Neutral Citation Number: [2025] EAT 68

Case No: EA-2023-000837-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 May 2025

Before :

THE HONOURABLE MR JUSTICE CAVANAGH

- -

Between :

MRS S MOGANE **Appellant**

- and –

BRADFORD TEACHING HOSPITALS NHS FOUNDATION TRUST
(No. 2)

Respondent

- -
- -

ADAM OHRINGER (instructed by **Direct Access**) for the Appellant
JAMES BOYD (instructed by **DAC Beachcroft**) for the Respondent

Hearing date: 8 May 2025

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

This was a case in which the Appellant had been unfairly dismissed for redundancy. The Appellant was given an enhanced redundancy payment. The Employment Tribunal found that, if a fair selection procedure had been followed, there would have been a 50% chance that the Appellant would have been fairly dismissed. The Employment Tribunal assessed the Appellant's loss of earnings as a result of her unfair dismissal, applied the 50% **Polkey** discount, and then made a deduction equivalent to the entirety of the enhanced redundancy payment (above the level of the basic award), pursuant to section 123(7) of the Employment Rights Act 1996.

The Appellant contended that the ET erred in assessing the compensatory award due to the Appellant. In Ground 1, the Appellant contended that the ET should have assessed her loss, prior to the deduction in respect of the enhanced redundancy payment under section 123(7), as consisting of 50% of her loss of earnings, plus 50% of the value of her enhanced redundancy payment. The EAT rejected this argument, on the basis that this would involve giving credit, in the calculation of the Appellant's loss, for something that she had actually received, namely the enhanced redundancy payment. Also, the approach to calculation of loss put forward on behalf of the Appellant was incompatible with the approach that the ET was required to follow, in accordance with the judgment of the Court of Appeal in **Digital Equipment Co. Ltd v Clements (No.2)** [1998] ICR 258.

Ground 2 was that the reduction under section 123(7) for the enhanced redundancy payment actually received should itself be subject to the **Polkey** deduction, so that the Appellant's compensatory award should only be reduced by 50% of her enhanced redundancy payment. The Appellant accepted, rightly, that the EAT is bound by the Court of Appeal's ruling in **Digital Equipment Co. Ltd v Clements (No.2)** to reject this argument.

Appeal dismissed.

THE HONOURABLE MR JUSTICE CAVANAGH:

1. This appeal is concerned with how enhanced redundancy payments should be taken into account when calculating compensation for unfair dismissal, in circumstances in which the compensation is subject to a **Polkey** reduction. The point is a short but important one.

2. The Appellant was the Claimant below and I will refer to her as the Claimant in this judgment. The Claimant is represented by Mr Adam Ohringer of counsel and the Respondent by Mr James Boyd of Counsel. Both counsel appeared below. I am grateful to both of them for their clear, helpful, and concise submissions.

The proceedings below and the ruling under appeal

3. The Claimant commenced employment with the Respondent on 26 July 2016 as a Respiratory Research Nurse. She was dismissed for redundancy on 10 April 2020. The Claimant was one of two Respiratory Research Nurses, Grade 6, who were employed by the Respondent on fixed-term contracts. The Respondent decided that it needed only one such nurse, and selected the Appellant for redundancy, whilst retaining her colleague in employment. The Appellant was selected because her fixed-term contract was the one that was next due for renewal. The Appellant was paid an enhanced contractual redundancy payment which exceeded the statutory redundancy payment entitlement by £17,431.88.

4. The Appellant presented a claim for unfair dismissal and also made claims relating to whistleblowing, race discrimination, harassment, victimisation, wrongful dismissal, unlawful deduction from wages, and failure to make the appropriate redundancy payment. Her claims were unsuccessful in the Employment Tribunal. She appealed the dismissal of her claim for unfair dismissal to the EAT. In the EAT, [2022] EAT 139; [2023] IRLR 44, the judge, Judge Beard, allowed

the Appellant's appeal and substituted a finding that the Appellant's dismissal had been unfair. The Appellant was treated as being in a pool of one when, in reality, she was in a pool of two, and a selection exercise should have been conducted to determine whether the Appellant or her colleague should be made redundant.

