Neutral Citation Number: [2022] EAT 84

Case No: EA-2018-SCO-000095-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 1 June 2022

Before :

THE HONOURABLE LORD SUMMERS

- -

Between :

MRS O DAFIAGHOR-OLOMU **Appellant**
- and -
COMMUNITY INTEGRATED CARE **Respondent**

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- -

Mr M Allison (instructed by Livingstone Brown Solicitors) for the **Appellant**
Mr A Hardman (instructed by Wrigleys Solicitors LLP) for the **Respondent**

Hearing date: 20 January 2022

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JUDGMENT

SUMMARY

[TOPIC NUMBERS] 11 – Unfair Dismissal , 8 – Practice and Procedure

The EAT considered the meaning of s. 124(5) of the **Employment Rights Act 1996** and concluded that payments to account should be deducted from the overall award before the applying the statutory cap even if that meant that the employer did not get any benefit from payments to account. The EAT further considered the circumstances in which an employee had the right to reconsider a judgement and concluded that reconsideration was not possible under the **Employment Tribunals (Constitution and Rules of Procedure) Regulations** 2013/1237, Schedule 1 paragraph 72 if it could not alter the outcome of the remedies hearing absent a change of position in the employee's evidence. In such a situation there was no reasonable prospect of the original decision being varied or revoked. The respondent cross appealed and submitted that it was not competent for the ET to review the issue of compensation since the EAT had directed it only to consider the question of re-engagement. But the EAT was satisfied that the wording of the statute permitted the ET to make a further compensation order if, of new, it refused re-engagement.

THE HONOURABLE LORD SUMMERS:

Introduction

1. In this case the appellant was held to have been unfairly dismissed. Thereafter she sought compensation and an order for re-engagement. The Employment Tribunal ("ET") awarded compensation and refused to order re-engagement (the "First Remedies Hearing").

2. The appellant appealed the ET's decision. Her appeal was successful and the case was remitted back to the ET for a further remedies hearing (the "Second Remedies Hearing"). On 28 August 2018 the ET awarded compensation to the appellant but again refused to order re-engagement.

3. The appellant sought reconsideration. Two applications were lodged. The Employment Judge ("EJ") denied reconsideration of both by decisions dated 17 and 18 September 2018. The Appellant has appealed the Judgement of the ET dated 28 August 2018 and the reconsideration of 18 September 2018.

4. A challenge to the competency of the appeal by the respondent was resolved by an earlier decision of the EAT (UKEATS/0036/18/SS).

5. I should note at this stage that the appellant's immigration status played a part in the hearings in the ET. The appellant's leave to remain in the UK had expired. The ET decided that it should disregard the appellant's immigration status in deciding whether to order re-engagement. The appellant does not challenge that decision.

The Interpretation of s. 124(5) of the Employment Rights Act 1996

6. It is convenient to dispose of the appellant's argument about the interpretation of s. 124(5) of the **Employment Rights Act 1996** at the outset before turning to the ET's decision to disregard "fresh

evidence". The Act requires the compensatory award to be "just and equitable" (s. 123(1)). The following section states at subsection 124(5) -

> **124 (5) The limit imposed by this section applies to the amount which the employment tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—**
> **(a) any payment made by the respondent to the complainant in respect of that matter, and**
> **(b) any reduction in the amount of the award required by any enactment or rule of law.**

The ET came to the view that the first compensatory award was deficient. In light of further evidence adduced at the Second Remedies Hearing it increased the total award to £128 961.59 (paragraph 84). The respondent had paid the award made after the First Remedies Hearing. This was in the sum of £46 153.55. The issue in dispute between the parties was whether the ET should have deducted the payment of £46 153.55 from £128 961.59 and then awarded compensation of £74 200, which represented the statutory cap. Mr Allison on behalf of the appellant submitted that this approach was required by s. 124(5). It was submitted that the "amount" to which the statutory cap applied was the total compensatory award "after taking into account" "any payment made by the respondent to the complainant in respect of that matter" (s. 125(a)). The payment of £46 153.55 was such a payment. The words "after taking account" meant that this figure had to be deducted. This brought the total award down to £82 808.04. The appellant submitted that the ET should then have applied the statutory cap of £74 200. In that situation the appellant would receive a payment of £74 200.

