Appeal No. UKEAT/0050/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 September 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR I TAN — APPELLANT

SOLIHULL COMMUNITY HOUSING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS AMY STROUD (of Counsel) Instructed by: Lyons Davidsons Solicitors Victoria House 51 Victoria Street Bristol BS1 6AD
For the Respondent	MR ANDREW JOHN MCGRATH (of Counsel) Instructed by: DLA Piper UK LLP Victoria Square House Victoria Square Birmingham B2 4DL

SUMMARY

UNFAIR DISMISSAL

Compensation

Mitigation of loss

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

Unfair dismissal compensation. Insufficient reasons to explain why (a) pension loss was reduced by 85 pc and (b) no future loss of earnings, particularly partial continuing loss was awarded.

Appeal allowed and remitted for further consideration and reasons by same Employment Judge.

HIS HONOUR JUDGE PETER CLARK

1. The Claimant, Mr Tan, was employed by the Respondent, Solihull Community Housing Ltd, as an Anti-Social Behaviour Officer from 16 June 2009 until his dismissal effective on 11 July 2012. He brought a complaint of unfair dismissal in the Birmingham Employment Tribunal. The claim was resisted and came on for a hearing on liability before Employment Judge Lloyd. By a Judgment with Reasons dated 25 July 2013 that Judge upheld the complaint with a 25% deduction for contributory fault, applied to both the basic and compensatory awards.

2. A Remedy Hearing took place on 2 October 2013. On that occasion, following reconsideration on the Claimant's application, an uplift of 20% under section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992** was applied. Between dismissal and that hearing the Claimant obtained fresh employment as a postman with Royal Mail Group ("RMG") on 25 March 2013 at a much reduced level of pay. However, on 29 March he was the victim of a hit and run accident when he was struck by a vehicle on a pedestrian crossing. The motorist did not stop.

3. Ms Stroud, appearing for the Claimant here and below, invited me to read the medical evidence adduced below in relation to the effects of the RTA. I have done so. In summary the Claimant sustained an undisplaced fracture of the medial tibial plateau of the right knee; fracture of ribs 9-11 on the left side; and sprain to the lateral collateral ligament on the right side of the knee. There is reference to a head injury but no neurological treatment was required.

4. He was seen in Accident and Emergency on 29 March and remained in hospital until discharge on 2 April. He was then seen at the outpatient clinic on 8 April and 16 May. He was last seen by his general practitioner on 4 June and given a sick note until 16 July. According to the GP's letter of 8 July he was expected to make a full recovery from his RTA injuries.

5. In assessing the Claimant's compensatory award the Judge considered the rival Schedules of Loss and accepted the approach advanced by the Respondent. In particular (1) the Claimant's loss of earnings was found to be recoverable to the date of the Remedy Hearing and no further. In calculating loss to that date the Judge adopted the Respondent's figure for net weekly pay at dismissal, £407.23. 64 weeks from dismissal to 2 October 2013 was £26,062.73. To that figure was added loss of statutory protection, £300, and deducted (a) net pay in lieu of notice, £1,502.89, and (b) wages and sick pay from RMG during that period totalling £1,931.82, giving a total award for loss of earnings of £22,928.01.

6. The Judge declined to make any award for future loss of earnings beyond the date of the Remedy Hearing. His reason for declining to make any award for future loss is contained at paragraphs 5.8 and 5.9 as follows:

> **"5.8 I accept the justification of net to loss to the date of the remedy hearing, but not that loss of earnings shall continue to accrue beyond that date. The claimant has a range of experience and skills including his driving instructor qualification and business experience. He is eminently employable; and indeed found employment – with Royal Mail Group Ltd by 25 March 2013.**
>
> **5.9 I do not accept that his back condition will render him less employable for the sort of work he is suitable for, including administrative, business and general managerial skills. Subject that [sic] I accept his losses to date he cannot rely on the hit and run incident as supporting any claim for future loss. It is a supervening event of criminal liability. It breaks the chain of causation. He has a claim to the MIB [Motor Insurance Bureau] to recover such losses as arise."**

7. Second, in relation to pension loss, the Judge accepted the Respondent's case that there was only a 15% chance of the Claimant's employment with the Respondent continuing until

age 65. He was aged 51 years at dismissal. He therefore applied an 85% reduction to the gross calculation figure for pension loss.

8. Against both the future loss and pension loss calculation the Claimant brings this appeal. Both grounds, as articulated in amended Grounds of Appeal, were permitted to proceed to this Full Hearing at a Preliminary Hearing before HHJ Richardson.

Future Loss

9. I have earlier set out paragraphs 5.8 and 5.9 of the Judge's Reasons in full because, it seems to me, the first ground of appeal is posited on a misunderstanding of what the Judge actually decided, possibly contributed to by some infelicitous wording.

