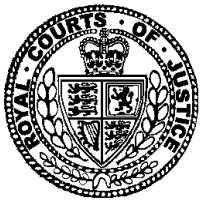

Neutral Citation Number: [2019] EWCA Civ 1060

Case No: C1/2017/2812

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
JAY J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE RAFFERTY
and
LORD JUSTICE FLAUX

- -

Between :

DR CATHERINE MACKENZIE	**Appellant**
- and -	
THE CHANCELLOR, MASTERS & SCHOLARS OF THE UNIVERSITY OF CAMBRIDGE	**Respondent**

- -
- -

Mr Aidan O'Neill QC (instructed by **Sinclairs Law**) for the **Appellant**
Mr Clive Sheldon QC (instructed by **Shakespeare Martineau LLP**) for the **Respondent**

Hearing date: 12 June 2019

- -

Approved Judgment

Revised – 22 July 2019

Lord Justice Underhill :

INTRODUCTION

1. This is the hearing of an application for judicial review, which has been retained in this Court under CPR 52.8 (6). The essential background can be summarised as follows.

   (1) The Claimant was until her dismissal with effect from 31 December 2013 employed by the University of Cambridge as a lecturer in law in the Department of Land Economy.

   (2) She brought proceedings in the employment tribunal claiming that she had been unfairly dismissed contrary to Part X of the Employment Rights Act 1996 ("the 1996 Act"). In the course of the hearing of that claim the University conceded liability.

   (3) Under the statutory scheme governing remedies for unfair dismissal, of which I give more details below, the Claimant had a choice whether to seek, on the one hand, an order for reinstatement or re-engagement (under sections 113-115 of the 1996 Act) or, on the other, a compensatory award. She chose to seek an order for re-engagement.

   (4) The University resisted the making of such an order on the ground that re-engagement would not be practicable. The tribunal rejected that argument. It held that although there had indeed been an irretrievable breakdown in the Claimant's relationship with a senior colleague there was no breakdown in the relationship of mutual trust and confidence between herself and the University more generally, which continued (and indeed continues) to engage her as a casual worker.

   (5) The tribunal accordingly made a re-engagement order. Para. 1 of the formal Judgment, sent to the parties on 8 December 2015, begins:

   > "Pursuant to s. 113 and s. 115 of the Employment Rights Act 1996, the tribunal orders that the Respondent is to re-engage the Claimant as a University Teaching Officer in the role of Lecturer."

   It goes on to provide for continuity of service. Para. 2 specifies the salary and other benefits which the Claimant is to receive. Para. 3 provides that the order "shall be complied with by 17th February 2016". At para. 15 of the Reasons the tribunal calculates the Claimant's pecuniary loss between the dismissal date and 17 February 2016 – "back pay" – as £102,901.43 (gross) and says that the University "is required to pay the Claimant [that sum] as part of the order for re-engagement".[1]

   (6) It is the University's case that the effect of the tribunal's order is not to impose an enforceable obligation on it actually to re-engage the Claimant but only to

[1] The reason why this does not form part of the Judgment itself appears to be because of certain observations of Lord Donaldson MR in the case of *O'Laoire* to which I refer below – see his judgment at p. 203 F-H; but it is unnecessary that I explain the point here.

render it liable for an "additional award", under section 117 of the Act, if it did not do so. It has declined to re-engage the Claimant and has paid her the net equivalent of £107,467.07, which it is common ground was the maximum amount payable under the applicable provisions.

2. On 19 October 2016 the Claimant commenced judicial review proceedings against the University in the Administrative Court challenging what she characterised as its "ongoing failure to comply with the Order of the Employment Tribunal that [she] be re-engaged as a lecturer …". The primary relief sought in her pleaded grounds is:

   (1) the quashing of the University's decision to refuse to comply with para. 1 of the re-engagement order;

   (2) a declaration that that refusal is unlawful.

