Appeal No. UKEAT/0301/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 April 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

WINDOW MACHINERY SALES LTD T/A PROMAC GROUP — APPELLANT

MR J LUCKEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD POWELL (of Counsel) Instructed by: Averta Employment Lawyers LLP 6 & 7 Park Farm Barns Chester Road Stonebridge Nr Meriden Warwickshire CV7 7TL
For the Respondent	MR ANDREW MacPHAIL (of Counsel) Instructed by: Imperium Law Solicitors 10-12 Church Street Nuneaton SK11 6LB

SUMMARY

UNFAIR DISMISSAL

Compensation

Mitigation of loss

The Employment Tribunal did not err in law in its assessment of the period of the Claimant's loss or in its approach to the issue of mitigation. Appeal dismissed, except that a substantial error of calculation was corrected.

HIS HONOUR JUDGE DAVID RICHARDSON

1. By a Judgment dated 21 December 2012, Employment Judge Woffenden sitting in the Employment Tribunal at Birmingham upheld claims of constructive unfair dismissal and breach of contract which Mr John Luckey ("the Claimant") brought against Window Machinery Sales Ltd ("the Respondent"). A substantial award of compensation was made for unfair dismissal in the sum of £66,258.58. The Respondent has appealed against that Judgment. Two grounds of appeal, grounds 7 and 8 in the Respondent's Amended Notice of Appeal, have been allowed to proceed to a Full Hearing. Both are concerned with the assessment of compensation for unfair dismissal.

2. It happens that the Employment Judge has subsequently revoked the Judgment dated 21 December 2012 and reconsidered the matter. By a Judgment upon a reconsideration dated 1 May 2014 she awarded £72,539. The reconsideration was not concerned with the issues which are the subject of this appeal. The increase of the award was related to the incidence of taxation.

3. The reasoning which the Respondent seeks to criticise is in the Reasons given for the Judgment dated 21 December 2012. Technically, there ought to be an appeal against the Judgment dated 1 May 2014 since the earlier Judgment has been revoked. In the exceptional circumstances of this case, the parties agree that it is just to give leave to amend the Notice of Appeal to challenge the Judgment dated 1 May 2014. I do so and I dispense with all formalities.

The Background Facts

4. The Claimant was born on 28 January 1950. He has been a skilled engineer all his working life. His particular speciality has been the refurbishment of machinery used for the manufacture of windows. On 10 April 2007, he was employed by the Respondent in this capacity as a Refurbishment Engineer.

5. During his employment he was told that he would be eligible for a bonus when he completed five years' service. However, when he completed his five years of service, he was told the bonus had been withdrawn. He was upset with the Respondent's management. He was told to go home and suspended without pay. He resigned with effect from 3 May 2012, at which time he was 62 years and four months old. His claim for constructive unfair dismissal succeeded, as did his claim for payment of bonus.

The Award of Compensation

6. The hearing of the Claimant's claims took place on 3 December 2012. In accordance with usual practice, the Claimant had prepared a Schedule of Financial Loss. He claimed a total of £17,750 for unfair dismissal. This included his loss to date and an amount for future loss. The claim for future loss read:

> **"Future Loss**
>
> **Say, 26 weeks x £318.69 …"**

This, taken together with his claim for past loss of earnings, amounted to an overall claim for just over a year's loss of earnings, in other words until the Claimant was 63 years, four months old.

7. By the Employment Tribunal hearing it was the Claimant's case that he would have remained employed by the Respondent until the age of 65, when he would in any event have retired, and that he had suffered loss of earnings until he attained his 65th birthday. He was cross-examined, and the Employment Tribunal heard submissions on that basis.

