Appeal No. UKEAT/0186/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 16 November 2016

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS J LENNON-KNIGHT APPELLANT

YAKIRA GROUP LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID FLOOD (of Counsel) Instructed by: Wolf Law Champion European Suites Arrowe Brook Road Upton Wirral CH49 0AB
For the Respondent	MR DAMIAN BROWN (One of Her Majesty's Counsel) Instructed by: Hill Dickinson LLP No 1 St Paul's Square Old Hall Street Liverpool L3 9SJ

SUMMARY

UNFAIR DISMISSAL - Automatically unfair reasons

UNFAIR DISMISSAL - Compensation

In assessing future loss of earnings the Employment Tribunal applied a two year cut-off in a case where it was common ground, based on agreed medical evidence, that the Claimant would never regain her previous career position of Finance Director on equivalent terms. **Wardle** [2011] ICR 1290, paragraphs 47 to 54, and **Chagger** [2010] ICR 397, paragraph 74, (both Court of Appeal) considered. Appeal allowed and future loss issue remitted to the same Employment Tribunal for reconsideration.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This case has been proceeding in the Liverpool Employment Tribunal. The parties are Mrs Lennon-Knight, the Claimant, and Yakira Group Ltd, the Respondent. The Claimant was employed by the Respondent as Group Finance Director. Her employment commenced on 3 August 2009 and ended with her resignation on 28 January 2013. She was then 47 years old.

2. She commenced these proceedings, complaining of automatically unfair constructive dismissal under section 103A of the **Employment Rights Act 1996**. The reason for her resignation, she contended, was that she had blown the whistle on the Respondent's CEOs in respect of a proposed share deal and thereafter she was exposed to detrimental treatment.

3. Following a liability hearing before Employment Judge Robinson and members, by a Judgment dated 24 February 2014 her complaint was upheld, and following a remedy hearing held on 24 March 2014 the Tribunal awarded her compensation totalling £124,175.73 by a Judgment ("the first remedy Judgment") dated 14 April 2014.

4. Against the first remedy Judgment the Claimant appealed (UKEAT/0325/14/DA). By a Judgment delivered on 12 December 2014 HHJ Hand QC allowed the appeal and remitted the matter to the Robinson Tribunal on two matters: grossing up and future loss. The remitted remedy hearing took place on 22 October 2015. On that occasion the parties were represented, as today, by Mr David Flood for the Claimant and Mr Damian Brown QC for the Respondent. Following consideration in private the Tribunal delivered their second remedy Judgment with Reasons on 14 January 2016.

5. For present purposes I am not concerned with grossing up of the award, but solely in respect of the Tribunal's conclusion that the Claimant should recover future loss limited to two years' partial loss running from the date of the second remedy hearing; that is, until 22 October 2017. In the first remedy Judgment the Tribunal had limited future loss to one year from the first remedy hearing, held in March 2014. It is against the future loss holding in the second remedy Judgment that the Claimant now brings this, her second, appeal (UKEAT/0186/16/RN). The appeal was considered on the paper sift by Laing J, who directed that the appeal proceed to this all parties Full Hearing. She took the view that it was reasonably arguable that limiting future loss to a two year cut-off was insufficiently reasoned and/or perverse.

The Claimant and the Medical Evidence

6. At the first remedy hearing the Tribunal had before them the report of Professor Green, Consultant Psychiatrist, dated 26 November 2013. At the second hearing, on 22 October 2015, the Tribunal had a further report from Professor Green, who had been instructed by the Claimant's solicitors, dated 17 May 2015. Professor Green had, in turn, seen a letter from Tracy Clarke dated 13 April 2015. She had delivered a course of cognitive behavioural therapy to the Claimant. In addition, the Respondent had instructed its own expert, Dr Faith, Consultant Psychiatrist, who saw the Claimant and then reported on 24 September 2015. As Dr Faith makes clear in her report, there was no material difference in the opinions expressed by the experts. Neither was called before the Tribunal. I have read their reports and the Claimant's quantum witness statement.

7. The Tribunal summarised the evidence of both medical witnesses at paragraphs 5 to 11 of their second remedy Reasons. I need not set out those paragraphs here. The Tribunal heard again from the Claimant at that hearing. Their findings of fact in relation to her evidence

overall are set out at paragraphs 12 to 28. It was common ground (see paragraph 30) that the Claimant would be unable to go back to her former position as a Financial Director.

