

# Court of Appeal Rejects Novel Claim for Loss of Earnings Following Criminal Conviction

14 June 2023

The Court of Appeal has upheld the decision of the High Court in *Benyatov v Credit Suisse Ltd* [2023] EWCA Civ 140, finding that an employer does not have a duty to take reasonable care to avoid the risk of their employee being convicted of a criminal offence.

**Background.** Benyatov served as the Head of European Emerging Markets in Credit Suisse's London office. In 2006, Benyatov was advising a client on the purchase of a Romanian state-owned electricity company when, while on a business trip to Romania, he was arrested on suspicion of criminal wrongdoing in connection with the transaction. He was subsequently charged with "economic or commercial espionage" and "the initiation and establishment of an organised criminal group" by the Romanian authorities. These allegations were thoroughly investigated by Credit Suisse, which was satisfied that Benyatov had done nothing wrong. Credit Suisse instructed lawyers to conduct his defence, whilst keeping Benyatov employed at the Bank.

In 2013, the Bank notified Benyatov that he had been provisionally selected for redundancy, and he was placed on garden leave pending consultation. His employment did not in fact terminate until mid-2015. At the end of 2013, Benyatov was found guilty by the Romanian court and sentenced to 10 years' imprisonment.

With the continued support of the Bank, Benyatov appealed against his conviction, which resulted in the reduction of his sentence to 4.5 years. The sentence has never taken effect, since Benyatov moved to the United States in 2015 as he would have been liable to be arrested under a European Arrest Warrant had he remained in the United Kingdom.

It was common ground that Benyatov's conviction effectively prevents him from working in the financial services industry. Benyatov originally estimated his loss of earnings at over £66 million, although the trial judge determined that the appropriate amount if Benyatov had been successful would have been approximately £12.5 million.

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Benyatov made two main claims – one related to negligence and the other to contractual indemnity. This article will focus on the negligence claim, in particular the arguments regarding the duty of care owed by an employer towards their employees.

**The Negligence Claim—Rejecting a Novel Duty of Care.** The negligence claim put forward by Benyatov was that Credit Suisse had a duty of care, as his employer, which included obligations to assess the risks of working on projects that may place him “at a material risk of criminal conviction” or “otherwise expose [him] to criminal conviction in Romania”. The Claimant’s case was that the Bank knew or should have known about the risks that doing privatisation work in Romania entailed, and should have taken the necessary steps to protect Benyatov, particularly due to publicly available adverse press coverage of political risk, corruption and poorly functioning judiciary in Romania; and the interest of the Romanian secret police in an earlier privatisation project that they had been involved with.

The Bank argued that there was no duty to protect the economic interests of its employees, and that recognising a new duty of care would not be fair, just or reasonable. It acknowledged that although, as an employer, it did owe the Claimant a tortious duty to “take reasonable care not to expose the Claimant to risks of personal and psychiatric injury that were reasonably foreseeable and which the Defendant could guard against by proportionate measures”, the events in Romania did not fall under those categories.

The question of whether a duty of care should be recognised in this novel situation was examined first by the High Court, which identified the necessary approach in the novel situation to be “incremental and by analogy with established authority, identifying the legally significant features of the situations”. Benyatov challenged the High Court’s dismissal of his negligence claim on the bases that the Judge took the wrong approach in law to the question of whether the alleged duties of care arose; and that the Judge failed to take into account relevant factual evidence establishing a duty of care.

Benyatov argued that the Court should draw an analogy from the audit duty found in *Rihan v Ernst & Young Global Ltd [2020] EWHC 901 (QB)*. In *Rihan*, Kerr J found that there was a duty on EY to take reasonable steps to prevent the claimant suffering financial loss by reason of their failure to conduct the audit ethically and without professional misconduct, since this met the usual requirements to establish a duty of care: foreseeability of loss and proximity.

The Court of Appeal disagreed with Benyatov’s argument that the principle in *Rihan* should be applied in this case and held that *Rihan* has no application here. *Rihan* dealt with the duty of an employer to avoid misconduct, as opposed to the fact pattern in this case, where the alleged duty was to protect against the wrongdoing of third parties.

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The Court of Appeal concluded that the High Court Judge had not erred in his approach to the law or the evidence. The lack of foreseeability that Benyatov would be exposed to a conviction (as determined by the Judge) undermined his arguments that the Bank should have assumed responsibility and had failed to do so adequately. The fact that the Benyatov provided no new evidence of the foreseeability of the events made it all the more difficult to convince the court to find that a novel duty was owed by Credit Suisse to take reasonable care to avoid the risk of an employee being convicted in the performance of their work for their employer. Although the High Court judgment discussed the Bank's assumption of responsibility in detail, the Court of Appeal made it clear that this was unnecessary as the employment relationship was sufficient; whether responsibility was assumed was not important as the risks were not foreseeable.



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