   Two other heads of relief are also pleaded, but it is common ground that they are ancillary to the primary relief sought, and I need not set them out here.

3. Although the Claimant does not in terms seek a mandatory order that the University comply with the tribunal's re-engagement order the evident intention of the orders which she seeks is to compel it to do so; and Mr Aidan O'Neill QC, who appears for her before us, confirmed that it was his case that she would in principle be entitled to such an order – and to the remedies that would be available under the general law if it were not complied with. He acknowledged that the Court is not normally willing to grant an order for specific performance of a contract of employment, but he pointed out that that is not a universal rule and that in this case the employment tribunal had found in terms that re-engagement would be practicable.

4. Permission to apply for judicial review was refused on the papers by Morris J on 26 May 2017. The Claimant renewed the application at a hearing before Jay J on 10 October 2017 but permission was again refused. Both judges held that the remedies under the 1996 Act were exclusive and could not be enforced by proceedings in the High Court.

5. On 17 April 2018 Floyd LJ granted permission to apply for judicial review and, as already noted, directed that the application be retained in this Court.

6. The essential issue raised by the claim is whether the Claimant is entitled to relief in the High Court in relation to a right arising under the 1996 Act, and more particularly in relation to the enforcement of an order for re-engagement made by the tribunal under that Act. It is her case that she is so entitled as a matter of ordinary domestic law; but she relies also, so far as necessary, on sections 3 and/or 6 of the Human Rights Act 1998, on the basis that if she were not entitled to such relief her rights under articles 6 and 13 of the European Convention on Human Rights[2] and under article 1 of Protocol 1 to the Convention would be infringed.

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[2] She originally relied also on article 8, but shortly before the hearing of the appeal this part of the case was abandoned in the light of the recent decision of the Grand Chamber of the European Court of Human Rights in *Denisov v Ukraine* [2018] ECtHR 76339/11.

THE STATUTORY PROVISIONS

7. The statutory regime relating to unfair dismissal is contained in Part X of the 1996 Act. Chapter I provides for the right not to be unfairly dismissed. Chapter II, which comprises sections 111-132, is headed "Remedies for Unfair Dismissal".

8. Section 111 provides for the employment tribunal to have jurisdiction to determine claims of unfair dismissal: that is of course an exclusive jurisdiction.

9. Section 112 is headed "The remedies: orders and compensation" and prescribes the remedies that the employment tribunal can give where, in the exercise of its jurisdiction under section 111, it makes a finding of unfair dismissal. It provides that the tribunal shall first explain to the claimant what orders may be available under section 113 – that is (see below) an order for reinstatement or an order for re-engagement – and ask him or her whether they wish such an order to be made. If they do, the tribunal has a discretion whether to make an order. If it decides not to do so, it will make a compensatory award, in accordance with sections 118-126. Because the tribunal has to consider as a first step whether to make an order under section 113 (if sought), reinstatement/re-engagement is sometimes referred to as the "primary" remedy for unfair dismissal, but in reality such orders are only made in a very small minority of cases, either because claimants do not seek them in the first place or because tribunals decide not to make them.

10. Sections 113-117 form a group of sections under the heading "Orders for Reinstatement or Re-engagement". Section 113 identifies the two orders between which a tribunal can decide – an order for reinstatement and an order for re-engagement, with the detailed provisions about such orders appearing in sections 114 and 115 respectively. I will refer to the two together as "section 113 orders".

11. We are concerned with re-engagement. Section 115 (1) provides:

> "An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment."

Sub-section (2) requires the tribunal to specify the terms on which re-engagement is to take place and identifies certain matters which must be included. The only one to which I need specifically refer is (d), which reads:

> "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 re-engagement".

It was in accordance with that provision that the tribunal included in its Reasons the finding referred to at the end of para. 1 (5) above.