7. Mr Hardman submitted that this approach was not required by the wording of the statute. I summarise his submission as follows. The words "taking into account" necessitated the deduction of the sum already paid to the appellant. If this sum was ignored no "account" would have been taken of it. The appellant's approach did not give credit to the respondent for the payment of the first award.

Since the maximum sum the appellant was entitled to receive was £74 200 the respondent had in effect been penalised for complying with the ET's order at the First Liability Hearing.

8. I have some sympathy with the respondent. I am sure the respondent did not foresee that if a Second Remedies Hearing was held, the ET would re-visit not only the issue of re-engagement but also the appropriate compensatory award. Had it foreseen this possibility the respondent would probably have declined to make payment until the compensatory order became final. In the events that have happened it has ended up paying £46 153.55 plus £74 200 instead of £74 200.

9. I have come to the view that Parliament's intention was that the ET should calculate the employee's total compensation and then subtract from it any prior payments of the sort covered by paragraphs (a) and (b). At the hearing of the appeal it did not seem to me that this approach "took account" of the payments made by the respondent since it gave them no credit for their payment and made no difference to their liability. But this may be to look at matters from the respondent's perspective. By taking account of these payments before applying the cap the appellant is benefitted and the disparity between her loss of £128 961.59 and the sum paid is diminished. The ET therefore fixes the sum that it would apart from the statutory cap award by way of compensation and applies the cap "after taking into account" prior payments as identified in s 124(5)(a) and (b). The cap is then applied to that figure.

10. Although the words "taking into account" are somewhat nebulous I am satisfied that they refer to a reduction in the sum due. I note that s. 124(5)(b) refers to a "reduction". It would appear to me that both sub-paragraphs are designed to perform the same purpose namely to identify sums that must be deducted from compensation. I also note that in s. 115(3) the words "take account" are used with the explicit purpose of reducing the employer's liability where the employee has received e.g. wages

in lieu of notice. Thus although at the hearing I was attracted to the idea that "taking account" did not necessarily involve a deduction, I am persuaded that the appellant's construction is correct.

11. I accept that the ET was obliged to award a sum that it considered just and equitable. But I do not accept that this enables me to avoid the approach required by the wording of s. 124(5). What is just and equitable is dependent on a variety of matters. I am sure the appellant considers it just and equitable that she receives as much of her total loss as is possible.

12. That said I have considerable sympathy for the respondent. In paying the award fixed by the ET after the first Remedy Hearing it complied with it perceived to be its duty. No doubt it did not foresee that as a result of the appeal on the question of re-engagement, the ET would revisit the question of compensation and award a higher figure that would have the effect of depriving the respondent of the benefit of the payment.

Fresh Evidence

13. The ET's judgement of 28 August 2018 sets out the evidence adduced by the parties in connection with re-engagement. The respondent produced two job vacancy lists. The first dated 29 June 2018 and the second dated 7 August 2018. The appellant's evidence in relation to the first vacancy list was as follows -

> **"The claimant was not interested in a post (at Support level or Senior Support worker level). The claimant identified two posts which she considered would have been suitable…" (paragraph 44)**

The appellant therefore rejected posts that on the face of it were comparable to her grade and identified two posts she thought were suitable to her. The respondent did not think she was qualified to fill the posts she identified. The ET agreed. By the time of the remedies hearing in August 2018 these posts were no longer available (paragraph 47). The appellant's evidence in this connection was

> **"A new list of vacancies was provided to the Tribunal on 7 August. This list appeared to show that the two roles which the claimant had identified as potentially suitable from the 29 June list were no longer available. Like the previous list most of the roles were at Support Worker or Senior Support Worker level. The claimant was not interested in any such roles" (paragraph 47).**

