Appeal No. UKEAT/0360/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 February 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

LIPTON GROUP LIMITED APPELLANT

MRS J CUDD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS EMMA SOLE (of Counsel) Instructed by: Sharma Solicitors Hamilton House Mabledon Place London WC1H 9BB
For the Respondent	MR GEOFF CAESAR (Solicitor) Office 23 Couching House 41 Couching Street Watlington Oxfordshire OX49 5PX

SUMMARY

SEX DISCRIMINATION - Injury to feelings

The Employment Tribunal assessed the Claimant's compensation for injury to feelings for pregnancy discrimination at £12,000.

It appeared that the Employment Tribunal had taken into account JSB Guidelines which they had misquoted and the award seemed excessive even by reference to the guidelines as the Employment Tribunal understood them to be.

The award was therefore set aside. The parties agreed that the Employment Appeal Tribunal should re-assess the compensation; the correct figure, in the Employment Appeal Tribunal's view, was £9,000.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against the decision of an Employment Tribunal sitting in Watford, Employment Judge Tuck and members, which was sent out on 18 November 2013. The Employment Tribunal found that the Claimant had been constructively unfairly dismissed and subjected to pregnancy discrimination but not to sexual harassment. The appeal relates only to an award of £12,100 made for injury to feelings arising from the pregnancy discrimination. I should say the appeal is by the Respondents below, the employer, Lipton Group Ltd.

Background Facts

2. The Claimant worked for that company, which is a small family company with ten employees, from November 2007 as a Group Support Officer. In December 2012 she told her employers that she was pregnant and her due date was 31 May 2013. On 21 January 2013 Miss Lipton, the daughter of the Chairman of the company and the sister of the Managing Director and herself a director, started to work in the office rather than at home. The Claimant had been instructed to carry out a handover to Miss Lipton, which took place on 22-30 January 2013. When told that she was to carry out that handover, the Claimant had written:

> **"Chris has spoken about a handover which I do find very early as I have four or five months left."**

3. It is fair to say that that matter, namely being asked to make a handover to Miss Lipton so far before her due date, was not specifically part of the grounds upon which the Employment Tribunal found in her favour in this case. However, that handover certainly led to things which did form part of those grounds because it seems that the relationship between the Claimant and Miss Lipton did not fare well during those days in January 2013, and there were mutual

complaints made about their respective conduct. It was the way that the employer dealt with the Claimant's complaints about Miss Lipton, in particular, that formed the basis of her claim for unfair constructive dismissal and pregnancy discrimination. It seems that Mr Taylor, the CEO of the company, reacted to the mutual complaints rather like a rabbit caught in the headlights. That is my expression entirely based on my reading of the Judgment.

4. Matters came to a head with a series of meetings on 4 February 2013, which led to the Claimant going off sick. She was then told that she would be facing immediate disciplinary action, and this led her to write an e-mail on 18 February 2013 in these terms:

> **"It is completely disproportionate for the company to have begun disciplinary action against me in respect of 'gross misconduct' simply because I raised a grievance about the way I was spoken to by a director.**
>
> **The company's approach has been very heavy handed, particularly given that you are aware that I am 6 months pregnant. The stress that this has caused me and my unborn child has meant that I have had to be signed off work since the 5th February on the advice of my doctor.**
>
> **I can only conclude that, given my pregnancy, the company no longer wishes to continue my employment.**
>
> **I am therefore resigning with immediate effect. …"**

Mr Julian Lipton, who I think is the Managing Director, replied:

> **"It is with surprise and sadness that I received your letter dated 18 February resigning from your job …"**

It is clear that the Tribunal regarded those words as disingenuous and they state:

> **"It was not at all surprising that she had resigned her job."**

The Employment Tribunal Decision

5. In the list of issues that the Tribunal had to deal with were these under the heading "Constructive unfair dismissal":

> **"2.2.1. Has the Respondent, without reasonable cause, acted in such a way (objectively viewed) as was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant?**

2.2.2. In particular:

2.2.2.1. Was the Claimant prevented from raising a grievance informally?

2.2.2.2. Was the holding of three meetings on 4 February 2013 overbearing?

2.2.2.3. Did Mr Taylor adopt an "aggressive stance" in the grievance meetings?

2.2.2.4. Was the grievance procedure followed disproportionate?

2.2.3. If so, do the acts referred to above individually and/or cumulatively amount to a breach of the implied term of trust and confidence?