5. The case was then remitted to the ET for the remedy hearing. It was heard by Employment Judge Ayre, sitting alone, in the Midlands East Region. The remedy hearing took place remotely. EJ Ayre's judgment was entered in the Register and sent to the parties on 23 June 2023. EJ Ayre had not been the Employment Judge at the liability hearing.

6. By the time that the remedy hearing was heard, the issues had narrowed considerably. It was agreed between the parties that:

(1) The Claimant's total loss of earnings was £58,371.85, which included £500 for loss of statutory rights;

(2) The Claimant had not failed to take reasonable steps to mitigate her loss;

(3) The Claimant had, as I have said, received an enhanced redundancy payment which exceeded her statutory redundancy entitlement by £17,431.88. As the basic award for the purposes of calculating loss for unfair dismissal, was, in the Claimant's case, the same as the Claimant's statutory redundancy entitlement, this meant that the enhanced redundancy payment also exceeded the Claimant's basic award by the same amount (see the Employment Rights Act 1996, "ERA 1996", ss 119 and 162); and

(4) The statutory cap on the compensatory award, as laid down in section 124 of the ERA 1996 was £29,251.17.

7. The first issues that remained to be determined by EJ Ayre were whether the compensatory award should be reduced because there was a chance that, even if a fair selection procedure had been

followed, the Claimant would still have been dismissed, and, if so, by what percentage reduction. This is, of course, known as the **Polkey** exercise, applying the principles laid down by the House of Lords in **Polkey v AE Dayton Services** [1988] AC 344; [1988] ICR 142.

8. The Respondent contended that if a selection exercise had been conducted in relation to the pool of two Research Respiratory Nurses, the Claimant and her colleague, the Claimant would inevitably still have been selected, and so her compensatory award should be reduced to nil. EJ Ayre did not accept this submission. The EJ concluded that, given that there were two employees in the pool, there was a 50% chance that a fair process and a fair selection procedure would have resulted in the Claimant being dismissed for redundancy at the same time as she was, in the event, dismissed. EJ Ayre therefore decided to make a 50% **Polkey** reduction to reflect the chance that the Claimant would have been dismissed in any event.

9. There is no appeal against this finding.

10. The Claimant's appeal is concerned with the next stage in the EJ's analysis. This relates to the only other matter that was in dispute at the remedies hearing in the Employment Tribunal. This was as to how the enhanced redundancy payment should be dealt with. On behalf of the Claimant, Mr Ohringer had submitted that the starting point for the calculation of the compensatory award, before the application of the 50% **Polkey** reduction, and any other reduction, should be the figure for loss of earnings of £58,371.85, plus the enhanced redundancy payment figure of £17,431.88, making a total of £75,803.71. This was on the basis that, if the Claimant had been dismissed in any event, she would still have received the enhanced redundancy payment. Given the EJ's finding of a 50% **Polkey** reduction, he submitted that this figure should then be reduced by 50%, making £37,901.86. Mr Ohringer accepted that, on the basis of Court of Appeal authority that was binding on the ET, the amount of the redundancy payment actually received, minus the basic award, then stood to be

deducted. The authority is **Digital Equipment Co. Ltd v Clements (No.2)** [1998] ICR 258 **("Digital Equipment**"), which held that this was the effect of section 123(7) of the ERA 1996. This meant that, on the basis of Mr Ohringer's submissions, the compensatory award should be £37,901.86 minus £17,431.88 = £20,469.98.

11. EJ Ayre did not accept Mr Ohringer's submissions in relation to the treatment of the enhanced redundancy payment. She did not consider it appropriate to include the amount of the enhanced redundancy payment in the calculation of the Claimant's losses, before the 50% **Polkey** reduction and the deduction of the amount of the enhanced redundancy payment were applied. Accordingly, the steps in the EJ's calculation of the Claimant's compensatory award were as follows:

(1) The financial loss incurred by the Claimant in this case was agreed at £57,871.85;

(2) To that should be added the agreed sum of £500 for loss of statutory rights;

(3) These two figures, added together, give a total of £58,371.85;

(4) That sum must be reduced by 50% to reflect the chance that the Claimant would have been dismissed in any event;

(5) The 50% reduction results in a figure of £29,185.93;

(6) From that must be deducted the enhanced redundancy payment of £17,431.88; and

(7) This resulted in a compensatory award of £11,754.05.

