Neutral Citation Number: [2025] EAT 3

Case No: EA-2022-SCO-000110-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 7 January 2025

Before :

THE HONOURABLE LORD COLBECK

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Between :

DANNY DUPLOYEN **Appellant**

- and –

WHYTE & MACKAY LIMITED **Respondent**

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Mr Danny Duployen, the **Appellant**
Kerry Norval (Burness Paull LLP) for the **Respondent**

Hearing date: 24 October 2024
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JUDGMENT

The Honourable Lord Colbeck:

Introduction

1. The appellant was employed by the respondent, as a forklift truck / warehouse operator, from 20 March 2017 until the termination of his employment on 29 September 2021. The relevant aspects of the circumstances of the termination of the appellant's employment are considered below.

2. The appellant brought claims of constructive dismissal and disability discrimination against the respondent. Following a hearing in Glasgow on 27 – 29 June and 15 August 2022, before Employment Judge Strain and members, in a judgment sent to parties on 29 September 2022, the tribunal held that the appellant was constructively dismissed, upheld the appellant's claims of disability discrimination and ordered payment of both a basic award and a compensatory award.

3. In a reconsideration judgment dated 5 April 2023 and sent to parties on 26 April 2023 the tribunal made certain minor revisions to its judgment but otherwise confirmed it.

4. The appellant appeals against the decision of the tribunal on five grounds – (i) the tribunal erred in not ordering re-instatement, which failing (ii) re-engagement; (iii) the tribunal erred in assessing the award for injury to feelings at the lower band; (iv) the tribunal erred in its approach to mitigation of loss; and (v) the tribunal erred by failing to consider adding interest to the awards for injury to feelings and financial loss for discrimination. I consider each ground in turn.

Re-instatement

5. In the final (un-numbered) paragraph of its judgment, the tribunal accepted the respondent's submission that reinstatement should not be ordered on the basis that the relationship between the parties had clearly broken down. This was said to be evident from the appellant's submissions and evidence as to the credibility of his line managers and their treatment of him during his employment with the respondent. The appellant describing one as unhelpful, unpleasant and that they made the appellant feel that he was a nuisance. The tribunal concluded that reinstatement was not reasonably

practicable.

6. In relation to the issue of re-instatement, first, the appellant argued that the tribunal misapplied the law in reading "reasonably practicable" as meaning “reasonable” whereas it should have determined it as meaning “possible”. Second, he argued that the tribunal failed to take into consideration a material factor, namely, that the appellant had made it clear that he would put the dispute behind him and get on well with his manager if re-instated.

7. The respondent argued that the appellant’s interpretation of the applicable statutory provision was without foundation. They further argued that the tribunal had carefully considered this issue and, in effect, reached a decision it was entitled to on the evidence.

8. What is “reasonably practicable” is a question of fact, and a matter for the tribunal to decide. In **Asda Stores Ltd v Kauser**, unreported [UKEAT/0165/07/RN] 15 October 2007, at paragraph 17, Lady Smith explained the test in the following way: “… the Court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.”

9. In argument, the respondent relied upon the Court of Appeal’s decision in **Coleman v Magnet Joinery Ltd** [1975] ICR 46 in which the court considered the relevant legislation in force prior to s.116 **ERA** (s.106(4) of the **Industrial Relations Act 1971**), which also used the word ‘practicable’. The court held that the term “practicable” in this context means not merely “possible” but “capable of being carried into effect with success”.

10. The tribunal had the benefit of hearing evidence relevant to the issue of re-instatement. In considering whether to make an order for reinstatement, the tribunal is required to take into account whether the complainant wishes to be reinstated; whether it is practicable for the employer to comply with an order for reinstatement, and, where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement. On the reasoning of the tribunal, the third consideration did not arise in this case. The appellant wished to be re-instated,

however, the tribunal formed the view that it was not practicable for the respondent to comply with an order for reinstatement.

11. The appellant’s argument that the tribunal misapplied the law in reading "reasonably practicable" as meaning “reasonable” whereas it should have determined it as meaning “possible” is misconceived, As explained by Lady Smith in **Asda Stores Ltd** it is not simply a matter of looking at what was possible but of asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done. The conclusion reached by the tribunal on the issue of re-instatement (see paragraph 5 above) was to the effect that, on the facts found, whilst re-instatement was “possible” it was not reasonable to expect it to be ordered.