The appellant was only interested in a Service Manager's post in South Liverpool. The respondent did not think she had the skills or experience for this post. The ET agreed and concluded she was not equipped for this post (paragraph 53). The role was more senior than that which she had occupied at the time of her dismissal. The ET considered whether training might have enabled her to fulfil the relevant criteria but came to the conclusion that this was not a realistic option (paragraph 73). It noted that the ET had to act responsibly in ordering re-engagement. The respondent was engaged in providing care to the elderly and vulnerable. This was a highly regulated sector of the employment market. The ET did not think it could in this circumstance hope for the best and make an order that ignored the appellant's lack of management experience. The ET stated -

> **"The Tribunal did consider whether it would be possible to make an order that the claimant be re-engaged to some other role. Whilst at first sight this had some attractions the Tribunal decided on further examination that it was not practical for us to do this. The first reason was that the claimant had now seen two different vacancy lists which were dated some two months apart each having around 200 vacancies. In the view of the Tribunal the claimant had not identified a vacancy from either of the two lists which would be a suitable vacancy to which she could be re-engaged. It is clear from the terms of section 115 that we are required to take into account any preferences expressed by the claimant, it appeared to the Tribunal that if we made some kind of generic order for re-engagement then there was actually little likelihood of a vacancy coming up within the near future which would be suitable in terms of being something that the claimant was prepared to accept and that it would be reasonable to reinstate her to" (paragraph 75).**

14. It is clear from this paragraph that the ET considered the unwillingness of the appellant to consider other posts was an obstacle to an order for re-engagement. The ET could have pronounced an order identifying the sorts of jobs that the ET considered were suitable to her qualifications and

experience but since the appellant had only been willing to accept a post that was in the ET's view beyond her qualifications and experience, the ET decided it could not order re-engagement. The ET noted that the same issue had accompanied the first list of vacancies. The ET refused to order re-engagement.

15. The appellant moved to reconsider. The **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237**, Schedule 1 provide at paragraph 72 -

> **"(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application."**

The EJ sitting alone issued two reconsideration judgements dated 17 and 18 September 2018. The EJ dismissed the motions to reconsider. The EJ did not think that there was any reasonable prospect of the original decision being varied or revoked.

Mr Allison for the appellant indicated that he did not challenge any part of the first reconsideration judgement. The appellant did however challenge the second reconsideration judgement of 18 September 2018 and submitted that the ET should examine fresh evidence that new jobs had been advertised by the respondent since the second Remedies Hearing at the same grade as the post previously filled by the appellant. The appellant submitted that they were suitable to the appellant and not beyond the appellant's skills and experience. In particular none of them suffered from the problems identified in the Liverpool South job considered by the ET in its judgement.

16. In the second reconsideration judgement the ET noted that it had sat on a number of occasions to deal with the issue of remedy. After the first remedy hearing the appellant had appealed to the EAT. The case had come back to the ET for a second remedy hearing (paragraph 6). Borrowing language used in **Flint v Eastern Electricity Board** [1075] ICR 395 at pp. 404D-405B it described the reconsideration a "second bite at the cherry" (paragraphs 4 and 6). The ET noted that if it admitted the evidence of further vacancies and permitted the appellant to submit that some of these were suitable to her, a new hearing would have to be fixed. The respondent's position was that the new vacancies were not suitable. If the fresh evidence was to be considered a further hearing would have to be convened to assess the parties' competing submissions.

17. The EJ took the view that if he allowed the motion there was no reason why, if the appellant failed, she should not lodge a further motion to reconsider based on further job vacancies. The respondent was a large business and further job opportunities would continue to become available. The ET thought that allowing the motion for reconsideration would open the door to further litigation. He thought this would offend the principle of finality of litigation. The EJ held -

> **"The claimant has had a full opportunity to argue for re-engagement. The hearing has been completed and the respondent and the public are entitled to consider that that is the end of the matter. It is my view that the arguments in favour of finality are so certain in this case that I can say that there is no realistic prospect of the Tribunal granting a reconsideration simply on the basis that other jobs have now been advertised which the claimant considers are suitable to her and which the respondent consider would not be suitable to her" (paragraph 9).**

18. The appellant submitted that the EJ had erred in deciding that there was unlikely to be any further vacancies that were suitable to the appellant (paragraph 75 second Remedies Judgement). This submission was based on the proposition that there was bound to be more job opportunities. The respondent waswas a large employer and it was only reasonable to suppose that further opportunities would arise.