12. Section 116 contains provisions relating to the exercise by the tribunal of its discretion under section 113. I need only note that one of the factors which it must

take into account is whether it is practicable for the employer to comply with an order for reinstatement or re-engagement.

13. Section 117 is headed "Enforcement of order and compensation". It reads (so far as material):

> "(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if —
>
> (a) an order under section 113 is made and the complainant is reinstated or re-engaged, but
>
> (b) the terms of the order are not fully complied with.
>
> (2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.
>
> (2A) …
>
> (3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged 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 nor 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,
>
> (b) …
>
> (5)-(8) …"

14. It will be seen that section 117 covers two situations – first, where an order is made under section 113 and is not "fully" complied with (sub-sections (1) and (2)); and secondly where such an order is made but the complainant is not reinstated or re-engaged, in other words where the order is not complied with at all (sub-section (3)). We are concerned with the latter scenario. What the Act provides for in that case is:

(a) a compensatory award "calculated in accordance with sections 118 to 126", i.e. an ordinary compensatory award such as would have been made initially if no section 113 order had been made;

(b) an "additional award" of between 26 and 52 weeks' pay – *unless* the employer shows that it was not practicable to comply with the order (this being a separate exercise from any assessment of practicability conducted at the time the order was made).

15. The next part of Chapter II (sections 118-126) contains the provisions for assessing a compensatory award. I need not summarise them here, save to note that section 124 provides for a limit, the so-called statutory cap, which at the time of the tribunal's order in this case stood at (in the circumstances applicable to the Claimant) £74,200.

16. The final part of Chapter II (sections 127-132) concerns interim relief, in the form of an order that for certain limited purposes a claimant's contract of employment should "continue" pending the determination or settlement of his or her complain. Interim relief is only available in certain types of cases, into which the Claimant's case does not fall; but one aspect of the provisions relating to it is relevant to the issues before us – see para. 24 below.

17. I should finally note that section 15 (1) of the Employment Tribunals Act 1996 (not, N.B., the Employment *Rights* Act, with which we are otherwise concerned), which is headed "Enforcement", provides that any sum payable in pursuance of a decision of an employment tribunal (in England and Wales) shall be recoverable as if it were payable under an order of the County Court.

18. The statutory scheme as outlined above has formed part of the unfair dismissal legislation since the Employment Protection Act 1975.

CONSIDERATION OF THE CLAIM

19. I can, without disrespect to Mr O'Neill's very full written submissions, summarise his argument as follows. The starting-point was that the effect of section 115 is that an order for re-engagement creates an obligation on the employer to re-engage the employee and a correlative right in the employee to be re-engaged: he said that that was the clear meaning of the words used. It followed, he submitted, that that right must be capable of being enforced. He said that it was well-recognised at common law that there must be an effective remedy for the breach of any right: as well as quoting the maxim *ubi ius ibi remedium* he referred us to a passage in the speech of Lord Shaw in *Butler v Fife Coal Co Ltd* [1912] AC 149 (see pp. 178-9) and to the recent decision of the Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] ICR 1037. But he said that it was also clear from the Strasbourg case-law that the absence of the means of enforcing a Court order, and specifically an order for reinstatement of an unlawfully dismissed employee, was a breach both of article 6 of the Convention and of article 1 of Protocol 1. He took us in his oral submissions to *Ursan v Romania* (ECtHR 35852/04), but his skeleton argument refers to several other decisions which he submitted were to the same effect[3]. Since the scheme under the 1996 Act did not provide any mechanism in the employment

[3] For completeness, these were *Van der Hurk v Netherlands* (1994) 18 EHRR 481; *Hornsby v Greece* (1997) 24 EHRR 250; *Ghibusi v Romania* (2006) 43 EHRR 8; and *Fidanyan v Armenia* [2018] ECtHR 62904/12. He also referred to *Volkov v Ukraine* (2003) 57 EHRR 1, but the issues in that case were different.

tribunal for the specific enforcement of a re-engagement order, an employee whose employer had failed to comply with an order for re-engagement must be entitled, so that he has an effective remedy and in conformity with the requirements of the Convention, to invoke the procedures of the High Court[4].

