Appeal No. UKEATS/0050/13/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 22 July 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MISS MARGARET GENNELLI MALCOLM APPELLANT

DUNDEE CITY COUNCIL RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Miss Malcolm in person and represented by her brother Mr George Malcolm
For the Respondent	Mr Michael Upton (Advocate) Instructed by: (Licensing) Legal Section Dundee City Council 21 City Square Dundee DD1 3BY

SUMMARY

Compensation. The claimant was the subject of sexual harassment. The medical evidence was that the claimant was unfit for work due to a combination of events, the harassment being one of the causes. The ET reduced compensation thus: by 50% to reflect their finding that the respondent had been a contributor rather than the sole cause of the claimant's loss; and to nil for a period during which the claimant had prepared for and then attended university, on the basis that the claimant not available for paid work at that time. The award of compensation was calculated to 2013, on the basis that the evidence of the claimant and her medical adviser was that the ending of litigation would assist recovery. The ET made no reference in its decision to a claim in respect of loss caused by reduced hours of work, and to a submission that the claimant had failed to prove her loss by failing to lead evidence of other work she would have done had she been fit. The ET did not determine pension loss but indicated that it hoped parties would agree a figure in that regard. The parties did not agree.

Held: There was no error of law in the ET decision to apportion the illness and the loss caused by it to various causes. The ET was entitled to find that wage loss would be likely to cease in 2013. The ET erred by omitting to give a reasoned decision in relation to the submissions about wage loss. Remitted to the same ET to hear evidence and submissions on the figures for wage loss and pension loss.

THE HONOURABLE LADY STACEY

1. This is an appeal and cross-appeal by Miss Malcolm and the city council concerned with the compensation due to Miss Malcolm in respect of sexual harassment in 2001. I will refer to the parties as the claimant and the respondent. Before me, the claimant appeared in person assisted by her brother Mr George Malcolm. She said at the outset that she found it difficult to make representations and therefore her brother would present the case. From time to time she asked if she might add something, which I allowed her to do. For the respondent, Mr Upton, counsel, appeared, instructed by Mr Woodcock, solicitor to the respondent. The decision under appeal was sent to parties with reasons on 31 May 2013.

2. This case has a very long history. The amount of compensation to which the claimant is entitled was considered by a Tribunal chaired by EJ Watt. The ET heard evidence from Dr Tilak, Dr Yellowlees, and Professor McIntosh. Submissions were made. The underlying facts of sexual harassment had been established before an ET chaired by E J Worthington which gave its written reasons on 5 December 2006. That ET considered the claims to be time-barred and so dismissed the case. The claimant appealed that decision to the EAT and then to the Court of Session. The Court of Session decided that the claim was not time-barred, and that the facts of sexual harassment by employees for whose acts the respondent were responsible happening between May and December 2001 were established. The court remitted the matter to the ET to consider the appropriate amount of compensation. The ET chaired by EJ Watt required to proceed on the findings in fact made by the ET chaired by EJ Worthington but to make up its own mind about the amount of compensation.

3. The decision which the ET made was to award the sum of £25,000 for injury to feelings; £12,500 for psychiatric injury; and £25,603 for loss of earnings. No award was made

in respect of future wage loss. The ET stated that there should be an award in respect of loss of pension rights for the period 1 October 2007 to 31st May 2013. The ET expressed the hope that parties would reach agreement on the amount of the award for pension loss, having found that pension loss was a good head of claim. The ET did not make an award in respect of loss for the period between 2002 and 2003 when the claimant intended to go to university, or for the period between 2003 and 2007 when she was attending university. Such past wage loss as was awarded was reduced by 50% on the basis that the loss was not solely caused by breach of duty by the respondent. No award was made in respect of future loss, because the ET found that by 2013 the claimant would probably be recovered and fit for employment.

4. The grounds of appeal for the claimant which were allowed through the sift were that the past financial loss should not have been reduced by apportionment of some of the loss to reasons other than the actions of the respondent. Further, the figure for past wage loss omitted anything in respect of loss of wages from reduced hours employment at Asda despite submissions having been made on that subject. Wage loss should have been awarded in respect of the time when the claimant was attending university and intending to do so. Future wage loss should be awarded until the claimant's retiring age when she will be eligible for a state pension. Pension loss should be payable for the period during which wage loss ought to be awarded.

5. The respondent cross appealed. The grounds which passed the sift were that there had been no evidence about alternative employment which the claimant would have had had she not been the subject of sexual harassment by employees of the respondent. Therefore there was no basis for the ET to decide what loss the claimant had suffered. There was no evidence that she would have been in pensionable employment and therefore no evidence on which the tribunal could properly award her pension loss.