12. The Appellant was not entitled to a basic award because she had received a redundancy payment that exceeded the amount of the basic award (ERA 1996, s122(4)(b)).

The grounds of appeal

13. On behalf of the Claimant, Mr Ohringer relies upon two grounds of appeal.

14. Ground 1 is that the EJ erred in failing to calculate the Claimant's losses, before any deduction, on the basis that they consisted of 50% of the loss of earnings figure, plus 50% of the enhanced redundancy payment that the Claimant would have received even if she had been fairly dismissed.

15. Ground 2 is that, where the compensatory award is reduced by a percentage in accordance with the **Polkey** principle, any deduction in respect of an enhanced redundancy payment under section 123(7) of the ERA 1996 should also be subject to the **Polkey** principle and the deduction should be pro-rated accordingly.

16. Mr Ohringer accepts that I am bound by the ratio decidendi of the Court of Appeal in **Digital Equipment**, and that this means that I am bound to reject Ground 2, but he sets out the ground so as to reserve his position as regards arguing the point at a higher level if the point is taken further and leave to appeal is given either by this Appeal Tribunal, or by the Court of Appeal.

The relevant statutory provisions

17. The relevant statutory provisions are sections 123(1), 123(3) and 123(7) of the ERA 1996.

18. These provisions state:

> "(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."
>
> ….
>
> "(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
>
> (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

> (b) any expectation of such a payment,
>
> only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal."
>
> ….
>
> "(7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award."

The parties' submissions

Ground 1

19. On behalf of the Claimant, Mr Ohringer submitted that the logical consequence of the ET's finding that there was a 50% chance that the Claimant would have been dismissed fairly in any event is that her losses are to be calculated by reference to two counter-factual worlds, consisting of (a) the 50% chance that she would not have been dismissed and would have continued to earn her wages; and (b) the 50% chance that she would have been dismissed fairly, in which case she would no longer have earned wages, but would have received the enhanced redundancy payment. Mr Ohringer relied upon section 123(3), which specifically states that that the loss of a redundancy payment is to be included as an element of loss for the purposes of section 123(1) of the ERA 1996.

20. Mr Ohringer submitted that this approach is logically correct and is compliant with the principle laid down by the Court of Appeal in **Digital Equipment**. He further submitted that this approach is materially indistinguishable from the approach that was taken by Slade J in the case of **MacCulloch v Imperial Chemical Industries** (UKEAT/0275/09), when faced with exactly the same issue.

21. On behalf of the Respondent, Mr Boyd submitted that the EJ's approach was correct in law. He emphasised that section 123(1) is expressly made subject to section 123(7). He submitted that there is no inconsistency with section 123(3), which is designed to deal with the situation in which a claimant has been unfairly dismissed but would, had they not been unfairly dismissed, have been lawfully dismissed for redundancy and would, in those circumstances, have received a redundancy payment in excess of the basic award, or would have received a more generous enhanced redundancy payment than that which they actually received. Mr Boyd further submitted that **MacCullough** was such a case, and so can be distinguished from the present case.

22. Mr Boyd submitted that the approach advocated by Mr Ohringer is inconsistent with section 123(7) and cannot be reconciled with **Digital Equipment**. In addition, Mr Boyd said that this approach runs counter to the legislative policy behind section 123, in the context of redundancies, and that this was made clear by the EAT in the case of **Rushton v Harcros Timber & Building Supplies Ltd** [1993] ICR 230.

