Contractual redundancy pay and the statutory cap

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Ugradar v Lancashire Care NHS Foundation Trust UKEAT/0301/18

Facts

The Claimant was employed on “Agenda for Change” terms and conditions. Section 16 of those terms and conditions provided an entitlement to a contractual redundancy payment. The following are the salient features of that entitlement:

Firstly, the definition of redundancy and the conditions of qualification and entitlement broadly follow the statutory scheme set out in Part 11 of the Employment Rights Act 1996 ("the ERA"). For example, the right to a redundancy payment is extinguished if an employee unreasonably refuses to accept or apply for suitable or alternative employment within the same or another NHS employer. In addition, the contract provides that "suitable alternative employment" is to be determined by reference to Sections 138 and 141 of the ERA.

Secondly, however, the amount of redundancy payment is substantially higher than provided for by the statue. Paragraph 16.8 provides:

> *"---16.8. The redundancy payment will take the form of a lump sum, dependent on the employer's reckonable service at the date of termination of employment. The lump sum will be calculated on the basis of one month's pay for each complete year of reckonable service, subject to a minimum of two year's continuous service and a maximum of 24 years' reckonable service being counted.*
> *For those earning less than £23,000 per year (full time equivalent), the redundancy payment will be calculated using notional full-time annual of £23,000, pro-rated for employees working less than full time.*
> For those earning over £80,000 per year (full time equivalent) redundancy payment will be calculated using notional full-time annual earnings of £80,000, pro-rated for

> employees working less than full time. No redundancy payment will exceed "160,000 (pro-rata)."

Thirdly, there is an express provision governing the relationship between the contractual payment and the statutory payment. This provision is central to the appeal. It is contained in the last sentence of paragraph 16.1. Paragraph 16.1 reads as follows:

> “16.1. This Section sets out the arrangements for redundancy pay for employees dismissed by reason of redundancy who, at the date of termination of their contract, have at least 2 years of continuous full-time or part-time service. These take effect from 1 April 2015. It also sets out the arrangements for early retirement on grounds of redundancy and in the interests of the service, for those who are members of the NHS Pension Scheme and have at least two years of continuous full-time service and two years of qualifying membership in the NHS Pension Scheme. NHS contractual redundancy is an enhancement to an employee's statutory redundancy entitlement, the statutory payment being offset against any contractual payment."

The Claimant was employed by the Respondent with effect from 10 January 2005. By 2017 she was employed in a Band 8A position combining a management role with a clinical setting. However, this post disappeared in a re-organisation.

The Respondent put forward various alternative roles which the Claimant did not accept. When her employment terminated the Respondent declined to pay a redundancy payment alleging that she had unreasonably refused alternative employment. In due course the Claimant commenced Employment Tribunal ("ET") proceedings in which she claimed both the contractual redundancy payment and a statutory redundancy payment.

The ET

EJ Ross found that the employment the Respondent offered was not suitable and that the Claimant acted reasonably in refusing it.

The was though another issue between the parties. Whether the Tribunal was limited in its award as to contractual redundancy pay to £25,000 pursuant to Article 10 of the Employment Tribunal’s Extension of Jurisdiction (England and Wales) Order 1994. The Claimant sought £43,949.04 of which just £5868.00 represented the statutory redundancy payment. The Respondent argued that the claim was therefore in total limited to £25,000

(and not that plus the statutory redundancy payment). The Claimant argued for £25,000 plus the statutory redundancy payment. The difference between the parties had a value of £18,000.

EJ Ross accepted the Respondent's argument on the basis that the definition of a contractual and statutory payment is almost identical under the contractual scheme. Given that she concluded a contractual redundancy payment was payable and it included a statutory payment, in light of the wording of the contractual policy the Claimant was not entitled to receive a statutory redundancy payment as well. EJ Ross stated:

> *"90. The introduction to the contractual redundancy payment scheme specifically states*
>
> *"NHS contractual redundancy is an enhancement to an employee's statutory redundancy entitlement; the statutory payment being offset against any contractual payment."*
>
> *91. I find the statutory entitlement is subsumed into the contractual entitlement and that full entitlement is curtailed by the cap as described above."*

The EAT

The EAT concluded that the Claimant was entitled to be paid a statutory redundancy payment in addition to the contractual redundancy payment which was capped at £25,000.