6. The first issue with which I will deal is that of apportionment. In the case of **Thaine v London School of Economics [2010] ICR 1422** it was held that in cases under section 65 (1) (b) of the Sex Discrimination Act 1975 the principles relating to the assessment of damages at common law apply when making an award of compensation for sex discrimination. In the event that more than one cause of harm is identified, the test of causation is whether the respondent's breach of duty had materially contributed to harm suffered by the claimant. The extent of the respondent's liability is limited to that contribution, because there is no reason why the respondent should have to compensate the claimant for ill-health and its consequences in its entirety, if the unlawful acts for which it was responsible was one of many contributory causes.

7. The ET took the view that the claimant had had psychological and psychiatric difficulties from a very early age as was set out in the report of Dr Tilak. It preferred that doctor's evidence to the evidence of Dr Yellowlees where there were differences between the opinions of the two doctors. It decided that it should apportion the cause of the claimant's psychiatric illness 50% to the events in 2001 which were carried out by employees of the respondent and 50% to other causes.

8. Mr Malcolm argued that there should be no apportionment. In the skeleton argument written by the claimant and relied on by her brother, reference is made to the case of **BAE Systems v Konczak** , unreported, EAT 13 January 2014. From that case Mr Malcolm sought to argue that the ET had to decide whether the psychiatric illness which had resulted in the loss to the claimant had divisible causes. If it did it then had to decide if the award fell to be apportioned. The transcript of the case shows that there was discussion before the EAT about a lecture given by Dame Janet Smith on 17 November 2008 under the title "Causation – the

search for principle." At paragraph 34 the following quotation from her ladyship's speech is given: –

> **"I do not think that one can apportion damages to psychiatric injury. It seems that it is *par excellence* an indivisible injury. As a rule the Claimant will have cracked up quite suddenly; tipped over from being under stress and to being ill. The Claimant will almost always have a vulnerable personality. But the defendant must take the Claimant as he finds him, eggshell skull and vulnerable personality included. Having a vulnerable personality should not result in any reduction in damages."**

9. The EAT judgment goes on to contrast that view with a view given by Hale L J, as she then was, in the case of **Hatton v Sutherland [2002] ICR 613**, where she said: –

> **"Many stress-related illnesses are likely to have a complex ideology with several different causes. In principle a wrongdoer should be only for the proportion of the harm suffered for which he is by his wrongdoing responsible.… It is different if the harm is truly indivisible: a tortfeasor who has made a material contribution is liable for the whole, although he may be able to see contribution from other joint concurrent tortfeasor's have also contributed to the injury.… Hence if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. There is no reason to distinguish these conditions from the chronological development of industrial diseases or disabilities. The analogy with the polluted stream is closer than the analogy with the single fire. Nor is there anything in Bonnington Castings v Wardlaw [1956] A C6 13 or McGee v National Coal Board [1973] 1 WLR 1 requiring a different approach."**

10. The ET resolved any difference between these opinions in the **BAE** case by deciding that in the ordinary case it is necessary for the ET to reach a conclusion about an injury or state of health said to result from the wrongful act of the employer as to whether that injury state of health is divisible or indivisible. Mr Malcolm appeared to argue that the ET had not carried out the exercise required by the BAE case.

11. I do not know the context of the speech by Dame Janet Smith and I am not able to decide if there really is a conflict between the view she expressed and that expressed by Hale LJ. If that is, then I prefer the view given by Hale LJ in the course of the judgment to that expressed by another High Court judge in the course of a lecture. It seems to me that the judgment from the court, while not binding on me, is very persuasive and that I should regard it as authoritative compared to a quote from an article said to be delivered at a conference by another judge. I agree that the ET should decide on the condition suffered by the claimant and then decide if it is divisible. The ET was entitled on the evidence in this case to decide that

there were divisible causes. It is entirely possible to apportion the causes of the psychiatric injury in this case. The evidence, accepted by the ET, from Dr Tilak was that the claimant had suffered psychiatric illness from an early age. While she had been fit to work, she had been off sick with stress for eleven months in 1999, which was about 18 months before the events that we are concerned with happened. That was clearly a serious matter, given the length of time off work, and so it is plain that the claimant was suffering from psychiatric illness with serious consequences for her ability to work before the events of May to December 2001 happened.