10. My starting point is that the Judge did not find that the chain of causation was broken by the RTA on 29 March 2013, stopping any loss of earnings claim at that point. On the contrary, he awarded full loss to the date of hearing, 2 October 2013, less wages and sick pay from RMG after 25 March. This is not therefore an analysis which raises the spectre of the House of Lords Decisions in **Baker v Willoughby** [1970] AC 467 and **Jobling v Associated Dairies** [1981] 2 All ER 752, on the effect of an intervening act in the assessment of damages for personal injury in the law of tort. Nor do I consider that the principles stated by Beldam LJ, correcting my approach in **Whelan & Anr T/A Cheers Off Licence v Richardson** [1998] IRLR 114, in **Dench v Flynn & Partners** [1998] IRLR 653, are strictly engaged. The real question for the Judge under section 123 of the **Employment Rights Act 1996**, having awarded full loss to the date of the Remedy Hearing, was whether it was just and equitable to award a further sum for future loss. He decided not apparently because (a) the Claimant's range of skills and experience made him eminently employable and (b) he was not prevented from obtaining fresh

employment either by reason of a pre-existing back condition nor, of particular relevance, as a result of injuries sustained in the RTA on 29 March, some six months earlier.

The Appeal

11. I have had the advantage of full oral argument of considerable focus from Counsel. As a result of our discussion, the way forward in this appeal is now clear to me.

Pension Loss

12. Ms Stroud's challenge on this aspect of the case is that the Judge's reasoning is not **Meek**-compliant. The finding as to the substantial 85% discount from the gross pension loss calculation is limited to paragraph 5.6.5 where the Judge simply states:

> **"I believe a 15% chance of employment with the Respondent at 65 is a realistic one."**

13. True it is that that was the percentage contended for by the Respondent in their Counterschedule of Loss below. However, that is a figure arrived at after taking account of a number of factors including the Claimant's pre-existing back condition, which had left him unfit for work between August and December 2011, and the possibility or not of future redundancy.

14. There is no analysis by the Judge of the various factors relied on by the Respondent and contested by the Claimant. No findings on those features of the case appear in the Reasons. Ms Stroud correctly refers me to the observations of Sedley LJ on the minimum requirements of proper Tribunal Reasons in **Tran v Greenwich Vietnam Community** [2002] IRLR 735, paragraph 17. Simply to recite the background and the parties' contentions and then to announce a conclusion does not explain how the Tribunal got from its findings of fact to its conclusions.

15. That, in my judgment, is what has happened on this aspect of the case here. The reasoning is inadequate. What should now happen I shall return to when considering disposal of the appeal.

Future Loss

16. I note, contrary to the view apparently expressed in the last two sentences of paragraph 5.9, that the Judge did not in fact cut off the loss of earnings claim at the date of the RTA, 29 March 2013, but awarded full loss to the date of the Remedy Hearing, less payments received from RMG.

17. However, the difficulty with the Judge's decision to apply a complete cut-off at 2 October is that does not address the question of a potential continuing loss after that date. On the findings at paragraph 5.9 the Judge was satisfied that the Claimant was not prevented from working after that date by reason either of back condition or the effects of the RTA. No **Polkey** argument was advanced on behalf of the Respondent to the effect that his employment could have been fairly terminated before the Remedy Hearing. That was a wholly permissible finding. However, there is no finding as to whether he was then able to return to work for RMG; I am told by Mr McGrath in his written submissions that the Claimant was dismissed by RMG in September 2013, shortly before the Remedy Hearing. Thus he was unemployed as at 2 October. There is no suggestion in the Judge's Reasons that the Claimant had failed to mitigate his loss up to that date; indeed specific reference is made to the RMG job at paragraph 5.8.

18. However, as Ms Stroud points out, the earnings in that job were about one-third of those with the Respondent. There is no finding as to the earnings level at which the Claimant was expected to re-enter the labour market as at 2 October. Even in Mr McGrath's written closing

submissions below he submitted that the future loss award should be "limited", not that it was unsustainable.

19. In all these circumstances I am persuaded that the question of future loss must be revisited by the fact-finding Tribunal.

Disposal

20. It follows, in my judgment, that the appeal must be allowed. I do not consider this to be an appropriate case for a Burns/Barke reference at this stage. Further, the case should be remitted to the Employment Tribunal rather than for me to attempt to deal with the matter, particularly in light of the recent guidance from the Court of Appeal in the cases of **Jafri v Lincoln College** and **Burrell v Micheldever Tyre Services Ltd**, reported at [2014] IRLR 544 and 630 respectively. The only outstanding question is whether it should return to the same or a different Employment Judge. Having considered Ms Stroud's submissions in support of a fresh Tribunal, I am quite satisfied that it should return to Employment Judge Lloyd, who heard the liability issue over five days and then conducted the Remedy Hearing, reaching a balanced Judgment on each occasion in my view (the Liability Decision was not appealed), subject only to the issues raised above, which required further consideration and reasoning. Accordingly the matter will be remitted to the same Employment Judge for hearing on submissions only. No further evidence will be admitted.