The Tribunal's Second Remedy Decision

8. In expressing their conclusions the Tribunal appear to have detected two conflicting pieces of evidence from the experts (see paragraphs 41 and 42) despite the apparent agreement between those experts, and at paragraph 55 the Tribunal say:

> **"55. We limit the future loss to the two years that Dr Faith in her opinion views as a period of rehabilitation for the claimant. We will compensate the claimant for the difference in her earnings at the present time of about £32,000 and the £90,000 that she was earning previously, for two years to the end of October 2017 properly grossed up as agreed between the parties. …"**

This Appeal

9. I have had the advantage of particularly focused and clearly articulated arguments from both counsel. In essence, Mr Flood submits that, given the agreement between experts that the Claimant will never regain her career at the level of Finance Director with commensurate remuneration - a fact accepted by the Respondent (paragraph 30) and acknowledged by the Tribunal (paragraph 47) - it was wrong in principle for the Tribunal to impose a two year cut-off (paragraph 55) to reflect Dr Faith's opinion that it would take that length of time for the Claimant to complete her rehabilitation to its optimum position.

10. To the contrary, Mr Brown points to a number of "imponderables" (a word used by the Tribunal at paragraph 56) which influenced the Tribunal in arriving at the two year cut-off. They include the Claimant's CV, post-termination of employment with the Respondent which speaks of the importance of her work/life balance (see paragraph 25), the cessation of CBT (paragraph 43), and the prospect of improvement once the litigation is over (paragraph 52). These were all factors which, submits Mr Brown, the Tribunal was entitled to take into account

in arriving at a conclusion on what compensation would be just and equitable as between the parties.

11. In approaching this future loss issue as a matter of law, I have been greatly assisted by the learning to be derived from the judgment of Elias LJ in **Wardle v Crédit Agricole Corporate and Investment Bank** [2011] ICR 1290 CA, paragraphs 47 to 54. In summary, Elias LJ drew a distinction between the majority of cases where future loss should be awarded up until the time when the employee was likely to obtain a job equivalent to that which he or she had with the Respondent (see paragraph 52), and those rare cases where there is no real prospect of the employee ever obtaining an equivalent job. In that event, the assessment will be made on the basis of loss, albeit partial, continuing for the remainder of the Claimant's working life on a multiplier basis. The circumstances in **Abbey National plc v Chagger** [2010] ICR 397 CA (see particularly per Elias LJ, paragraph 74) are cited as an example of this latter situation (see paragraph 53 of **Wardle**). **Wardle** itself was not such a case on its facts (paragraph 54).

12. Applying that approach to the agreed evidence, concession by the Respondent (at paragraph 30) and findings of the Tribunal (particularly at paragraph 47), this is, in my judgment, plainly a lifetime loss case. It seems to me that the Tribunal was wrong in principle to limit the loss to the two year period that Dr Faith opined would lead to optimum, albeit not complete, recovery by the Claimant. At that point the Claimant would still not attain her pre-termination career level of Finance Director. She would, as the Tribunal found, have then been obliged to take a less well-paid job, possibly, on the evidence, as a Financial Controller, better-paid than that which she had at the time of the second remedy hearing. The difference in pay between her pre-termination salary and that of at best a Financial Controller is not spelt out in

A the Tribunal's Reasons, but on their findings it plainly represents a continuing partial loss for which she has not been compensated.

B 13. As to the factors cited by Mr Brown, they may feed into the appropriate multiplier. It will not necessarily be sufficient simply to apply the Ogden tables, which Mr Flood suggested, in the course of argument in the case of this 51-year-old Claimant, indicated a multiplier of just under nine. Any reduction in the standard multiplier should be explained by the Tribunal. C Similarly, the multiplicand representing the partial loss dependent on the level of earnings anticipated by the Tribunal may vary during the future continuing loss period according to her future career progression as found. These are all matters for the first-instance Tribunal to factor D in in arriving at a proper conclusion.

Disposal

E 14. It follows, on the particular facts of this case, that I am persuaded by Mr Flood that the Tribunal fell into error in its approach to future loss at the remitted hearing. On that basis, the appeal is allowed, and the first three lines of the Judgment dated 14 January 2016 are set aside. I raised with counsel whether the case ought to return to the same or a different Employment F Tribunal to determine afresh the future loss question. Both were agreed that it should return to Employment Judge Robinson's Tribunal. I therefore so direct, if practicable; otherwise, a differently constituted Tribunal will be appointed by the Regional Employment Judge.

G

Costs

15. I order the fees in the total sum of £1,600 to be paid by the Respondent to the Claimant.

H