12. Mr Malcolm referred to the case usually called 'the Wagon Mound' by which I understood him to mean the well-known case which is concerned with foreseeability of a particular kind of harm. It did not have any application to the current case; in this case no one argues that the abuse suffered by the claimant in 2001 was other than abuse from which psychiatric injury might be a foreseeable consequence. He also referred to the idea that a person with an eggshell skull or a vulnerable personality who would therefore be more likely to suffer severe consequences than would a person who was in good physical and mental health, was nevertheless entitled to damages, as the person who acts wrongfully must take his victim as he finds him. Broadly speaking he is quite correct in that. It does not seem to me however that that is the point that is raised in the current case. The ET in this case looked at the consequences of the wrongful acts of the respondent in the context of the claimant's existing medical condition. They found that there were causes other than the respondent's employees' acts contributing to the claimant's condition. In my opinion they were entitled so to find. The claimant had been off work for the period referred to above before the acts with which I am concerned happened. The ET was entitled to find in the circumstances that the respondent's employees' acts were not the only cause for the claimant becoming ill. Other events had actually contributed to the claimant's inability to work; it was not simply that she was vulnerable and succumbed to illness where others might not.

13. The next argument from Mr Malcolm concerned the periods for which wage loss should be awarded. The ET gave past wage loss for the period between 2007 and 2013 on the basis that the medical evidence was that the claimant was too ill to work during that time. She had gone to university in 2003 and graduated in 2007. It did not give wage loss for that period, nor for the year before when the claimant was intending to go to university. Mr Malcolm argued that the reason that the claimant had gone to university was that she was too ill to carry out paid work, but she was fit to go to university. He said that she would not have gone to university otherwise because apart from anything else she could not afford to do so. She was however allowed to attend university while getting benefits which included having mortgage interest paid. He argued that the suggestion of going to university was made to her by her doctor and by an official at the job centre. If the claimant had not been ill she would not have gone to university. Therefore he argued that while she had enjoyed university and benefitted from it, the fact was that she was prevented from making money at that stage due to her medical condition. He reminded me that the medical evidence was that the claimant was unfit for paid work, but not unfit for study. Mr Malcolm referred to the cases of **Hibiscus Housing Association Ltd v McIntosh unreported EAT 2009**, **Khanum v IBC Vehicles Ltd unreported EAT 1999** and **Sivanandan v Hackney Borough Council [2013] EWCA Civ 22**. It did not seem to me that these cases were particularly helpful but I understood Mr Malcolm to argue that the principle he wished to advance is that it is insufficient for the ET simply to find that the claimant had gone to university and was therefore not available to take paid employment. They should instead have considered why the claimant had gone to university and should have found that she did so because she was unfit for work and university attendance was thought to be therapeutic for her. Those facts were before the ET and were not disputed. Thus it was plain that the lack of paid employment was caused, not by choice to go to university, but by the claimant's medical condition.

14. In my opinion Mr Malcolm is correct. The question of going to university is a question of fact and it will be for each tribunal to decide whether there ought to be an award of wage loss at that time. What is unusual about the claimant's case is that she did have medical evidence that she was unfit to carry out paid work (except for some work at Asda) but was fit to study. The choice for her therefore would be to stay at home and not work, in which case she would be entitled to compensation, or to go to university. In either scenario she would be living off benefits. The ET does not in my opinion give cogent reasons why wage loss for that period should not be recovered.

15. The next argument concerns the claimant's part time work in Asda. The medical evidence was that the claimant could cope with some paid work because of the adjustments that management at Asda were prepared to make. There is a factual dispute about what happened in the ET so far as this is concerned. Amongst the papers there are three schedules of damages one of which bears to set out figures for the money that the claimant would have made at Asda had she been able to work for 15.5 hours instead of 3.5 hours. The medical evidence was that she could only do 3.5 hours. If that was before the ET, then they have not explained why no award was made in respect of it.

16. The next argument concerned future wage loss. The ET chaired by EJ Watt awarded no wage loss after 2013. It did so because there was evidence from the claimant herself that she hoped that the end of the case would help her to get better; and there was medical evidence from Dr Tilak expressing the same hope. The claimant has in fact gone on with her studies, to obtain a PhD, starting in autumn 2013. An interim payment has been made by the respondent to enable her to do this. That is because she requires to pay fees. It is a self-funded PhD. She maintains that she is doing it because she is not fit to work but she is fit to carry out the studying required for the course. The claimant argues that she is still in the same position as

during her undergraduate studies; that is, she is able to study but not to work; her disability being caused by the acts of the respondent's employees. The claimant argues that she will not be able to get the State pension until she is 67 and the further loss should continue until then.