Ground 2

23. Mr Ohringer accepts that the **Digital Equipment** case is authority for the proposition that the deduction under section 123(7) for an enhanced redundancy payment should be made after any reduction in the compensatory award due to the **Polkey** principle. He submitted that the **Digital Equipment** case was wrongly decided, on the basis that it results in claimants having their compensation reduced or even extinguished by an enhanced redundancy payment which was already their due. He said that Parliament cannot have intended this outcome and that, if Parliament had intended it, far clearer words would have been used.

24. Mr Ohringer submitted that where the compensatory award is reduced by a percentage in accordance with the **Polkey** principle, any deduction under s.123(7) of the ERA 1996 should also be

subject to the **Polkey** principle and the deduction should be pro-rated accordingly. In the present case, this would have meant that only 50% of the enhanced redundancy payment should have been deducted.

25. However, as I have said, he accepted that I was bound to follow the reasoning of the Court of Appeal in the **Digital Equipment** case and so that this ground cannot succeed in the EAT.

Discussion and conclusions

Ground 1

26. I will start by considering the issue by reference to first principles and I will then examine the authorities.

27. In my judgment, despite the attractive way in which the argument was put, there are a number of cumulative reasons why Mr Ohringher's submissions in support of Ground 1 must be rejected.

28. First, Mr Ohringer's submissions start from the premise that the calculation of the Claimant's loss, prior to the **Polkey** reduction, should take account both of the Claimant's loss of earnings, and the loss of the enhanced redundancy payment. But the Claimant has not lost the enhanced redundancy payment: it was paid to her. It my judgment, and with respect, it makes no sense to include, in the calculation of losses arising from unfair dismissal, something that was not lost at all. Section 123(1) provides that the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal. It cannot be just and equitable to calculate the compensation due to the Claimant by reference to something that she has not lost at all.

29. Second, section 123(3) does not provide any support for Mr Ohringer's argument. It is true that section 123(3) envisages that there will be cases in which the losses taken into account in the compensatory award comprise or include the loss of a redundancy payment. But the subsection does not lend any support to the proposition that, where a claimant has received - not lost - a redundancy payment, the value of that redundancy payment should nevertheless be counted towards the claimant's financial losses resulting from the dismissal.

30. As Mr Boyd submitted, section 123(3) is designed to deal with a very different type of case. Section 123(3) is, in my view, intended to deal with a case in which a person was redundant, and should have been dismissed for redundancy, but instead was dismissed for a different reason, such as gross misconduct, and thereby lost out on the enhanced redundancy payment that should have been due to them. Section 123(3) covers cases in which the sole, or primary loss, consists of the loss of an enhanced redundancy payment. In such a case, there may be no loss of earnings, or there may be loss of earnings limited to the additional time it would have taken to go through a fair redundancy selection procedure. Alternatively, section 123(3) may cover a case in which a claimant was unfairly dismissed for redundancy, and would have been dismissed for redundancy in any event, but, if the procedures followed had been fair, the claimant would have remained in employment for an additional period and would have been paid an enhanced redundancy payment, or a larger enhanced redundancy payment than they actually received. Section 123(3) is not intended to provide for compensation for the loss of an enhanced redundancy payment when such a payment was made to the claimant.

31. Third, in my judgment, there is a logical fallacy at the heart of the part of Mr Ohringer's submission that is based on the **Polkey** principle. The **Polkey** approach requires a Tribunal (normally) to work out the percentage likelihood that the claimant would have been dismissed even if fair procedures had been followed. It also requires there to be a comparison between the financial position of the claimant in light of his or her unfair dismissal, and his or her financial position if the

dismissal had not taken place. It is true that, in this limited sense, the **Polkey** principle requires the use of a "counter-factual": the Tribunal must work out what would have been the claimant's financial position if the claimant had not been unfairly dismissed. In the present case, if the Claimant had not been unfairly dismissed, she would have carried on working for the Respondent. She would not have been made redundant. It follows that the relevant "counter-factual" for the purposes of working out the Claimant's financial loss is the earnings she would have received if she had carried on working for the Respondent. These earnings then had to be compared with the earnings if any, she received from other employment or other mitigation.