19. I consider that the appellant has misinterpreted the ET's decision. The ET accepted that new jobs would become available that were in theory comparable to her previous position. The difficulty was that the appellant had formed an unrealistic view of the types of job that were suitable to her (paragraph 77 of Second Remedies Judgement). The ET detected the same attitude in relation to the first list of vacancies (paragraph 69 of the Second Remedies Judgement). The ET's conclusion that "there was little likelihood of a vacancy coming up within the near future which would be suitable in terms of being something that the claimant was prepared to accept and that it would be reasonable to reinstate her to" (paragraph 75) was based on what the appellant was "prepared" to accept. Thus while the ET accepted that new jobs would continue to become available that might in theory be suitable to the appellant the EJ thought that there was no "realistic prospect" of engagement because the appellant's perception of her capability did not match the view of the ET or the respondent.

20. The appellant submitted that the ET fell into error of law in assessing whether the principle of finality of litigation applied because the ET took account of the second remedy hearing (paragraph 6 of second reconsideration judgement). I accept that ordinarily it will not be relevant to take account of a prior remedies hearing where, as here, the only reason it has been necessary to convene a second remedies hearing is because the appellant has successfully appealed the result of the first remedies hearing. If the ET's conclusion at the first remedies hearing has been shown to be faulty then the appellant should be regarded as entitled to a second remedies hearing. In such a situation any delay in the proceedings has not been caused by the fault of the appellant and should not be held against the appellant.

21. I note however that the EJ does not focus on the procedural steps as such but on the period of time taken by the steps. Thus in paragraph 6 he narrates the time occupied by these steps of process. It would appear to me that an EJ is entitled to have regard to the slow progress of a case even when that has not been due to the fault of any party. Mr Hardman accepted during the appeal that the slow

progress had not been the fault of the appellant. Nevertheless there may be circumstances where the rate of progress has been so slow that delay may be a factor in entertaining a motion for reconsideration. Given that the hearings were not lengthy and that the delay has been primarily due delays in scheduling hearings, I am not persuaded however that this factor would have justified the decision to refuse reconsideration.

22. The appellant submitted that the EJ erred in saying that the appellant had a "second bite at the cherry" (paragraph 6). This figure of speech is borrowed from **Flint** (above). The appellant argued that this was a reference to the second remedies hearing and implied that the ET regarded it as an indulgence that counted against reconsideration. For the reasons given above I accept that where the appellant was entitled to the second remedy hearing because of her successful appeal this "second bite at the cherry" should not be a factor that counts against the appellant.

23. The EJ also took the view that the appellant was not entitled to rely on the fact that new job opportunities had emerged since the Remedies Hearing. In a large organisation it was inevitable that new jobs would be advertised. If the emergence of new jobs was a sufficient basis for granting reconsideration then there would be a conveyor belt of reconsideration hearings and the principle of finality of litigation would be confounded. I agree that it is not sufficient to submit that new opportunities have emerged since the remedies hearing. I accept that there may be circumstances that might justify reconsideration. If re-engagement was refused because the job was unusual and no suitable opening existed at the time of the remedies hearing, reconsideration might be possible if it was represented that a suitable job had arisen after the hearing. The EJ might be disposed to grant reconsideration and convene a fresh hearing to see whether a suitable job had in fact emerged. An ET might consider that the employee's application to be re-engaged should not be frustrated by bad timing. I can also see that if a job emerged after the remedies hearing that the respondent accepted was appropriate reconsideration would be appropriate. I do not detect anything of a similar nature in

this case. There was nothing to suggest that the first or second job lists were unrepresentative or that the new list produced by the appellant was not similar to those that had gone before. The EJ reasoned that the appellant's motion would mean that the appellant could reconsider "again and again" (paragraph 8). The EJ's point is to an extent a rhetorical one. In practice the ET's patience would run out even if it did grant reconsideration. I do not consider that there was a real prospect of a conveyor belt of reconsideration motions. The EJ's underlying point however was a good one. If reconsideration could be justified on the basis of new job opportunities emerging that superficially matched the appellant's job grade, and that was all that was needed to justify reconsideration, then logically reconsideration might follow reconsideration. I accept that this would not be consistent with justice and would not be consistent with the principle of finality of litigation.

