Appeal No. UKEAT/0087/15/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 May 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

ESSEX COUNTY COUNCIL APPELLANT

MS E JARRETT RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS KATHERINE EDDY (of Counsel) Instructed by: Essex Legal Services New Bridge House 60-68 New London Road Chelmsford Essex CM2 0PD
For the Respondent	MR ANTHONY ROBINSON (Solicitor) Scott-Moncrieff & Associates Ltd 88 Kingsway Holborn London WC2B 6AA

SUMMARY

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE - Disclosure

The exercise by an Employment Judge of her discretion to make a case management order requiring the Claimant to disclose information about her pension entitlements was flawed. The information was clearly relevant to an assessment of the chance that the Claimant would have remained in employment until age 70 as she claimed she would have done had she not been discriminated against, and was not disproportionate to the claim which was put by the Claimant at over £900,000. It had to be remembered that where future loss is concerned the assessment is one of chance, not whether on balance a particular event is more likely to happen than not.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This is an appeal against a case management decision in which Employment Judge Gilbert refused an application by the Respondent for the disclosure of information.

2. The context is this. The Claimant was held. by a Tribunal at Colchester chaired by Employment Judge M Warren, to have been discriminated against by her employer, Essex County Council. She had also been unfairly automatically dismissed. Her case is that she suffered a personal reaction to the events of which she complained, in a way which added to her difficulty aged 58 in finding alternative employment.

The Background

3. The Tribunal adjourned the question of remedy. Schedules of Loss were compiled. In the Claimant's Schedule of Loss she argued that she had lost future earnings for the whole of 12 years until the age of 70 because she would not have retired from work at any earlier age. That amounted to just over £550,000, being calculated on the basis of the net wage she would have received. She had been employed in the County's legal service as a solicitor at a salary just short of £70,000. There would inevitably follow a future loss of pension, which was assessed, also on the basis that she would have retired at 70, at just over £125,000. Accordingly the future loss claim was on any showing a large one.

4. The Claimant served a witness statement in support of her claim for future loss. She made it clear that she was the sort of person who for personal reasons enjoyed working, or would have done had she been fully fit to do so, and had every intention of continuing in

employment to the age of 70. At one point in her witness statement, dealing with employment and finances, she noted that, in view of her shortened period of employment with the Respondent (it was a period of just some two years), she would not be entitled to a large pension and that she was also not entitled to draw her state pension or deferred pension until the age of 66/65. She went on to say that she had intended to continue working until the age of 70 if she still remained in good health.

5. The Respondent applied for the disclosure of information which, in its submission, was relevant to the question of whether she would actually have remained in employment until the age of 70, relating to the Claimant's pension entitlement from other sources. It noted that the Claimant's representative confirmed that the Claimant had the information but did not consider it to be relevant to the question of remedy.

The Remedy Decision

6. In considering that application, which came before Judge Gilbert, who had not been party to the Liability Decision, the Judge considered a full Letter of Resistance, which was sent to the Tribunal by the Claimant's solicitors. In that letter, dated 12 February 2015, it said in just over a page why in its view it considered the information should not be disclosed. It said that the request for it was misguided on several points, and that the solicitors had tried without success to explain to the Respondent that the Claimant's previous pension entitlement with previous employers had no bearing on the issue of the losses suffered as a consequence of the discrimination to which she had been subjected by the Respondent. It argued that the Respondent's claim that the information was relevant to the date of leaving could not be accepted because that was a matter of intention and that the Respondent did not seem to understand that a lot of people decide to work beyond the age of 60 or 65 for various reasons,

some of which are not related to the size of their pensions, adding as was the Claimant's case that the size of her pension had never been a consideration or a determining factor.

7. It then dismissed as speculation which was groundless, a pension expert's evidence which had been supplied by the Respondent, observing that the fact that some ex-employees of Essex County Council retired at the age of 60, 62 or 65 did not mean that the Claimant was bound to follow suit:

> **"… Put simply, our client is a highly educated woman from a family with a strong work ethic. She has worked hard all her life and will continue to do so."**

It therefore thought that the Respondent was not entitled to be told the size of the Claimant's pension from other sources.