32. In my judgment, it does not make any sense to aggregate the Claimant's loss of earnings with the value of her enhanced redundancy payment when working out her actual loss, before applying the 50% **Polkey** reduction. If the Claimant had not been unfairly dismissed, she would have carried on receiving her wages with the Respondent, and so the loss of those wages have properly been taken into account. But if the Claimant had not been unfairly dismissed, she would not also have received the redundancy payment. Put another way, the Claimant could not both have carried on receiving her wages and also have qualified for the enhanced redundancy payment. Mr Ohringer's argument makes use, at the same time, of two "counter-factuals" which are incompatible with each other. They could not both have happened.

33. It follows that the proposed method for calculating losses, advanced on behalf of the Claimant, would result in a starting-point figure that substantially exceeded her actual losses.

34. There is another way of putting the same point. It is not correct to say that there was a second "counter-factual" in this case, which needs to be taken into account for the assessment of loss, in which the Claimant was dismissed for redundancy and received her enhanced redundancy payment. This is not a "counter-factual" at all, because this is what actually happened.

35. Fourth, the approach proposed by Mr Ohringer would run counter to section 123(7) and the ruling in **Digital Equipment**. In the present case, having worked out the actual loss suffered by the Claimant as a result of her unfair dismissal, and having applied the 50% **Polkey** reduction to it, the Tribunal then deducted the value of the enhanced redundancy payment. The Court of Appeal in the **Digital Equipment** case said that this was the meaning and effect of section 123(7), and so the EJ's approach was in accordance with Court of Appeal authority that was binding on her. I, too, am bound by this authority but, for what it is worth, I respectfully agree with the Court of Appeal's conclusion on this issue: it is hard to see how section 123(7) could have any other interpretation placed upon it. But this does not mean that it is just and equitable to include the enhanced redundancy pay at an earlier stage in the process, when calculating the Claimant's losses for the purposes of section 123(1). Indeed, as Mr Boyd submitted, to do so would be to run counter to **Digital Equipment** and would undermine the public policy reason for section 123(7). The idea behind section 123(7) is to avoid a disincentive for employers to provide more generous redundancy payments to departing employees than the statutory minimum. The disincentive would exist if the enhanced redundancy payment was left out of account, in whole or in part, when calculating a claimant's losses under section 123. If that were the case, then an employer who had voluntarily made a redundancy payment to an employee, or who made provision for such a payment in a contractual scheme, would be no better off than the employer who had paid the statutory minimum, when compensation for unfair dismissal was calculated (see **Rushton v Horcros**, below).

36. I should add that, whilst section 123(7) provides for the deduction from the compensatory award of the enhanced (i.e. more than statutory minimum) element of a voluntary or contractual redundancy payment, section 122(4)(b) has the same effect as regards the statutory minimum redundancy payment, in that it is required to be set off against the basic award. The result is that the

entirety of a voluntary or contractual redundancy payment is taken into account so as reduce the total sum due to an employee who has been unfairly dismissed.

37. Though I have set out these four reasons why, in my judgment, the argument on behalf of the Claimant is misconceived, the Claimant's argument really falls down at the first point: it cannot be just and equitable to compensate a claimant for a payment that she has not lost, but, rather, received as a result of her unfair dismissal.

38. I now move on to the authorities. I will consider in turn: (1) the authorities on section 123(1) and its predecessors; (2) the authorities on section 123(7); and (3) **MacCullough**.

The authorities on section 123(1) and its predecessors

39. The authorities dealing with the underlying principles to be applied for compensation for unfair dismissal stress that the purpose of the compensatory award is to compensate and not to over-compensate or to provide a windfall. The requirement that the sum that is paid is "just and equitable" does not mean, in the normal case, that the Tribunal should do anything other than to assess the true amount of a Claimant's loss, as best it can.