24. Although the appellant made no submission to this effect, it might be thought that the appellant should be given an opportunity to take a more realistic view of her capabilities if it was evident from the vacancy lists that there were jobs which on a more realistic view of her capability could have been the subject of a re-engagement order. It seems clear that she was qualified for some of the jobs that were available on both lists. The ET was satisfied that it could have ordered her re-engagement. The difficulty was that because of her expectations, an order for re-engagement was not going to be practicable and a generic order would be futile (paragraph 75 second Remedies Judgement).

25. In making an order for re-engagement the tribunal is required under the **Employment Rights Act 1996** to take account both the wishes of the employee (s. 116(3)(a)) and the practicability of re-engagement for the employer (s. 116(3)(b)). The ET took account of the difficulties the appellant's attitude created (paragraph 77 second Remedy Judgement).

26. As I have sought to explain the reason that the ET held that it was unlikely there would be further job opportunities was not because more jobs would be advertised but because of the disparity between the appellant's perception of her skills and experience and the perception of respondent and ET. The EJ does not perhaps emphasise this feature as much as he might have done but it was plainly on his mind. At paragraph 8 of the second reconsideration judgement he states as follows -

> **"There is a mismatch between the respondent and the claimant as to the claimant's general capabilities to carry out a role in which she has no experience"**

27. This conclusion is an insuperable obstacle for the appellant. A further reconsideration could only benefit the appellant if she changed her stance. I have no indication that the appellant has changed her stance. But even if she had I am not persuaded that reconsideration hearings may be used by parties to change position on a matter that has been determined.

28. While I do not criticise the appellant for having a "second bite at the cherry" and am satisfied that she was entitled to conduct the Second Remedies Hearing, I do consider that the principle of finality of litigation is germane to the appellant's application to reconsider. The respondent does not accept that the four jobs identified by the appellant on the new list are suitable. If reconsideration was granted a further remedies hearing would be required to assess the parties' competing positions. **Flint** emphasises the need for finality in litigation. This is underscored by Underhill P in **Newcastle Upon Tyne City Council v Marsden** [2010] ICR 743 at para 16. Plainly if I allowed the appeal further litigation would ensue. In these circumstances I consider that the EJ was entitled to exercise his discretion as he did.

29. The decision to refuse to order re-engagement and the decision to reconsider are discretionary in nature. Where a discretion is engaged the appellant must be able to demonstrate that the decision is manifestly wrong. I am not satisfied that she has done so. As I have explained there were

considerations that justified the course taken by the EJ and I do not consider that in these circumstances it would be proper to interfere with the exercise of his discretion.

Cross Appeal

30. The respondent submits that the ET was not entitled to increase the amount of compensation in its second Remedies Judgement since the remit from the EAT directed it to consider the question of re-engagement not compensation. I do not consider that this is correct. The ET pointed out that s. 112(3) and (4) of the **Employment Rights Act 1996** require the ET to consider compensation if it decides not to re-engage (paragraphs 60-62). On this view of matters the ET was compelled to revisit the question of compensation in light of the further evidence it had heard. In any event the EAT did not express any view on whether the ET should revisit compensation. That matter was left open. I consider that the ET was correct in reaching the conclusions set out in paragraphs 60-62. The cross appeal must fail.

Conclusion

31. In the result I shall vary the ET's order in connection with compensation in its judgement of 28 August 2018 and refuse the respondent's cross appeal. The appellant is entitled to payment of £74 200. I shall refuse the appellant's appeal against the judgement of 28 August 2018 and the ET's refusal to reconsider of 18 September 2018 insofar as the appellant sought to challenge the ET's refusal to order re-engagement.