On appeal (although not at the ET stage) the Respondent sought to rely on the doctrine of merger and the decision in ***Fraser v HMLAD Limited [2006] ICR 1395***. In Fraser, the claimant brought a wrongful dismissal complaint to the ET and recovered capped damages. Thereafter, he was barred from pursuing a further complaint in the civil courts for damages over and above the cap. It was held that his cause of action had merged into the Judgement obtained in the ET. Mummery LJ said:

> *"29. In my judgment, this was clearly a case of merger of Mr Fraser's cause of action for wrongful dismissal in the final judgment of the tribunal on the claim for wrongful dismissal as between the same parties as in the High Court proceedings. Merger was not prevented from taking place by the express statement in the ET1 that Mr Fraser expressly reserved his rights to bring High Court proceedings for the excess. The merger arose from the fact that the cause of action had been the subject of a final judgment of the tribunal. Once it had merged, Mr Fraser no longer had any cause of action which he could pursue in the High Court, even for the excess over £25,000. The claim for the excess is not a separate cause of action. The cause of*

action for wrongful dismissal could not be split into two causes of action, one for damages up to £25,000 and another for the balance. A claim in the High Court for the balance of the loss determined in the tribunal would have to be based on a single indivisible cause of action for wrongful dismissal."

The EAT distinguished ***Fraser*** on the basis that in the present case there were two causes of action: one contractual and statutory. Although they overlapped they were found not to be the same cause of action for the purposes of the doctrine of merger. Furthermore, in the present case the causes of action were pursued together. The mischief which ***Fraser*** seeks to limit is the bringing of successive litigation over the same issue. In the present case the ET should have given judgment which best reflected the obligation of the parties in respect of both statute and contract.

In respect of the statutory principles for a statutory redundancy payment the relevant provisions are as follows:

a) Part XI of the ERA sets out the scheme for statutory redundancy payments.

b) Section 135 provides the rights in general terms.

c) Sections 136 to 162 contain detailed provisions governing and qualifying the right.

d) Section 163 provides for the ET to have exclusive jurisdiction in respect of any question relating to entitlement and amount.

e) Section 164 provides the time limit.

Two specific features of the ERA were considered by the EAT. Firstly, there is a general restriction on contracting out in section 203 of the ERA. Any provision in agreement is void insofar as it purports to exclude or limit the operation of any provision of the Act or preclude any person from bringing proceedings before an ET (section 203(1)).

Secondly, there is an exception to this general restriction which applies to statutory redundancy claims; see section 203(2)(c) and Section 157. Section 157 permits the Secretary of State to make an exemption Order where there is a collective agreement making provision for termination payments. Some Orders have been made under this provision but none were applicable in this case.

The Claimant met the requirements of Part XI ERA for the payment of a statutory redundancy payment but no payment was made. A complaint was brought in time to the ET. The EAT stated it was the duty of the ET to determine the complaint (s163(1) ERA) and there was no basis upon which it could legitimately decline to do so. If the contract purported to restrict the rights of the Claimant to a statutory redundancy payment it was void by virtue of section 203 (in the absence of an order under s157).

In any event, para 16.1 of the Agenda for Change did not restrict the right to a statutory redundancy payment. It only provides for set off of that payment against any contractual payment.

In the present case, the Claimant was therefore entitled to the £25,000 (cap for the contractual payment) and the statutory redundancy payment. The cap does not apply to the statutory redundancy payment (para 25).

Discussion

Is the statutory cap on contract claims out of date? £25000 is a modest sum in the context of employment relationships. HHJ Richardson certainly thinks so and in his parting comments on this case made several critical comments about the cap being out of date and in need of revision:

> *"28. As we leave this case we would add the following comment. The statutory cap in the 1994 Order has remained unchanged for a quarter of a century. It seems only necessary to pass a statutory instrument to provide for a higher cap. The powers are now contained in Sections 3, 8 and 41 of the Employment Tribunals Act 1996. This case and the case of Eden to which we have referred, demonstrates that at its present level the cap is capable of producing real injustice. In order to bring the claim for a contractual redundancy payment before a Tribunal with relevant specialist experience, the two employees had to forego substantial parts of their contractual entitlement. If the statutory cap had been increased in line with inflation they would not have suffered these losses. The statutory cap is also out of step with the very much wider powers of the ET and in other areas of its jurisdiction."*

In my opinion, the cap is likely to be revisited to increase the jurisdiction of the ETs at some point in the future. However, alongside debates over increasing the time limits for discrimination claims which could increase case loads and the issues over administrative capabilities in the ETs it is unclear when this is likely to happen.

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