20. In my view that argument fails at the first stage. Section 115 must be read in the context of the group of sections of which it forms part, and specifically of section 117. In my view it is clear when sections 115 and 117 are read together that an "order for re-engagement" is not intended to impose an absolute and indefeasible obligation on the employer to re-engage the employee, or a correlative right in the employee to be re-engaged. Rather, it creates a situation in which the employer must *either* re-engage the employee *or* become liable for the awards specified by section 117 (3), which include an additional award on top of what it would have had to pay if no re-engagement order had been made. In my view, the only natural reading of section 117 (3) is that the consequences for which it provides are the *only* consequences that follow from non-compliance with a re-engagement order, particularly bearing in mind that the section is headed "Enforcement of order …". Mr O'Neill submitted that it was necessary to treat sections 115 and 117 as wholly distinct – one providing for the substantive right, and the other for its enforcement. I do not agree. This group of sections constitutes a scheme in which it is necessary to construe any particular section in the light of the others. (I should say that although I have referred in the foregoing only to section 115, because that is what we are concerned with in this case, the same must go for orders for reinstatement under section 114.)

21. That conclusion in my view follows from the reading of the sections themselves, but it is reinforced by three other considerations.

22. First, if Mr O'Neill were right there would be a situation where rights created by the 1996 Act fell to be enforced by orders of the ordinary Courts. The statutory scheme of employment protection is intended to be entirely self-contained and fall under the exclusive jurisdiction of the employment tribunal: Mr Clive Sheldon QC, for the University, referred us to paras. 51-54 of the speech of Lord Hoffmann in *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, at pp. 542-4, but in truth the point is axiomatic. It is true that pecuniary awards of the tribunal are enforceable in the County Court (see para. 17 above); but that is the subject of express statutory provision, and there is no equivalent provision empowering the County Court, or indeed the High Court, to make an order for specific enforcement of a section 113 order. Further, the County Court procedures in question are enforcement procedures in the narrow sense: the employment tribunal has specified the amount payable, and the role of the Court is simply to see that payment is made. By contrast, what the Claimant is seeking from the High Court is not "enforcement" in that sense but a substantive order of that Court. It cannot be assumed that in such a case the Court could or should merely cut-and-paste the tribunal's order. At the very least it would be necessary for it to provide for a new date for compliance (the original date having, *ex hypothesi*, passed); but other elements of the section 113 order might require to be

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[4] It was put to Mr O'Neill that if his submission were right the proceedings in question would be of a private law character. He accepted that that was so, though he maintained that it had not been inappropriate to proceed in the present case by way of judicial review. I am not sure I agree with the latter point, but if this were his only difficulty the problem could probably be cured by an order under CPR 54.20.

re-visited as a result of the passage of time or other changed circumstances. We would thus have a situation in which the High Court was having to make decisions of a kind which would normally fall within the jurisdiction of the employment tribunal. That would be a unique hybrid and in my view unacceptable in principle.

23. Secondly, the provisions of section 117 are mandatory: both sub-section (1) and sub-section (3) provide that in the situations to which they apply (respectively, partial compliance and non-compliance) the tribunal "shall" make awards of the kinds specified. On the face of it, that would mean that an employee in whose favour a section 113 order had been made but which had not been complied with by the specified date would be entitled *both* to an order from the Court for specific performance *and* to a full compensatory award and additional award which the statute provides for only in the case where reinstatement or re-engagement has not occurred. That seems to me wrong in principle. Mr O'Neill submitted that that was the wrong analysis. The right to an award under section 117 (3) was intended to be additional to the right to be reinstated/re-engaged rather than in substitution for it. If the employee is in the end reinstated or re-engaged, albeit belatedly, that fact could be reflected in the amount of the compensatory award; and it was not inappropriate that the employer should have to pay an additional award as a penalty for its initial non-compliance. I cannot read section 117 (3) in that way. It seems to me clear that the awards for which it provides are indeed intended to be made as an alternative to actual reinstatement/re-engagement. On Mr O'Neill's reading the employee would have both the penny and the bun; and the fact that the penny could possibly be reduced to a halfpenny by an adjustment of the compensatory award (which would in any event only be possible if the award was made after the belated reinstatement/re-engagement) does not make that any more acceptable in principle.

