising after reinstatement had been due to take effect; and (iv) an additional award of the maximum then allowed, £5,460. The EAT held that the ET had erred by treating the section 114(2) loss as a freestanding head, to be awarded whether or not the reinstatement order was complied with, when the award made under section 114(2) **ERA** would only stand if the reinstatement order was complied with; in cases of non-compliance, the loss addressed by section 114 would form part of the compensatory award made under section 117(3)(a), along with any loss post-dating the date for compliance.

19. As for the application of the statutory cap to the compensatory award in these circumstances, the EAT noted that the precursor to section 124(4) **ERA** (originally, section 74(8) of the **Employment Protection (Consolidation) Act 1978**, introduced by section 30(3)(b) of the **Trade Union and Employment Rights Act 1993**) had been intended to address a specific problem (identified by Lord Donaldson MR in **O'Laoire v Jackel (No. 1)** [1990] IRLR 70) arising from the fact that the section

114(2) award fell aside in circumstances in which an employer failed to comply with an order for reinstatement. In such a case, the employee's remedy lay in claiming a basic award, a compensatory award and an additional award; the employee could not, in addition, recover payment of the arrears of pay and benefits assessed under section 114(2). That meant, however, that (prior to the 1993 amendment) the statutory cap would apply to the compensatory award, which would, in some instances, make it cheaper for the employer to decline to reinstate the employee and pay the maximum compensatory award, together with an additional award and a basic award, rather than to comply with the reinstatement order and pay the sums due under section 114(2).

20. Having identified the mischief that section 124(4) (and its predecessor) was thus intended to address, the EAT in **Malik** concluded, as follows:

> "(1) the s.114 loss is payable on reinstatement by the employer pursuant to the tribunal's order.
> (2) if the order is not complied with, the applicant is entitled under s.117(3) to a compensatory award calculated in accordance with ss.118 - 127, together with an additional award in accordance with s.117(5)(b) and a basic award.
> (3) By s.123 the gross compensatory award, in this case, will include the s.114 loss and the future loss calculated by the tribunal, as well as the loss of statutory rights.
> (4) However, that compensatory award is limited by s.124. It is not limited to £11,300.00 by s.124(1) because of the overriding provisions of s.124(4).
> (5) Section124(4) provides that where, as here, the compensatory award is made under s.117(3)(a) the limit under s.124(1) may be exceeded to the extent only of the s.114 loss *less* the additional award made under s.117(3)(b). …"

21. Allowing the employer's appeal, the EAT substituted the awards made by the ET with the following: (i) a basic award of £1,845.00; (ii) a compensatory award of £19,582.89 (the claimant's losses as calculated under section 114(2) **ERA**, less the additional award); (iii) an additional award of £5,460.00.

22. The EAT's approach in **Malik** was approved by the Court of Appeal in **Parry v National Westminster Bank plc** [2004] EWCA Civ 1563, holding that the ET in that case had similarly erred in making *both* an award in respect of section 114(2) losses, notwithstanding that the reinstatement order had not been complied with, *and* a compensatory award (in the statutory maximum).

23. In the present case, the ET did not fall into the same error as that which arose in **Malik** and

Parry; it recognised that, the respondent having failed to comply with the reinstatement order, the sums that would otherwise have been due under section 114(2) fell to be treated as part and parcel of the compensatory award to which the claimant was entitled, pursuant to section 117(3)(a) **ERA**. In the normal course, a compensatory award would be subject to the statutory cap, as provided by section 124(1) and (1ZA) **ERA**; in this case, if applicable, the relevant statutory cap was agreed to be one year's gross salary. As section 124(4) **ERA** makes clear, however, the statutory cap may be adjusted in cases where there has been a failure to comply with an order of reinstatement and (i) a compensatory award is being made pursuant to section 117(3)(a), together with (ii) an additional award under section 117(3)(b); in such cases, the ET is entitled to make an award above what would otherwise be the applicable statutory cap to ensure that the aggregate of the compensatory and additional awards reflect the amount that would have been payable under section 114(2) had the order been complied with. That is necessary to address the mischief identified in **O'Laoire (No.1)**: Parliament plainly did not intend the application of the statutory cap to positively disincentivise employers from complying with ET orders for reinstatement.