8. The reason why I have dealt at some length with the response by the Respondent is that the Judge's Decision was brevity itself:

> **"Having considered the Respondent's application for disclosure by the Claimant and the [Claimant's] response to that application**
>
> > **(i) Disclosure of pension information about pensions she may receive from previous employment**
>
> **is refused for the reasons set out in the [Claimant's] response to the application."**

Accordingly, if the Claimant's reasons are valid, the decision was too; and if not, it was not.

The Respondent's Appeal

9. I begin by noting firstly that a decision by a Tribunal on a matter of procedure does not have to be as lengthy and detailed as a decision on liability. This is recognised in the **Rules** themselves. What is now Rule 62 of the **Employment Tribunal Rules** emphasises at subparagraph 4 that the reasons given for any decision shall be proportionate to the significance

of the issue and for decisions other than Judgments may be very short. This was. In the context of a decision made quickly (as it has to be), procedurally (as it was), it is no proper criticism that the reasoning is given by reference to another document. However, incorporating another document does give rise to the risk that what is in the other document may not be a sufficient ground for the decision which is reached.

10. There is a very wide latitude given to the exercise of a discretion in any preliminary or case management decision such as this. It is only if the matter has been approached in some wrong way or the Judge has come to a conclusion which was simply not open to her that such a decision can be overturned. This is a high hurdle.

11. Miss Eddy argues that there are three reasons why I should hold that this Decision, short though it was, was in error: first, that the Tribunal failed to have regard to and/or apply the correct legal test; secondly, that it failed to give adequate reasons for its decision to refuse the Respondent's application; and thirdly, it acted perversely in reaching a decision that no reasonable Tribunal would have reached.

Ground 2

12. As to the second of those grounds, it seems to me that the Tribunal did give reasons. They were adequate to explain why, in the context, the Tribunal had decided as it did. They did not need to be any longer. That is not to say that the reasons were good ones.

Ground 1

13. I do, however, have greater sympathy with ground 1. I do not think that it is necessary for an Employment Tribunal to have to set out the law which applies to making a decision on

disclosure. Such decisions are often made. Given the necessary terseness of such a decision, it should be assumed, unless there is reason to query it, that the Judge had regard to the proper test. The proper test here is not in doubt. Miss Eddy set it out in her skeleton argument. It is stated in **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740 at paragraph 22. It is familiar territory.

> **"… The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible."**

14. It is as to the application of the test that I have concern and have ultimately come to the conclusion that this appeal should be allowed. My reasoning is this. The issue is not, as the Claimant said, in effect, in her letter of response upon which the Tribunal Judge founded, a matter purely of intention. The expression of intention by a party, assuming for the moment that it is accepted as genuine, does not mean that the intention will actually be borne out in practice. It is the experience of all of us that people may intend to work on for several years but in the event do not do so or, conversely, may intend to retire early but in the event do not.

15. The exercise involved in a hearing as to remedy is, so far as future loss is concerned, one in which the Tribunal has to predict what would have been the future if the wrong had not been committed. The Claimant is entitled to be placed in that position. She must not be overcompensated but she must not be undercompensated. This calls for a judgment - an assessment - by the Tribunal. Part of the reason for it reaching any such decision will be its view as to the probability that the intention expressed to it in evidence by the Claimant will be carried through. It may fully accept that intention. But that does not mean to say that the future would have been as intended. It may reject the reliability with which the intention is expressed, in which case it will still have to assess what the future might have been. Or, and perhaps most

likely, it may conclude that it accepts the statement of intention to some extent or discounts it to some extent. That is very much a matter of assessing evidence and cross-examination. But it is also relevant to place the decision in context.

16. Context in such a case is important. There may be many reasons why an employment might end which do not depend upon the intention of the parties. See the decision of this Tribunal in **Contract Bottling Ltd v Cave** [2015] ICR 146, recently reported (see especially paragraphs 13 to 21). Here, for instance, there might be arguments which depended upon the extent to which the Claimant would have wished to retire given that her partner was retired. There might be questions as to her ability or desire to continue, which she recognised herself by referring to her state of health. What was in issue, in particular, was the question of whether she had sufficient funds from other sources such that she did not need to soldier on at work when she otherwise might have wished to cease. In short, it plainly would be a relevant question to ask the Claimant in the course of evidence what pension she had from other sources. Experience elsewhere shows that the receipt of a pension is one factor which may persuade a person to retire. It is often, for instance, referred to in those cases which have considered whether what could be discrimination on the ground of age is justified in the circumstances given the extent of any financial feather bed which would soften the impact of retirement.