24. Thirdly, as noted at para. 16 above, Chapter II includes elaborate provisions empowering the tribunal in special cases to impose by way of interim relief a continuation of the contract of employment, for limited purposes, against an employer who was unwilling to reinstate/re-engage the employee pending determination of the claim. That makes it even harder to accept that Parliament intended that employees should have an absolute right to re-engagement, on a final basis, and yet failed to make any explicit provision for it.

25. There are perfectly understandable reasons why Parliament should not have been prepared to empower tribunals to make specifically enforceable orders for reinstatement or re-engagement. As I have already mentioned, the law has always been very reluctant to countenance the making of orders requiring parties to continue in an employment relationship. Of course there are cases where for particular reasons such orders are acceptable, but there is nothing surprising in Parliament intending to legislate to give effect to the general rule and to rely on the mechanism of the additional award to incentivise employers to comply with a section 113 order. I accept that the phrase "*order* for re-engagement" may in that case be rather inapt; but ultimately what matters is not the label used but the substance of the provisions to which it refers.

26. Mr O'Neill made a further point based on the amount paid by the University to the Claimant in the present case – being, as I have said, the net equivalent of £107,467.07. The combination of the level of her earnings and the time that passed between her dismissal and the making of the re-engagement order meant that the amount of back

pay payable to her as specified in the Tribunal's Reasons – see para. 1 (5) above – was almost as much as the aggregate of the compensatory and additional awards payable under section 117 (3). It was common ground, following *Selfridges Ltd v Malik* [1997] UKEAT 1352/96, [1998] ICR 268, (approved in *Parry v National Westminster Bank plc* [2004] EWCA Civ 1563, [2005] ICR 396) that she was not entitled to both; the result being that in the events which had happened the University had had to pay only marginally more as a result of not complying with the order than it would have had to pay if it had done so. That does indeed appear to be a consequence of the way that the provisions are drafted, but it does not justify a departure from what I regard, for the reasons given, as the clear effect of the statutory provisions.

27. I have not so far referred to authority. But Mr Sheldon referred us to the decisions of this Court in *O'Laoire v Jackel International Ltd* [1990] ICR 197 and of the Employment Appeal Tribunal in *Mabirizi v National Hospital for Nervous Diseases* [1990] ICR 281. In neither case was the applicant seeking to argue that they could enforce an order for reinstatement/re-engagement in the ordinary courts, but in both the judgments contained reviews of the statutory scheme (then contained in the Employment Protection (Consolidation) Act 1978) which made it plain that the only remedy for non-compliance with such an order was under (what is now) section 117 (3).

28. In his judgment in *O'Laoire* Lord Donaldson MR said, at p. 203 C-D:

> "The Act provides no machinery for the specific enforcement of an order for reinstatement made under section 69 [now, section 114]. By contrast, it can, in effect, itself so order under sections 77(9) and 79(2)(a) [now, sections 128 and 130] in circumstances not here relevant and on an interim basis, by making an order for 'the continuation of the employee's contract of employment'. The absence of such machinery in general and the inclusion of an exceptional power of enforcement in exceptional circumstances is consistent with the general law which, subject to exceptions, does not permit courts specifically to enforce contracts of employment."