2.2.4. If the Claimant is relying upon a "last straw" event, does the 'last straw' relied upon have the essential quality of a 'last straw'?

2.2.5. Did the Claimant resign in response to the alleged breach?"

Then, under the heading "Pregnancy Discrimination":

"2.4. Was the Claimant treated unfavourably because of her pregnancy, contrary to s.18(2)(a) EqA? In particular:

2.4.1. Do the matters set out at para 2.2.2 above constitute unfavourable treatment?

2.4.2. If so, in respect of each act, was it carried out "because of" the Claimant's pregnancy?"

6. The Employment Tribunal found against the employer on all those points, but it is notable that nowhere is it expressly asked to adjudicate on whether the putative constructive dismissal was itself caused by pregnancy discrimination. That is a point which Miss Sole, for the Appellant, relies on.

7. So far as the injury to the Claimant's feelings which had to be awarded as a consequence of pregnancy discrimination is concerned, the evidence that she gave, which was clearly accepted by the Tribunal, was at paragraph 8.1 of the Judgment, which says this:

"The claimant told us and we accept that she was very upset at the actions of the respondent. She describes initially feeling devastated. While not in her contemporaneous emails that she describes she was having difficulty sleeping. She says that she was shaking in giving accounts to her husband and to her parents at the time, and from the evidence she gave we understand that she was frequently crying about these matters. She showed a lack of interest in her hobbies, felt very tired and lethargic and, against what should have been a happy time during her first pregnancy she felt that her experience was tainted by the discrimination she had suffered which was in the background all along. She indicated that it was something within her making her unhappy and that this has persisted in the eight and a half months since her employment terminated."

That is a reference to the time of the hearing, which was October 2013.

8. The Tribunal dealt with the award for injury to feelings at paragraphs 9.7 and 9.8 of the Judgment. 9.7 says this:

> **"9.7. In relation to compensation for injury to feelings, having regard to the evidence of the claimant, having regard to relevant guidance from the Judicial Studies Guidelines in relation to [personal] injury awards which indicate award of between £3,500 and £10,000 in cases of post traumatic stress disorder where, virtually, a full recovery is made within one to two years.**
>
> **9.8. Doing the best we can we think an appropriate award is £11,0000. We have added to that a 10% uplift in accordance with the decision of the Court of Appeal in *Simmonds v Castle* [2012], so have added to that a further sum of £1,100, making an award for injury to feelings in the sum of £12,100."**

9. The relevant Judicial Studies Guideline appears to be that relating to post-traumatic stress disorder, under the letter D, "Less Severe". There is the note:

> **"In these cases a virtual full recovery will have been made within one to two years and only minor symptoms will persist over any longer period."**

Then figures are given of a range £2,900 to £6,000 or, with a 10% uplift, £3,190 to £6,600. None of those figures have any resemblance to the range £3,500 up to £10,000, which the Employment Tribunal recite in paragraph 9.7. It is not clear, and neither counsel was able to help me, as to where on earth the Employment Tribunal's figures came from, nor entirely clear why they referred to any figures of that nature at all. It is also notable at this stage that their award of £11,000, which was more than the top of the bracket as they understood it, did not make a great deal of sense if they really were trying to follow the Judicial Studies Guidelines in relation to post-traumatic stress disorder, for two reasons. First, no-one has suggested that the Claimant was suffering anything like post-traumatic stress disorder, albeit her feelings were clearly hurt badly, and second, the Tribunal was compensating her for eight-and-a-half months' suffering, and the figures that the Tribunal were relying on related to a recovery being made within a period of one to two years.