40. So, for example, in the very early case of **Norton Tool v Tewson** [1972] ICR 50, Sir John Donaldson, President of the National Industrial Relations Court, referred to the materially identical predecessor of s.123(1) of the ERA 1996 and said, at page 54:

> "…. we do not consider that Parliament intended the court or tribunal to dispense compensation arbitrarily. On the other hand, the amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and upon the basis of principle.
>
> The court or tribunal is enjoined to assess compensation in an amount which is just and equitable in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle….First, the object is to compensate, and compensate fully, but not to award a

> bonus; save possibly in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or a tribunal. Secondly, the amount to be awarded is that which is just and equitable in all the circumstances, having regard to the loss sustained by the complainant…..The discretionary element is introduced by the words "having regard to the loss." This does not mean that the court or tribunal can have regard to other matters, but rather that the amount of the compensation is not precisely and arithmetically related to the proved loss."

41. In **Norton Tool**, Sir John Donaldson made clear that compensation for unfair dismissal could include compensation for loss arising from the dismissal of a claimant who was redundant, if that claimant was dismissed for another purported reason (such as gross misconduct) and thereby lost a right a redundancy payment (see page 57).

42. Again, in **Andrews v Software 2000 Ltd** [2007] ICR 825 (Elias J), the EAT, when summarising the effect of the authorities on section 123(1), said, at paragraph 54:

> "(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal."

43. I can find nothing in any of the well-known authorities on the **Polkey** principle (including **Contract Bottling Ltd v Cave** [2015] ICR 146, which was cited to me) which suggest that the approach put forward on behalf of the Claimant should be followed.

The authorities on section 123(7)

44. The leading authority is the **Digital Equipment** case. In that case, the Court of Appeal held that, for the purposes of compensation for unfair dismissal, any excess of the redundancy payment made by the employer over the basic award was not to be taken into account in ascertaining "the loss", for the purposes of what is now section 123(1), but was to go to "reduce the amount of the compensatory award", in accordance with what is now section 123(7), and that, accordingly, the

excess payment had to be deducted after the amount of the compensatory award had otherwise been decided.

45. The facts of the **Digital Equipment** case were very similar to the facts of the present case. Like the present case, the claimant in **Digital Equipment** was unfairly dismissed for redundancy and, like the present case, the ET determined that there was a 50% chance that if fair procedures had been followed the claimant would not have been selected for redundancy and would have kept his job (see 1998 ICR 258, at 260E-H). The claimant in **Digital Equipment** was given a redundancy payment in excess of the statutory minimum.

46. The argument that was advanced on behalf of the Claimant in **Digital Equipment** was different from the argument that was advanced before me by Mr Ohringer on Ground 1. It was the same argument as is being advanced in Ground 2. Mr Clements's loss of earnings was calculated as being £43,136. The balance of the redundancy payment, above the basic award, was £20,685. Mr Clements's counsel submitted that the enhanced element of the redundancy payment should be deducted from the loss of earnings, giving a net loss figure of £22,451. Counsel submitted that the 50% Polkey reduction should only be applied after that, resulting in compensation of £11,225, reduced to £11,000, because of the level of the statutory cap then in force. It will be seen, therefore, that the thrust of the Claimant's argument in **Digital Equipment** was that the **Polkey** discount should apply to the reduction for the enhanced redundancy payment, required by section 123(7). This is the same argument as is being advanced in Ground 2 of this appeal.

47. In **Digital Equipment**, Beldam LJ said, at 263F-G:

> "The question for us to decide is whether the language used in section 74 of the Employment Protection (Consolidation) Act 1978 [now section 123 of the ERA 1996] shows that Parliament intended that payments made by employers, which exceed the statutory redundancy payment, should be deducted after the tribunal had decided the amount of the compensatory award under section 74(1) [now s123(1)]. In other words, did Parliament

> intend that redundancy payments which exceeded the statutory redundancy payment should go to reduce the compensatory award or merely that they should be taken into account in deciding the loss on which the compensatory award should be based?"