12. In respect of the first ground of appeal the tribunal did not err.

Re-engagement

13. The issue of re-engagement was not addressed by the tribunal in its judgment. In the reconsideration judgment (at paragraph 51) it did not accept that it should have automatically considered re-engagement when it was not sought by the appellant (even where the appellant was unrepresented). In any event, had the remedy been sought the tribunal's decision “would have been the same” (by which I take the tribunal to mean that they would not have ordered re-engagement), on the basis that s.116(3)(b) **ERA** involves the same considerations of practicability for making a re-engagement order.

14. In relation to re-engagement, the appellant argued that the tribunal erred in law in concluding that it was not requiredto consider re-engagement following refusal of re-instatement (s.116(3)(b) **ERA**); and erred in law in finding that in applying the same considerations of practicability of re-instatement the same conclusion must follow. He contended that the tribunal had erred in law in failing to analyse at all whether it was impracticable to re-engage under reference to s.116(3)(b) **ERA**, as opposed to impracticable to re-instate, under reference to s.116(1)(b). The refusal to make an order for reinstatement arose out of a breakdown of the relationship between the appellant and line

management at the location where he worked. That would not have existed had the appellant been re-engaged at a different site as was proposed.

15. The respondent made, essentially, three points in relation to re-engagement. First, that the appellant did not seek re-engagement before the tribunal, depriving the respondent of the opportunity to put forward submissions / lead evidence on this point. Second, that even if re-engagement had been sought, it is reasonable to conclude that it would not have been granted standing the tribunal's findings about the breakdown in the relationship between the parties. Third, the tribunal addressed the issue of re-engagement at paragraph 51 of the reconsideration judgment, holding that, had the remedy been sought, the tribunal would have reached the same view as it did on re-instatement.

16. As noted above, the issue of re-engagement was not addressed by the tribunal in its judgment. In failing to consider re-engagement, the tribunal erred in law.

17. The starting point is s.112 **ERA**. Having concluded that the appellant's complaint of unfair dismissal was well-founded (as it did), the tribunal was required to explain to the appellant what orders may be made under s.113 **ERA** and in what circumstances they may be made; and to ask him whether he wished the tribunal to make such an order. It is only if the appellant had expressed such a wish, that the tribunal is entitled to make an order under s.113 **ERA**. If no such order is made, the tribunal makes an award of compensation for unfair dismissal.

18. The question of remedy is addressed at Part 9 of the ET1 form. In the present case, at the point of completing that form, the appellant sought neither reinstatement nor re-engagement. By the time of the hearing before the tribunal the appellant sought reinstatement (see judgment at paragraph 25) but not, it appears, re-engagement.

19. Once a tribunal is entitled to make an order under s.113 **ERA** (as it was in the present case), it has a discretion as to whether to make such an order. In exercising that discretion, the tribunal shall *first* (my emphasis) consider whether to make an order for reinstatement (see s.116(1) **ERA**). If the tribunal decides not to make an order for reinstatement, as it did in the present case, it shall *then* (my emphasis) consider whether to make an order for re-engagement and, if so, on what terms (see

s.116(2) **ERA**). It is important to stress that the tribunal is not in some way compelled to order either re-instatement or re-engagement, however, the terms of s.113 and 116 **ERA** are such that, where the tribunal is entitled to make an order under s.113 **ERA**, it must consider the former and, if in the exercise of its discretion it determines not to order re-instatement, it must then consider re-engagement.

20. In considering the question of re-engagement, the tribunal was required to take in to account three matters - any wish expressed by the appellant as to the nature of the order to be made, whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and where the appellant 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 (see s.116(1) **ERA**).

21. Having reached the conclusion it did on the question of re-instatement, by the time it came to its reconsideration the tribunal appears to have little more to proceed on that a stated wish on the part of the appellant to be re-engaged. The issue of re-engagement was not one that was explored in evidence before the tribunal. As the respondent rightly identifies, this deprived them of the opportunity to lead evidence on the issue, although they did have the opportunity to make submissions upon it at the point of reconsideration. In the circumstances of the present case, there was no evidential basis upon which the tribunal could order re-engagement. Those circumstances arose due to the manner upon which the appellant elected to present his case. The error identified at paragraph [16] above was remedied by way of the reconsideration judgement. The decision of the tribunal not to order re-engagement was the only one open to it on the evidence.