The Appeal

10. Miss Sole, who represented the employers below and has argued the appeal here today, says in brief that the Employment Tribunal have made an error of law by referring to the JSB Guidelines erroneously in the way I have described and that they have clearly made use of the Guidelines in reaching the figure of £11,000 or £12,000 so that their conclusion cannot be supported as a matter of law.

11. Mr Caesar, who argued the case below as well and has been here today, points out that the reference to the JSB Guidelines makes very little sense and, as I say, they do not seem to have followed what they believed to be the guidelines anyway. I accept that point. Nevertheless it seems to me that, if an Employment Tribunal refers to something in the very direct way that they have in this case, one must assume that they had a reason for doing so and have taken account of the matters that they refer to. It follows from that that, if they have misstated something as radically as they appear to have in this case, the EAT can only conclude that they have made an error of law and that that error of law was material to their decision. On that ground alone, it seems to me that the appeal must be allowed and the award must therefore be set aside.

12. Both sides agree that, if the appeal is allowed, I should proceed by putting myself into the shoes of the Employment Tribunal to reconsider the award and to substitute such figure as I think right.

My Assessment of Compensation

13. So far as the correct figure is concerned, I primarily have regard to the findings of the Tribunal at paragraph 8.1 and the history I have recited, but I do not have regard to any feelings

which may directly arise out of the Claimant's interaction with Miss Lipton in January 2013. Miss Sole also says, in effect, that I should not take account of any injured feelings which arise from the constructive dismissal and, I suppose it follows, the loss of the job itself because the dismissal was not relied on as a specific head of pregnancy discrimination. I reject that submission. There was a clear causative link in the Tribunal's findings between the pregnancy discrimination and the Claimant's justifiable resignation and therefore the feelings that arose from her dismissal and the loss of her job. I simply do not see how those things can be divided up.

14. I do take account of the points that Miss Sole referred to in her Notice of Appeal: there was no recognised psychological illness here; on the findings of the Tribunal the Claimant was only to be compensated for eight-and-a-half months of feelings; and, related to the first point, that she was not or did not give any evidence of being on any kind of medication.

15. Looking at the whole picture I must assess which of the brackets laid down in the leading case, which is the one to which Tribunals should have regard, of **Vento v Chief Constable of West Yorkshire Police (No 2)** [2002] IRLR 177, this case falls within. In my view this is not a case that comes within the lowest bracket, up to £6,000, which is for less serious cases such as where the act of discrimination is an isolated or one-off occurrence. The discrimination in this case arose out of a series of events, on any view, and led to a dismissal as opposed to being one incident at work of discrimination, which is what I understand the lower band to be concerned with. I therefore have no hesitation in saying this comes within the middle band, namely an award between £6,000 and £18,000.

16. I have also had regard to two Employment Tribunal cases which are set out in *Harvey*. They are a case called **Magdelaine v Jon Associates Ltd** (Case no 3203175/2005, 14 March 2006, unreported), which is at paragraph 951 in the relevant section of *Harvey*, Volume 2, L 951, and the case of **Haynes v Neon Digital (Document Solutions) Ltd & Ors** (Case no 1501563/2010, 6 March 2012, unreported), which is at paragraph 961.01. Those two cases are not in any way binding on me or any other Tribunal, but it is obviously desirable that awards are as consistent as they can be, and those particular cases have been singled out by the editors of *Harvey* and have been put into the relevant section of *Harvey*. It seems to me one should have some regard to them. It seems to me also that this case actually comes right between those two and that the correct award is one of £9,000 for injury to feelings.

Disposal

17. Whether I would have allowed the appeal on the basis that the award of £12,100 was manifestly excessive, I rather doubt. But I have not decided the appeal on that basis. Given that I have reconsidered the matter, reached my own view, and the figure I have come to is a full quarter less than the award, it seems to me right that I allow the appeal and substitute my figure.