Covid 19 Employment Law Series
VI: Coronavirus & Loss of Earnings

Hari Menon, 7.4.20

PARKLANE PLOWDEN CHAMBERS

1. It is to be expected that the current pandemic will result in employers seeking to rely on economic hard times with a view to curtailing employees' claims for loss of earnings and financial benefits[1]. This will typically be through reliance on the contention that the employees would have been dismissed in any event and any compensation for loss of remuneration should therefore, be extinguished or reduced. In some cases, there will be genuine grounds for such a stance, whilst opportunism could be the driver in others. Thus far, there is no indication that significant job losses are predicted in central and local government and in public services sector. What is said hereafter is applicable principally to employment outside the public sector. This article deals both with ordinary unfair dismissal claim and claims in Great Britain based on protected status where there is no cap on compensation.

2. The basic proposition here is straightforward. This is: (i) that the loss of earnings claimed by the employee should be reduced; (ii) because he would have been dismissed in any event, at some point; and (iii) this is, in turn, because economic conditions attendant upon, and arising from, the pandemic have caused such an adverse effect on the employer's business that the employee was going to lose his job. The burden will be on the party advancing the argument i.e. the employer. It must be understood that all of this goes beyond a ***Polkey*** point and is an issue going to causation of loss. It encompasses the most egregiously unfair dismissals where the employer has not got the ghost of a chance of running any ***Polkey*** defence. An example would be an unfair dismissal based on direct sex discrimination.

[1] This includes benefits relating to employment e.g. private health insurance and loss of pension.

3. The precise situation can vary from the employer's operations closing down altogether to where it is still trading but has had to make redundancies in its set-up which (the employer claims) would have included the claimant.

4. The legal foundation for the basic proposition has a well-established pedigree:

    a. An employee will not be awarded compensation for a period after his employer's operation has closed down in its entirety[2]. This is the most straightforward case in principle.

    b. Other than the situation in a. above, the Tribunal is faced with making an assessment of the chances of the claimant continuing in employment and for how long. This is generally done by reference to the percentage chance of between 0% and 100% of the employee remaining in employment, and not on the basis of the balance of probabilities. That is so for both ordinary unfair dismissal claims[3] and those based on protected status[4].

5. Clearly, the easier task is faced by Tribunals which have to engage in prediction to a lesser degree. The simplest example is of an employer which has already gone into liquidation prior to the remedies hearing. It is quite clear here that any claim for loss of earnings could not go beyond the period after which the employer's business closed down[5].

6. Other scenarios range from an employer continuing without any job losses to one where the employer remains in business, but the employee's section or department has ceased to exist. In this latter category, the assessment of the employee's chance of remaining employed is analogous to consideration of a redundancy situation. The Tribunal will have to take into account issues such as suitable alternative employment, redeployment elsewhere in the employer's organisation and the employer's obligations in these respects.

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[2] ***James W Cook & Co (Wivenhoe) Ltd (in liquidation) v Tipper*** [1990] ICR 716, CA.

[3] e.g. ***Ministry of Justice v Parry*** [2013] ICR 311, EAT @para.46.

[4] e.g. ***Vento v Chief Constable of West Yorkshire Police*** **(No 2)** [2003] IRLR 102, [2003] ICR 318, CA @ paras 32–33.

[5] Other than for compensation in a sum representing what an employee would have been due under the statutory provisions relating to redundancy consequent upon the employer's insolvency (e.g. arrears of wages, accrued holiday pay and notice pay) had he remained employed until the closure. For more on this point see the earlier helpful article in this Covid 19 series by my colleague, Robert Dunn: "Insolvent Employers, Redundancy and the Coronavirus".

7. The fate of others in the employee's section or department may sometimes provide the Tribunal with valuable evidence about where to pitch its assessment of the loss of a chance. The principle that there is no need to gaze into the crystal ball when you can read the book will have a certain appeal for a Tribunal spared from the task of making a prediction. The fact that all others within the section or the department have been made redundant makes an employer's contention for the employee's loss of earnings to be limited intuitively attractive.

8. However, care should be taken to ensure that any comparison to other colleagues who have been made redundant are on a like for like basis. The fact that an employee is in a particular section or department does not mean all employees within it have the same skills, experience or ability to be deployed into alternative employment within the employer's organisation. Some employees are more able to be deployed into alternative employment than others.

9. In this connection and generally, the points worth considering are: (a) to what extent the employee's duties were, or the employee could have been deployed to, a sector not affected by closure under the relevant regulations in Great Britain[6] (e.g. services not caught by the regulations such as public utilities and others specifically exempted such as food retailers, pharmacies etc..); (b) the extent to which the employee could have been deployed into alternative employment in or serving such a sector whilst maintaining compliance with the regulations; and (c) to what extent the employee was providing services for key workers[7] or could have been redeployed into alternative employment providing such a service whilst maintaining compliance with the regulations.

10. Another important consideration is whether any dismissal could reasonably have been avoided if the employer had the option of putting the employee on furlough under the Coronavirus Job Retention Scheme[8]. The whole purpose of the scheme is to avoid mass redundancies and Tribunals should be encouraged to look closely at employers who make redundancies in situations where the employer had recourse to the scheme.

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[6] Under: reg.4, 5 & Sch.2 Part 3 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg. 3 & 4 Sch.1 Part 3 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, reg.2 & Sch. 1 The Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020.

[7] Current government guidance on key workers is at https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision

[8] See the forthcoming article in this series later this week on the Coronoavirus Job Retention Scheme by my colleague, Bryony Clayton.

11. A potential issue arises in relation to assessments of loss of earnings by Tribunals shortly before the appreciation of the full effects of the pandemic in the UK Such assessments would not have taken into account the potentially huge economic consequences on employers and on the viability of their businesses. An employer at the receiving end of a loss of earnings award not predicated on an economic crisis and who has shortly afterwards had to make employees redundant may have a justified sense of grievance. In these circumstances, an employee may, by the sheer good fortune of having a remedies hearing listed in say, early January 2020, receive something of a windfall[9].

12. The employer in such a situation is not wholly without recourse. Under r.70 of the ET Rules a Tribunal has the power to reconsider any judgment when it is in the interests of justice to do so. A decision may be susceptible to reconsideration if the basis of the Tribunal's assessment has effectively been falsified by subsequent events[10].

13. The power to reconsider is not open-ended without limit of time and the desirability of finality in litigation is an important consideration[11]. There is a length of time beyond which the Tribunal's failure to take account of the effects of the pandemic in its calculation is simply an error inherent in any form of predictive assessment[12]. This is likely to be the case for assessments which are not recent. For example, an assessment made 6 months ago is unlikely to be suitable for reconsideration. The 14 days' time limit for applications for reconsideration in r.71 can be extended under r.5, but employers should make an application for reconsideration without delay.

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[9] As opposed to a claimant who has the remedies hearing listed in say, March which has been adjourned and will not now be heard until October at the earliest, at which point the effects of Coronavirus on the employer's business may take centre stage.

[10] ***Yorkshire Engineering and Welding Co Ltd v Burnham*** [1973] IRLR 316, [1974] ICR 77, [1974] 1 W.L.R. 206 NIRC. This case concerned a review under the old rules – now a reconsideration. See also ***Ladup v Barnes*** [1982] ICR 107, EAT.

[11] See e.g. ***Ministry of Justice v Burton*** [2016] ICR 1128, CA @ para.21 also concerning review under the old rules.

[12] See ***Yorkshire Engineering and Welding Co Ltd v Burnham***, supra, @ 211E, 212E.