17. In a case which came before me recently, in which I have yet to give Judgment, the facts show that in the police force the moment police officers are entitled to immediate payment of pension, the majority of them seek to retire even though they could continue for around 10 years or so. Evidence as to the behaviour of others is part of the context within which an assessment of the individual is to be made, though it remains, I emphasise, an assessment of what would have been the position, so far as it can be gauged, for that individual, as to which

plainly her past, her work, her character and her intention are all important. Nonetheless it seems to me to be relevant to know what financial resources she would have had had she continued to work, which would have had or might have had an impact upon her remaining in work. Given the size of the claim here, there could be no issue that asking the question and requiring an answer to it in the course of the hearing would be either inappropriate or disproportionate. I do not see why, since the information was known to the Claimant, it simply could not have been given in advance. It seems to me a simple matter to have provided an answer.

18. The Respondent was entirely right to say that the money received from other sources would be unaffected by whether the Claimant worked on in employment with Essex County Council or not. Credit does not have to be given for the receipt of such other income (see **Parry v Cleaver** [1970] AC 1). But that is not the point.

19. Further, as it occurs to me, the assessment here was based upon the net wage. Net wage is the gross pay from which tax has been deducted. The marginal rate of tax depends critically upon what other income is received. If, for instance, other pension payments amounted to say over £40,000 per year, then the Claimant would receive all her income lost by reason of the Respondent's wrong at a level from which higher rate income tax would be deducted. That affects the calculation. Plainly, therefore, the question of pension payment was relevant not just to the objective assessment of the chances of retirement before age 70, but also to the calculation of the quantum of any award.

20. Though relevance seems to me to have been questioned in the Claimant's letter of response which the Judge adopted, it is to Mr Robinson's credit, appearing for the Respondent

today, that he does not seek to argue that information as to other pension payments is of no relevance. He argues it is of little relevance because the intention of the Claimant is all-important. But on that too he quickly recognised that the question is not just one of intention. It is one of the assessment by the Tribunal of the chance, taking into account intention but not being ruled by it, that the Claimant would have continued in employment, had the wrong not been done.

21. Accordingly I think the reasons advanced by the Respondent do not stand scrutiny. It follows the reason advanced by the Judge itself does not stand scrutiny. In context, the only issue for me then becomes whether the disclosure can truly be said to be necessary. On this Mr Robinson argues, asking rhetorically, where do matters stop? Does the Claimant have to disclose how much money she has in her bank account, since she might be feather-bedded by that from the effects of a loss of income in retirement? That was not what was asked for here. Had it been there might be arguments that it was relevant but of such limited relevance that documentary proof ought not to be disclosed.

22. I take on board those points but I consider there was here, given the nature of the claim, and given the fact it was a request for information, no very obvious reason why the information was not supplied. The Claimant stood on a matter of principle. It might be that someone who has been wronged, as she was, would feel inclined to take such a stand, particularly in respect of information which might seem to be personal. But she could not legitimately refuse to answer a question about it if asked in cross-examination. I do not see it as being suggested that she could. It is proportionate that she should be asked the question in advance and give an answer. It is "necessary" in the **Canadian Imperial Bank** sense that it be given.

Conclusion

23. Accordingly, on grounds 1 and 3 I find that in this particular case, in these particular circumstances, the order was wrongly made. The parties are agreed that I should exercise my own discretion. Having regard to the statement of principle which I have set out and which is not disputed, and having regard to the relevance of the matter, I order that the information be disclosed. I emphasise, however, that the information should not be regarded as critical in the sense of determining whether or not the Claimant would have gone on to 70. It is one of the factors to which the Tribunal will expect to pay regard just as, in other cases, in other circumstances, it will have regard to the whole of the circumstances in reaching an appropriate conclusion, whatever that might be. On that basis this appeal is allowed.