48. Beldam LJ gave the answer on behalf of the Court of Appeal at 267B-C. He said:

> "A clear distinction is drawn in the subsections of section 74 between the said loss, that is "the loss sustained by the complainant in consequence of the dismissal" which is to make up the amount of the compensatory award and, on the other hand, the compensatory award itself. Thus in my view the section provides that the excess of the redundancy payment over the basic award is not to be taken into account in ascertaining the loss but is to go to "reduce the amount of the compensatory award."
>
> Approaching the interpretation of section 74 even as a whole I think it clear that Parliament intended that the employer who paid compensation for redundancy on a more generous scale than the statutory scale was to be entitled to full credit for the additional payment against the amount of the loss which made up the compensatory award.
>
> We were told in the course of argument that since the introduction of redundancy payments in 1965 it has become the practice of most large employers to provide for and to make payments well in excess of the statutory minimum. Mr. Richardson for Digital suggested that Parliament may well have wished by according them special treatment not to discourage the making of such increased payments by depriving the employer of the full benefit of them should he be found to have selected an employee for redundancy in breach of good industrial practice. Whether that is so or not, it seems to me the language used by Parliament is clear and if the result is unintended it must be for Parliament to correct it. For these reasons I would allow the appeal."

49. The policy behind section 123(7) and its predecessors was considered by the EAT in the earlier case of **Rushton v Harcros** (Judge Hague QC). The EAT said, [1993] ICR 230, at 236A-C:

> "We return to consider section 74(7) [now section 123(7)]. We consider that the meaning and intent of the subsection is reasonably plain, i.e. that in the calculation of a compensatory award an employer should receive credit for any redundancy payment he makes. The manifest purpose of the subsection was to encourage employers who find it necessary to dismiss for redundancy to be generous in making ex gratia payments. It would be unfortunate if an employer in deciding whether to make an ex gratia payment, and if so deciding the amount, had to take into account the possibility of an industrial tribunal award over and above the ex gratia payment, however generous that may have been. That would have the overall effect of reducing both the frequency and levels of ex gratia payments and would be detrimental to the interests of employees generally.

> It is much better that the financial arrangements arising from dismissal for redundancy should be made without the parties having to look over their shoulders at a possible tribunal hearing. We entirely agree with and would adopt the remarks of French J. to the same effect in **Horizon Holidays Ltd. v. Grassi** [1987] I.C.R. 851, 855."

50. In the present case, in Ground 1, Mr Ohringer accepted (as he must do at this stage because **Digital Equipment** is binding on me) that the **Polkey** reduction must precede the reduction for the enhanced redundancy payment. He approached the problem from a different direction. Mr Ohringer submitted that, at the section 123(1) stage, the value of the enhanced redundancy payment should be added to the loss of earnings, and then the 50% **Polkey** discount should be made, before the reduction for the enhanced redundancy payment, as required by section 123(7), is made. This would have the effect of increasing the overall total of the compensatory award, as its practical effect would be to add on 50% of the value of the enhanced redundancy payment.

51. In my judgment, the argument advanced by Mr Ohringer on Ground 1 is contrary to the spirit of the **Digital Equipment** judgment, and is contrary to the purpose and effect of section 123(7). The approach advocated by Mr Ohringer would lead to exactly the same outcome as the approach that was rejected by the Court of Appeal in **Digital Equipment**. I agree with French J and HHJ Hague QC that the policy objective behind section 123(7) is to ensure that employers are not "penalised" for offering redundancy payments that are more generous than the statutory minimum. This objective would be undermined if the employer did not receive full credit for the amount paid by way of enhanced redundancy payment, which would be the effect of Mr Ohringer's proposed approach. I emphasise, however, that this is not the only reason why I take the view that Mr Ohringer's approach is misconceived: it faces the even more fundamental objection that it involves compensating a claimant by reference to something that, far from being a loss arising from their dismissal, was a financial benefit of their dismissal.

MacCullough

52. Mr Ohringer submitted that the approach that he put forward in Ground 1 is materially indistinguishable from the approach adopted by Slade J in **MacCulloch v Imperial Chemical Industries** (UKEAT/0275/09), when faced with precisely the same issue.

53. I am unable to accept this submission. In my judgment, the EAT in **MacCullough** was faced with a different issue from the issue in the present appeal, and there is nothing in the reasoning of Slade J in **MacCullough** which supports Mr Ohringer's argument on Ground 1.