8. The Employment Tribunal Judge dealt with the matter in her Reasons in two places. In her findings of fact she said:

> **"4.18. I accept the claimant's evidence that had he not been constructively dismissed he would have remained in the respondent's employment until January 2015 on attaining 65. He had not applied for Jobseeker's Allowance because he took the view that he would not be entitled to it for at least the first three months after having left the respondent. He had been surviving on his wife's state pension and their savings. He had now decided following having taken advice from a financial adviser that he would draw down on his pension entitlements early and would not look for another job. He has not looked for another job to date because he assessed the chance of getting a comparable job within the area as nil. His previous employers Bowater was the only local employer big enough to require the services of a maintenance engineer, other than the respondent. He had come to the conclusion that he would be able to manage on his drawing down of pension until such time as he was entitled to his state pension."**

In her conclusions she said:

> **"19. The duty on a claimant to mitigate is fulfilled if he can be said to have acted as a reasonable person would do if he had no hope of seeking compensation from his previous employer. … The claimant is 62; there was no evidence that his engineering skills were readily transferable. He has made no attempt to find another job but decided that his wife having retired and, after taking financial advice, to draw down on his pensions and utilise his savings. The respondent did not adduce … any failure to mitigate. Taking into account the labour market in the West Midlands and the claimant's age (it remaining the fact that those over fifty are likely to experience difficulties in obtaining new employment despite legislation which makes age discrimination unlawful), I find that the claimant complied with the duty to mitigate his loss under section 123(4) ERA."**

9. The Employment Judge therefore calculated compensation up to 28 January 2015 - or at least, as the schedule to her Reasons makes plain, that is what she intended to do. However she said that it was 164 weeks from the date of the Employment Tribunal to 28 January 2015. This was wrong. It was in fact 112 weeks. This error has persisted even past the reconsideration until it emerged at the start of the hearing before me. The figure for future loss awarded by the

Employment Judge was £52,265.16. The correct figure would be £35,693.28, to which an adjustment must be made relating to the incidence of taxation

10. The parties have again agreed on the appropriate course. I will grant permission to amend the Notice of Appeal to take this point. I will dispense with all formalities. I will allow the appeal on this point so that the Judgment dated 1 May 2014 will be corrected. The Employment Judge's calculation was no doubt an accidental slip, but it was perverse in the true legal meaning of the word to say that the period in question was 164 weeks. The amendment to the Judgment will be made in a figure which the parties have agreed. Taking this course is just, appropriate, within the powers of the Employment Appeal Tribunal and desirable because it saves any need for a further reconsideration by the Employment Judge.

The Period of Loss

11. I turn now to the two grounds of appeal. Logically it is appropriate, first, to consider the period of loss which the Employment Judge awarded.

12. Mr Richard Powell, who appears for the Respondent, complains about the decision to award as much as the period to 28 January 2015. He does not say that there was any procedural irregularity in awarding loss until that late. Although the schedule claimed only 26 weeks, the claim for loss until 2015 was understood on all sides at the Employment Tribunal hearing, and the Respondent had a fair opportunity to meet it. He says, however, that the decision is substantially unreasoned and perverse. Developing the submission, he says that the Employment Tribunal appears to have made no allowance for the possibility that the Claimant might have ceased to work earlier either by reason of unhappiness with the Respondent or

fellow employees, of which there was evidence in the Employment Tribunal's Liability Reasons, or in order to take early retirement.

13. Mr Andrew MacPhail, who appears for the Claimant, replies that there was an express finding by the Employment Tribunal that, but for the dismissal, the Claimant would have remained with the Respondent until the age of 65 (see paragraph 4.18 of the Reasons). He submits that there is nothing perverse or inherently surprising or unreasoned about the finding.

14. I accept the submissions of Mr MacPhail. The Employment Judge had evidence upon which she could properly conclude that the Claimant would have remained in employment with the Respondent until the age of 65. She was entitled to take that date as the period over which loss would have considered. There was no error of law in doing so. She set out her essential factual conclusion: I do not think more reasoning was called for. The conclusion cannot possibility be described as perverse. In 2012, many people in their early 60's in secure employment would have stayed on at least until the age of 65 before retiring.

15. I should add that Mr MacPhail also submitted that Mr Powell was in reality attempting to take a **Polkey** point, which was not open to him on the appeal because it had been rejected at the Rule 3(10) stage. I am inclined to think that he is incorrect and that the argument rejected at the Rule 3(10) stage was rather different to that which Mr Powell puts forward. However, having dealt with this ground of appeal on its merits, I need reach no final conclusion on that question.