17. The last head of claim is pension loss. According to Mr Malcolm the claimant has suffered in that she had not been contributing to a pension because she has not been able to work. He argues that the ET will have to determine the amount of that pension loss because the parties have not been able to agree it.

18. Mr Upton for the respondent answered the appeal and made his own cross-appeal. The cross-appeal is concerned with the wage loss between 2007 and 2013. Mr Upton argues that there was no evidence before the ET as to what salary the claimant could have made in another job had she not been made ill by the respondent's employees' actions. The facts found were that the claimant had resigned from her post as a school laboratory technician because she feared she would be disciplined. The events leading to that state of affairs were not those which had been found to be unlawful. Therefore the claimant would not have been employed as a school laboratory technician had she not been ill. It is, he argues, for the claimant to lead evidence of her loss and she had failed to do so. Counsel stated that there was before the ET an agreed minute of the amount of salary that a school laboratory technician would have got, now at page 158 of the papers. He said that that was agreed to save a witness attending the ET. It is apparent from the reasons that the ET used that as the figure from which to calculate the loss. Mr Upton was quite unable to explain why that had happened, because he said that his submissions at the ET were to the effect that there was no evidence about what work the claimant would actually have done, and there was no agreement that she would have been a school laboratory technician. He reminded me that she in fact resigned from her job as a school technician in 2002 and he said there was no evidence which suggested either that she would

want to go back or that the Council would want to employ her. When I pressed him on why these figures had been agreed, he could only say that it was to save a witness attending. That was not answering my point. I wanted to know why it was necessary to have the evidence at all. In the reply made by both the claimant herself and her brother, they said that the claimant thought that the lawyer who represented her at that time, Mr Heggie, had agreed with the respondent that that was the loss and there was no need to lead anything further. The ET at paragraph 127 states that they have based their figures on the schedule lodged by Mr Heggie [page 158 of the bundle]. They find the appropriate period for which compensation should be awarded to be October 2007 to May 2013. They state:

> **"The Tribunal consider that if it had not been for the psychiatric illness then the claimant would probably have obtained a full time job by October 2007 after having graduated in June or July 2007. On the figures given for the earnings which she would have had in her previous position her net loss for that five years, seven month period is the sum of £73,859."**

19. Thus it seems that the ET decided that the claimant had not earned between 2002 and 2013. It decided that she should be compensated for the loss occurring between 2007 and 2013. In calculating the loss, it used figures in a schedule prepared by Mr Heggie. The difficulty is that Mr Upton maintains that those figures were agreed as being the salary of a school laboratory technician, but there was no agreement that the claimant would have earned that salary, as there was no agreement that she would be working in such a post.

20. I am completely puzzled as to what happened at the ET. The written reasons do not state why the figures from the school laboratory technician salary were used. The ET found that the claimant would have found a job after graduation. There is no reason given for holding that she would have been a school laboratory technician, which was a job for which a degree was not required, and from which she had resigned. That rather makes it look as though the ET thought that it was agreed that the figures were agreed as the loss. I do not doubt however that Mr Upton made a submission that there was no evidence of loss. No discussion of that submission appears in the reasons. I do not know why the respondent did not seek a review of

the ET decision on the basis that a submission had been ignored and the ET had wrongly thought that the figures for past loss had been agreed.

21. On the question of apportionment, Mr Upton's arguments were that it was perfectly in order to apportion and that I should follow the case of **Thaine**. I agree with his submission. The ET was entitled to hold that the medical evidence was that the claimant's medical condition had more than one cause. Thus they were entitled to apply the exercise of apportionment all as discussed in the judgment of Hale LJ.

22. On the matter of wage loss, Mr Upton argued that the ET was correct to decline to make any award for the period when the claimant was at university. He said that the position was simple in that she was at university and therefore not available for paid work and therefore was not suffering a loss. It did not seem to me that he took on board fully the special circumstances prayed in aid by the claimant of her being, unusually, fit to study but not fit to do paid work. I find this because the psychiatric report is clear that the fact of being paid and being part of a workforce was for psychological reasons very difficult for the claimant. I accept that that is rather unusual but that is what the medical evidence says, and the ET having accepted the medical evidence were not entitled to find that no compensation should be awarded for that period and for the year leading up to it.

23. Mr Upton argues that there is no pension loss due because the claimant did not lead evidence to show that she would have been in pensionable employment had the acts of sexual harassment not happened. His argument depends on the argument outlined above that there was no evidence that claimant would have been a school laboratory technician, and no evidence that she would have been in any other employment which was pensionable.