54. It is true that **MacCullough** was also a case in which the claimant was unfairly dismissed and was given an enhanced redundancy payment. However, the findings of the ET in **MacCullough** as regards what would have happened if she had not been unfairly dismissed were different from the findings in the present case. In **MacCullough**, the ET found that, if the claimant had not been unfairly dismissed, it was likely that she would have been made redundant at a later date, but would have received a more generous enhanced redundancy payment, of some £9,201 more than the enhanced redundancy payment of £19,456 which she actually received (see judgment, paragraph 2) The question for the EAT in **MacCullough** was whether, at the stage of assessing loss for the purposes of section 123(1), when read together with section 123(3), the loss of the ***extra*** enhanced redundancy payment as a result of the claimant's unfair dismissal should be ignored. Slade J said that the answer was "no". At paragraph 16 of the judgment, Slade J said:

> "16. In my judgment, on the proper construction of Section 123(3), it is not permissible, to deduct from loss of entitlement or potential entitlement to a future enhanced redundancy payment, any enhanced redundancy payment actually made. Thus the steps by which a compensatory award is to be made in respect of loss of enhanced redundancy payment is to assess the loss in accordance with Section 123(3) along with other heads of loss and under Section 123(7) to reduce from the award to be made under Section 123(1) the amount of any payment made in respect of enhanced redundancy pay over and above the basic award."

55. Again, at paragraph 20, Slade J said that:

> "The amount of the compensatory award should now be calculated by including under Section 123(3) a sum for the loss of enhanced redundancy payment (less the amount of a basic award) which would have been received in the future and reducing the award under Section 123(7) by the amount by which the enhanced redundancy payment made to the Appellant exceeds the basic award."

56. This is wholly consistent with the approach that was taken by EJ Ayre in this case. The reason that the loss of an enhanced redundancy payment was taken into account in **MacCullough** is because, in that case, the ET made a finding that the claimant's dismissal had deprived her of an additional sum by way of an increased enhanced redundancy payment which would have been paid to her if fair procedures had been followed. That was not the position in the present case. As paragraphs 16 and 20 of Slade J's judgment make clear, she accepted that the right approach for an ET to take was to calculate loss in accordance with section 123(1), and then to deduct the full amount of the enhanced redundancy payment that had actually been made to the claimant under section 123(7). There is nothing in **MacCullough** that would lend support to the proposition that the calculation of losses for the purposes of the section 123(1) stage of the analysis should include the loss of an enhanced redundancy payment that was actually paid to the claimant. I repeat, the enhanced redundancy payment that was taken into account at the section 123(1) stage in **MacCullough** was a sum of which the claimant had been deprived as a result of her unfair dismissal.

57. The error made by the ET in **MacCullough** was that it deducted the enhanced redundancy payment that had actually been paid to the claimant from the calculation of her loss at the section 123(1) stage, and then deducted the enhanced redundancy payment for a second time, at the section 123(7) stage (see EAT judgment, paragraph 3). There was a "double deduction" (paragraph 8). No such error was made by the EJ in the present case. In this case, the value of the enhanced redundancy payment was only deducted once, at the section 123(7) stage, in accordance with **Digital Equipment**.

58. Slade J accepted that the effect of **Digital Equipment** is that "the compensatory award after the 50 per cent reduction is to be reduced by the enhanced redundancy payment by applying what is now section 123(7)." (paragraph 18).

Ground 2

59. Mr Ohringer accepts that he cannot succeed with Ground 2 at the EAT level. This concession was rightly made. I am bound by **Digital Equipment** to find that, at the section 123(7) stage, the entirety of a payment in respect of redundancy over the amount of the basic award must be deducted. In **Digital Equipment**, the Court of Appeal rejected the argument that Mr Ohringer has put forward in Ground 2, namely that if there is a 50% **Polkey** reduction, only 50% of the enhanced redundancy payment should be deducted at the section 123(7) stage. For the reasons set out in my consideration of Ground 1, above, it is my respectful view that **Digital Equipment** was plainly rightly decided.

Conclusion

60. For these reasons, the appeal is dismissed.