Mitigation of Loss

16. Mr Powell then complains about the Employment Judge's conclusion that the Claimant complied with the duty to mitigate his loss. His submissions may be summarised as follows. The Claimant was healthy, articulate, presentable and mobile with a good record, current engineering and maintenance and repair skills and the capability to undertake full-time work. The duty to mitigate his loss required him to seek alternative employment, if necessary even at a lower rate of pay. A reasonable person would first seek comparable employment in their specialist field, contacting agencies and applying for any posts found. But once it became apparent that comparable employment was not available, a reasonable person would apply for alternative forms of work, gradually considering work at a lower rate of pay or considering part-time or occasional or even seasonal work.

17. Mr Powell contrasted this with the Claimant's approach. He had looked for no other work to the date of the Employment Tribunal because he assessed the chance of getting a comparable job at nil (see paragraph 4.18). It was, Mr Powell submitted, incumbent on the Claimant once that he realised that comparable work was not available to seek alternative employment, if necessary even at lower rates of pay. The Employment Judge appears to have found it reasonable for the Claimant not to look for work at all. This was an error of law. The Employment Judge should have found that, consistently with his duty to mitigate, the Claimant ought to have sought alternative work and she should have assessed his prospects of doing so. Her conclusion was essentially unreasoned or perverse.

18. Mr Powell also criticised the Employment Judge's approach to her experience of the labour market in the West Midlands. He said that she should have explained what her

experience was and how she took it into account in order to reach the conclusion she did. He relied on **Dugdale v Kraft Foods Ltd** [1977] ICR 48 at paragraphs 19 to 20.

19. Mr MacPhail replies to these submissions as follows. Whether an injured party has complied with the duty to mitigate is a question of fact. The Employment Judge stated the legal test correctly and made relevant findings of fact. Her conclusion could not be said to be unreasoned or perverse. The Respondent led no evidence at all on the question of mitigation. It is implicit in the Employment Judge's conclusion that the Respondent, upon whom the burden of proof lay, failed to show that, if the Claimant had taken any particular step, he would have been able to mitigate his loss. Given his age and the relatively short period before his intended retirement, and given also that his engineering experience was within a narrow field, the Employment Judge's conclusions cannot be described as perverse. The notion, Mr MacPhail submitted, that the Claimant should readily have taken low paid or seasonal work for the relatively short period until his retirement was to overstate the case for mitigation. The Employment Judge, he submitted, was entitled to take account of her general experience of the labour market.

20. Section 123(4) of the **Employment Rights Act 1996** provides that, in calculating the employee's loss following an unfair dismissal, Tribunals shall apply "the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law". There was no real dispute between counsel about the applicable principles of law. They took me to authorities on the question of the duty to mitigate including **AG Bracey Ltd v Iles** [1973] IRLR 210, **Ministry of Defence v Hunt** [1996] IRLR 139 and **Wilding v British Telecommunications plc** [2002] ICR 1079.

21. For the purposes of this appeal I can state the principles quite shortly. It is for the employer, not the injured employee, to establish that there has been a breach of the duty to mitigate and the extent of that breach. The duty upon an employer is to act reasonably in order to mitigate his loss "as a reasonable man unaffected by the hope of compensation from … his former employer" (**Wilding** at paragraph 37). The test is an objective one, based on the totality of the evidence, taking into account all relevant circumstances. The Tribunal must not be too stringent in its expectations of the injured party. It is to my mind plain from paragraph 19 of the Employment Judge's Reasons that she had these principles firmly in mind.

22. Where there is a substantial issue as to failure to mitigate, an Employment Tribunal may have to decide: (1) what steps it was reasonable for the Claimant to have to take in order to mitigate loss; (2) whether the Claimant did take reasonable steps to mitigate loss; and (3) to what extent, if any, the Claimant would have actually mitigated his loss if he had taken those steps. These questions are logically distinct, but the evidence which bears upon them will overlap and they are closely linked. The burden of proof is on the employer on all these questions. If the employer shows that there were many jobs available, it is easier for an Employment Tribunal to conclude that the employee ought to have engaged in a search for them. If the employer adduces no evidence at all on that question, it may well be difficult for an Employment Tribunal to conclude that an employee was required to engage in a substantial search for jobs.