22. In respect of the second ground of appeal the tribunal did not err.

Injury to feelings

23. The tribunal held that the appellant suffered embarrassment, humiliation and distress as a consequence of the discriminatory treatment by the respondent. The tribunal observed that the appellant was occasioned stress, worry and upset, and that the treatment had a detrimental impact

upon his mental health and impacted upon his relationship with his wife. The tribunal concluded that the injury to feelings ought to reasonably be assessed at the upper end of the lower range in **Vento v Chief Constable of West Yorkshire Police** [2003] IRLR 102 and awarded the appellant the sum of £7,500 in respect of injury to feelings.

24. The appellant argued that in assessing the award for injury to feelings at the lower band, the tribunal erred in law in failing to assess and make any award for the loss of employment and concomitant hardship as a result of discrimination, in particular given the finding in paragraph (kk) and there being a section in the judgment on "financial losses for discrimination" at paragraphs 93 to 97 in respect of the pecuniary component of the compensatory award. He further argued that the tribunal had failed to apply the guidance in **Vento** that the lower band should be awarded for "less serious" cases such as isolated incidents. In conclusion, the appellant contended that but for the foregoing errors, the tribunal ought to have concluded that an award for injury to feelings in the middle band was appropriate.

25. The respondent argued that there is no evidence to suggest that the tribunal acted on a wrong principle of law or had misapprehended the facts or made a wholly erroneous estimate of the loss suffered. Whilst they accepted that the **Vento** guidelines state that the lower band should be awarded for "less serious" cases such as isolated incidents, the words 'such as' make it clear it is not confined to isolated incidents. The tribunal had specifically considered the question of injury to feelings.

26. The guidance in **Vento** (to be found at paragraphs [65] – [68] of the judgment of the Court of Appeal) identified "*three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury*". Put shortly, an award within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. This case does not fall within that band. The middle band is to be used for serious cases, which do not merit an award in the highest band. Awards within the lower band (adopting the terminology used in the present appeal) are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The Court of Appeal stressed

that within each band there existed considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. The essence of this ground of appeal is whether the present case falls within the middle or the lower band.

27. The tribunal had the benefit of hearing the evidence. It formed the view that the present case was a "less serious" one (adopting the description in **Vento**) and awarded compensation accordingly. That was a conclusion which was open to the tribunal. It was not a perverse conclusion. A perverse conclusion being one which no reasonable tribunal, properly directing itself on the law and on the materials before it, could reasonably have reached. It is not open to this tribunal to interfere with such a conclusion simply on the basis that it would have reached a different conclusion on the same materials.

28. In respect of the third ground of appeal the tribunal did not err.

Mitigation of loss

29. The tribunal found that the appellant had failed to mitigate his loss, having made few attempts to obtain alternate employment. It found that the appellant had only made five applications (over a period of nine months) since the termination of his employment. The tribunal opined that that was wholly inadequate. The tribunal determined that any financial loss should be restricted to six months, stating that the appellant ought to have been able to secure suitable alternative employment within that time frame.

30. The appellant argued that the tribunal erred in law in failing to follow the established principles of assessing what steps were reasonable, and whether the appellant would have actually mitigated his loss had he taken such steps, in that there was no such assessment at all. He further argued that the tribunal had failed to assess the reasonableness of the appellant's conduct in mitigation of loss. In conclusion, the appellant contended that but for the foregoing errors, the tribunal ought to have concluded that the appellant should have been awarded compensation for loss of wages for two

years, as he had claimed.

31. The respondent argued that the tribunal had considered matters properly. Simply because the appellant does not agree with the tribunal's assessment, does not give rise to a ground for appeal.

32. The facts upon which the tribunal reached its decision in this regard are not disputed by the appellant. It cannot be said that the conclusion was a perverse one. The tribunal had regard to the relevant facts and reached a decision which was open to it. The ground of appeal appears to amount to no more than a disagreement with the decision of the tribunal.

33. The fourth ground of appeal is without merit. The tribunal did not err in the manner suggested.

Interest

34. The appellant argued that the tribunal erred in law by failing to consider adding interest to the awards for injury to feelings and financial loss for discrimination. In the hearing of the appeal, the respondent conceded that the tribunal should have made such awards of interest, from the mid-point between the first discriminatory act (inviting the appellant to a disciplinary hearing on 9 July 2021) and the date of the tribunal's judgment. The appellant took no issue with this.

35. The first discriminatory act was on 9 July 2021. The date of the tribunal's judgment was 22 September 2022. The mid-point between those two dates is 14 February 2022. Interest will run on the awards for injury to feelings and financial loss for discrimination at the rate of 8% per annum from that date until payment.

36. In respect of the fifth ground of appeal, the judgment of the tribunal will be varied to the extent set out in the preceding paragraph.