24. In the present case, the amount that would have been due pursuant to section 114(2) exceeded the statutory cap for a compensatory award under section 124(1) and (1ZA). The ET considered, however, that the adjustment allowed under section 124(4) meant that that limit could be exceeded to ensure that the amount of the compensatory award it made fully reflected the losses it had identified under section 114(2). It thus made a compensatory award in the sum of £67,469.78.

25. The problem with the ET's approach in this case was that it ignored the additional award that it was also making pursuant to section 117(3)(b). The adjustment to the application of the statutory cap permitted by section 124(4) applies "*to the extent necessary*" to ensure that "*the aggregate of the compensatory and additional awards fully reflect*" the section 114(2) sum. In the present case, aggregating the compensatory award, at what would otherwise have been the statutory maximum (£63,532.81), with the additional award (£27,300) produced a total sum of £90,832.81. Given that this was considerably more than the sum identified as payable pursuant to section 114 (£67,469.78),

it was not "*necessary*" for the limit otherwise imposed by section 124(1) (the statutory cap of one year's gross pay) to be exceeded.

26. That the operation of section 124(4) requires consideration to be given to both the compensatory and the additional awards is apparent from the statutory language, but was further underlined in the guidance provided by the EAT in **Malik** (see subparagraph (5) of the citation set out at paragraph 20 above). In **Malik** the aggregate of the compensatory and additional awards fell short of the sums assessed under section 114(2); as such the cap that would otherwise have applied pursuant to section 124(1) (£11,300) could be exceeded, but *only* to the extent necessary to ensure that the aggregate total of the compensatory award *and* the additional award reflected the section 114(2) sum. Contrary to the ET's understanding, I consider that was also the point made in **Parry**. The concern that had been expressed by Maurice Kay LJ was that "*the amount specified under s. 114(2) was being lost as a result of the statutory cap*" (see paragraph 17). The reassurance provided by counsel for the employer demonstrated how section 124(4) ensured that could not occur, albeit that that might mean that other elements of the compensatory award would be irrecoverable because of the operation of the statutory cap. The protection thus provided by section 124(4) means – as was recognised in both **Parry** and **Malik** – that the statutory regime does not provide an employer with a financial benefit from a failure to comply with a reinstatement order. In assessing whether that is the case, however, regard is to be given to the total sum that the employer will be required to pay, taking account of *both* the compensatory and additional awards. It is only where that aggregated total falls short of the sum that would have been payable under section 114(2) that it will be necessary for the statutory limit otherwise imposed on the compensatory award to be exceeded.

Disposal

27. For the reasons provided, I allow the respondent's appeal and the ET's compensatory award of £67,469.78 is set aside and substituted by a compensatory award of £63,532.81.

Costs

28. At the end of the oral hearing, Mr Sillitoe made an application on behalf of his client for costs, pursuant to rule 34A **EAT Rules 1993**. It is said that it had been unreasonable conduct for the claimant to decline to respond in any substance to the appeal. In particular, reliance was placed on an email exchange between the parties of 11 and 16 November 2022. This was initiated by those acting for the claimant, who made an offer to effectively split the difference between the ET's award and the sum the respondent contended. The respondent did not accept that offer and, responding "*without prejudice save as to costs*", stated that the appeal should be allowed by consent.

29. I do not consider it is necessarily unreasonable for a party responding to an appeal to take a neutral position, but not concede the appeal. In the circumstances of the present case, I am also not persuaded that the without prejudice correspondence changes the position. The reality is that the respondent would still have had to incur its costs regardless of the claimant's stance: allowing an appeal means the overturning of a judicial decision and, as the **EAT Practice Direction 2018** makes clear (see paragraph 17.3), it will usually be necessary that the matter be heard. Given the claimant's neutral position, it might have been open to the respondent to seek to have this appeal determined on the papers (thus at least saving its costs of attending the hearing) but this was really a matter for it. I am not satisfied that the conduct of the claimant in these proceedings can be described as unreasonable so as to engage the EAT's costs jurisdiction.