23. The Employment Judge did not state conclusions separately on each of these three questions. It is, however, entirely plain to my mind that she was not satisfied on the third of them: that is, that the Claimant would actually have mitigated his loss if he had applied for alternative work. It was for the Respondent to satisfy her on this question. The Respondent

adduced no evidence. The period until the Claimant's date of intended retirement was, while more than a few months, still relatively short. She was entitled to take into account, in general terms, the labour market in the area and the age of the Claimant. To my mind, her decision on this point is sufficiently reasoned. It cannot be described as perverse, and that is sufficient on its own to dispose of this ground of appeal.

24. It is less clear whether the Employment Judge concluded that it was reasonable for the Claimant not to have made any effort to obtain alternative employment, although I think she probably did. On this part of the case, I accept the submission of Mr Powell as to what will generally be required of an employee. A reasonable employee will first seek comparable employment in their own field, contacting agencies and applying for posts found. Once it becomes apparent that comparable employment is not available, a reasonable employee will generally apply for alternative forms of work, gradually considering work at a lower rate of pay and eventually considering even part-time work.

25. Those, however, are questions of general approach. I must keep firmly in mind that the Employment Appeal Tribunal is vested by Parliament only with the decision of questions of law. In the first place, I am entirely satisfied that the Employment Judge applied the correct legal test, stated accurately in paragraph 19 of her Reasons. I am also satisfied that her reasoning is sufficient. She makes it plain that the factors which she took into account were the lack of any evidence from the Respondent, coupled with the age of the Claimant, the fact that his skills were not readily or immediately transferable and the relatively short period to retirement.

26. I do not accept Mr Powell's submission that the Employment Judge's decision was perverse. The principles which the Employment Appeal Tribunal must apply are well established (see **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 93 to 95). Precisely because Parliament has provided for an appeal to the Employment Appeal Tribunal firmly on a question of law, the Appeal Tribunal must take great care to keep perversity grounds within limits. Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal has reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and law, would have reached. Given the combination of circumstances in this case to which I have referred, I do not think the Employment Judge's decision can be described as perverse.

27. Finally, I should say that I do not think the Employment Judge's reference to the question of labour market was inappropriate or insufficiently reasoned. In **Dugdale v Kraft Foods**, at paragraph 20, the Employment Appeal Tribunal (Phillips J) said:

> **"… it is highly desirable that in any case where particular use is made by an industrial tribunal of the knowledge or experience of one or more of its members in reaching their decision this fact should be stated, and that particulars of the matter taken into account should be fully disclosed."**

28. This is no doubt correct where particular use is made of knowledge and experience on the part of one or more of an Employment Tribunal's members - for example, if a member has knowledge of a particular industry or town. However, I do not think general knowledge by an Employment Tribunal Judge or member of the labour market in the area was the kind of matter which the Employment Appeal Tribunal had in mind in **Dugdale**. Up and down the country Employment Tribunals and Employment Judge inevitably take into account their general knowledge of the local labour market when they assess future loss of earnings. Sometimes (indeed, in my experience, frequently) general knowledge of the local labour market enables an

Employment Tribunal with some confidence to assess a period over which an employee will be able to obtain alternative employment and mitigate loss. Occasionally, however, the Employment Tribunal will not have that confidence. I read paragraph 19 of the Employment Judge's Reasons as saying, in essence, that the Respondent had placed no evidence about jobs before the Tribunal and that nothing in the labour market in the West Midlands of which she knew enabled her to make her own assessment in the Respondent's favour. In essence, the Respondent failed on the burden of proof on this point.

29. It follows from what I have said that the appeal will be dismissed except in relation to the error of calculation to which I referred earlier in this Judgment. On that point the appeal will be allowed and the correct figure agreed by counsel substituted.