24. My conclusion in this case is that the appeal succeeds in part. I am of the opinion that the claimant has shown that she had a medical condition which prevented her working between 2002 and 2007. Standing the ET's view that she was entitled to wage loss from 2007 to 2013, which they were entitled to hold, she should have been entitled to wage loss during that earlier period also. As I have accepted the argument that wage loss during the period of university study is due, it follows that what the ET has to assess is what would have happened if the events of 2001 had never happened. On the claimant's own evidence, she would not have gone to university. She had resigned from her job. It will be for the ET to decide if she would have got another job, if so, when, and at what salary.

25. I am not persuaded that the claim for future loss after 2013 is made out. While the claimant argued that it was speculative to say that she would suddenly get better in 2013, a degree of speculation is in the nature of the exercise to be carried out when deciding on future loss by any tribunal. The ET had a basis for its decision in that there was medical evidence and the claimant's own evidence to the effect that the end of litigation would help the claimant's health. It therefore seems to me that they have not erred in law in so deciding. It was not argued before me that the fact of the litigation continuing is relevant. That is because the question before me is whether the ET erred in law in deciding on the case presented to it. I find it did not, so far as future loss is concerned. Lest I am wrong in that, I should say that I would not in any event have accepted the submission for the claimant that loss will continue and should be the subject of compensation until the State retirement age. In light of the medical evidence loss until state pension age is not made out.

26. I am not able to make the calculation in the EAT. That is because there is utter confusion about what happened in the ET regarding the availability of other work. As I have indicated in my first judgment in this case, it was always going to be necessary to remit this

case to the same ET in relation to pension loss. The ET expressed the understandable hope that parties would agree pension loss, but that has not proved possible. In those circumstances the parties are entitled to a determination of such loss by the ET. In addition to a remit in respect of pension loss, I therefore remit it also in relation to the figures to be used for wage loss. The ET will have to determine what work the claimant would have done after her resignation in 2002 had she been fit; what wages she would have made; and what loss she sustained.

27. As regards pension loss the ET has found at paragraph 139 that the claimant would have found work in 2007 and that her employer would have been contributing to a pension. It will be necessary for the ET to consider whether or not the claimant would have been in that position had she not gone to university. They will also have to consider what employment she was likely to have between 2002 and 2007, and whether it would have been pensionable. If the claimant has suffered pension loss, the ET will require to determine the amount as parties have not been able to agree it.

28. This case has been before the tribunals and the court for too long already. I cannot make any findings of fact about what happened at the ET; I do not know why the salary of a school technician was agreed when counsel always intended to, and in fact did, make a submission that the figures were irrelevant. The case has been complicated and I do not underestimate the difficult task before the ET in deciding on remedy. It may not be surprising if some submissions were either misunderstood or overlooked. According to the submissions before me, the ET has not made reference to submissions made by the claimant on her reduced hours at Asda, nor to submissions made by respondent on lack of evidence about the work the claimant might have had. It is not an error of law for an ET to omit reference to a particular piece of evidence or the detail of a submission; but it is an error of law to make no reference to a submission which if accepted would alter the outcome of the case. I appreciate that both

parties wish an end to litigation. I am not inclined to make any order seeking information from the ET about the submissions on wage loss, and its reasons for using the figures which the claimant says were agreed and the respondent say were not, as I might do under the Barke /Burns procedure. Rather, with a view to finality, I will direct that the ET should hear such evidence and submissions as the parties choose to lead and make on the part of the case relating to the amount of wage and pension loss only.

29. My disposal therefore is to return this case to the Employment Tribunal to decide on the correct amount of compensation on the basis that the claimant was unable to work between 2002 and 2013 due to the acts of the respondent's employees; the ET must make findings of fact on the work that the claimant would otherwise have done and the salary she would have been paid; on whether that work would have been pensionable; and calculate the loss she has suffered. For the avoidance of doubt, the decision of the ET on apportionment is upheld, as is the decision that compensation should be calculated to 2013.

30. I am grateful to the claimant and Mr Malcolm and to Mr Upton and Mr Woodcock for the restraint shown in the way in which the submissions were made. It seems to me that the agreement to pay interim compensation to enable the claimant to study for a PhD shows good sense. If this case cannot be resolved by agreement, I have no doubt it will be helpful if parties agree such facts as they can, enabling the arguments before the ET to be on clearly defined issues.