29. In *Mabirizi* Knox J said, at p. 284 G-H:

> "Section 69 (5) [now, section 116] provides for the industrial tribunal first to consider reinstatement and if that is not ordered then under subsection (6) to consider re-engagement. Section 71 [now, section 117] then deals with the enforcement of any such order and with compensation if the order is not complied with. There is no machinery for anything in the nature of an order for specific performance, whereas there is machinery through the county court for enforcement of the monetary part of a reinstatement order … ."

He also said, at p. 285 C-D:

> "In our view Parliament has based the provisions of sections 69 and 71 on the general principle that it is undesirable to compel parties to enter into a contract of employment. Subject to exceptions, the courts do not

> order specific performance of such contracts, for the same general policy reason."

30. *Mabirizi* is not of course binding on us, and it may be a nice point whether the relevant passage in *O'Laoire* is *ratio*. But the fact that both Lord Donaldson and Knox J understood the effect of the statutory scheme in the same way as I do, and for the same reasons, does at the very least strongly support the conclusion that I would in any event reach. In truth, as Mr O'Neill frankly acknowledged, that has been the general understanding of employment lawyers for over thirty years. He submitted that the orthodox view was based on an insufficiently close reading of the relevant provisions and/or, since 1998, on a failure to re-examine them in the light of the Human Rights Act. But for the reasons given I believe that the reason why it is the orthodox view is that it is right.

31. Once that point is reached, the rest of Mr O'Neill's submissions fall away. The reason why there is no statutory machinery for requiring an employer actually to re-engage an employee, as opposed to requiring it to pay an additional award, is that the statute on its true construction does not give him or her a right to be actually re-engaged. That being so, failure to re-engage does not represent a breach of any right and there is nothing for which an effective remedy is required.

32. It is for the same reason that the Strasbourg cases are not material. *Ursan* clearly proceeds on the basis that domestic law (in that case, Romanian) did empower the court, in an appropriate case, to make orders which gave a dismissed employee the right actually to be reinstated; and the same is true of the other cases identified in his skeleton argument but to which we were not taken in oral submissions. On that basis, the proposition that the Convention requires there to be an effective means of compelling the employer to comply with such an order is unexceptionable, whether it is put under article 6, article 13[5] or article 1 of Protocol 1. But the necessary premise is that that is the intended effect of the court's order; and that is not the case here. I did not understand Mr O'Neill to be submitting that a pecuniary remedy could not in principle be an effective remedy for an employee who is unfairly dismissed, either generally or on the facts of the Claimant's case – that is, that the Convention requires that an unfairly dismissed employee should be entitled to an order for "actual" reinstatement (at least where that has not become impossible); but in any event I can see no basis in the authorities for such a submission.

33. I have not found it necessary to refer to the *ex tempore* judgment of Jay J, though I would pay tribute to its clarity; but his reasoning essentially corresponds with my own. I would only mention one point. He accepted a submission from Mr Sheldon to the effect that the tribunal's order under section 115 imposed an obligation on the University to re-engage the Claimant but that that obligation was discharged by the payment of the amounts due under section 117 (3). I do not think that that is quite the right analysis. The position is not so much that the obligation is "discharged". (If it were, I would have thought the relevant event was not payment, but the making of an award under section 117 (3); and that in turn would create a problem in this case since no award was ever made, because the University paid the full amount without the

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[5] Article 13 is of course omitted from the Convention provisions scheduled to the 1998 Act, but it is recognised as having effect nevertheless: see, e.g., *Secretary of State for Defence v Al-Skeini* [2007] UKHL 26, [2008] AC 153.

Claimant having to go back to the tribunal.) Rather, for the reasons which I have given, the obligation is one that the statute does not intend should be specifically enforceable: the only remedy for non-compliance is the additional award. If that means that it is a rather unusual form of "order", so be it.

DISPOSAL

34. I would accordingly dismiss the Claimant's application for judicial review.

Lady Justice Rafferty:

35. I agree.

Lord Justice Flaux:

36. I also agree.