Appeal No. UKEAT/0306/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2014

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MR S DALY APPELLANT

NORTHUMBERLAND TYNE AND WEAR NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR HARI MENON (of Counsel) Instructed by: Royal College of Nursing Legal Services 2nd Floor, Avalon House St Catherines Court Sunderland Enterprise Park Sunderland Tyne and Wear SR5 3XJ
For the Respondent	MR ANDREW WEBSTER (of Counsel) Instructed by: DAC Beachcroft LLP Wellbar Central 36 Gallowgate Newcastle Upon Tyne Tyne and Wear NE1 4TD

SUMMARY

DISABILITY DISCRIMINATION - Loss/mitigation

The appeal concerned a Remedy Judgment after a finding that he was entitled on the grounds to compensation for discrimination on the grounds of disability - failure to make reasonable adjustments, arising in consequence of disability and harassment.

The Claimant claimed that a finding by the Employment Tribunal that the Claimant would be able to recover his post termination earnings within 12 months was not adequately supported by the evidence. This ground of appeal was rejected on the basis that future loss always contained an element of speculation, and although the evidence was somewhat impoverished, the Employment Appeal Tribunal could not say that the finding was unsupported by the evidence. It was not for the Employment Appeal Tribunal to substitute its views for those of the Employment Tribunal or to second guess the Employment Tribunal.

The other ground of appeal was that the Employment Tribunal had estimated the earnings the Claimant might have received in the 12 months before regaining full capacity without any evidential basis. The reasoning of the Employment Tribunal in this regard was unsatisfactory and this issue was remitted to the same Employment Tribunal.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimant from a decision at a Remedy Hearing of 23 July 2014 at the Employment Tribunal in Newcastle presided over by Employment Judge Garnon, who sat with lay members. The particular issue in the case relates to a decision of the Employment Tribunal relating to compensation for loss of earnings, which were limited to 12 months from the date of the hearing.

2. The Judgment is expressed to be by consent. I think that perhaps is an unfortunate use of language because what in fact seems to have happened is that the Employment Tribunal made its findings and it was only the calculations that had been agreed and were effectively by consent, as also had been the issues that the Employment Tribunal had dealt with. Nothing turns on that. There had been an earlier Judgment of the Employment Tribunal on liability, with the same Tribunal, dated 9 January 2014. The Employment Tribunal there upheld the Claimant's complaints of failure to make reasonable adjustments and for compensation for discrimination because of something arising in consequence of disability as well as harassment. The claim for compensation for direct discretion was dismissed. On 15 May 2014 there was a partial Remedy Judgment and another one on 13 May. There was one Remedy Hearing and two Judgments were issued on 13 and 15 May. It was unusual. There was a split decision. On 12 May there was a hearing and this led to a Judgment relating to injury to feelings, which included aggravated damages in the sum of £21,000 and £15,000 for psychiatric injury. The financial loss was assessed later. On 23 July the second part of the Remedy Judgment was considered and on that occasion the Employment Tribunal awarded £13,300 for loss of earnings to the date of termination, £20,000 for future loss of earnings plus some small matters for

prescription charges. The £13,300 for loss of earnings to the date of termination is essentially the difference between the Claimant's salary and the reduced amount he received by way of temporary injury allowance. The appeal was referred to a Full Hearing by Mr Recorder Luba on 9 September 2014.

The Facts

3. I now say something about the factual background. The Claimant has the misfortune to suffer a deformity of his right hand, which it was accepted, qualified him as suffering from a disability. It is also right to say that his mental health I think for some time has been fragile, but he suffers from a mental impairment which is similar to post-traumatic stress disorder. He was employed by the Respondent on 14 August 2006, initially as a support worker but in January 2008 he became a trainee nurse. I believe it is known as a preceptorship before becoming a Mental Health Nurse. He duly qualified in October 2010, I believe, as a Mental Health Nurse. His employment lasted until shortly after the Employment Tribunal hearing because he had given notice a few days before the hearing that he intended to resign, as he did on 9 May 2014, effective 6 June 2014. The significance of this is twofold. Firstly, there is an outstanding claim before the Employment Tribunal, which I am told is for unfair dismissal and also for detriment having made a public interest disclosure, but also the fact that he decided to resign very shortly before the Employment Tribunal hearing meant that the evidence in relation to the loss of earnings had not been adequately prepared, certainly not on the basis that the Claimant's loss of earnings would commence so shortly. Indeed when the case was originally prepared by the Respondent it was on the basis that the Claimant still had a job to go back to and therefore his loss of earnings would be confined to a relatively modest period.

4. The original decision in relation to liability found that the Claimant had suffered longstanding and pervasive discrimination. The Respondent had laid unreasonable requirements upon him, having regard to his disability. It had not made reasonable adjustments. It is particularly concerning that the Claimant was a medical professional and he was treated in a way of which the Employment Tribunal was highly critical by medical staff in hospital. Be that as it may, it is not relevant to what I have to determine.

The Remedy Judgment

5. The Employment Tribunal, if one looks at paragraph 12(6) of the Decision with which I am concerned, concluded that the Claimant, as described by a psychiatrist, Dr Moosa, had suffered moderate to moderate severe psychiatric damage as a result of his treatment. He was awarded the sum of £15,000 by way of compensation, and that is not the subject of an appeal.

6. It is common ground that the evidence given to the Tribunal by Dr Moosa was either accepted by the Employment Tribunal explicitly or, if it was not explicitly accepted, that evidence was unchallenged. Dr Moosa's evidence, in essence, was that the healing process for the Claimant would start at the end of the proceedings. At the time it was assumed that this would be very shortly after the hearing, although the Claimant has himself rather prolonged this period by issuing further proceedings, as I have mentioned, for unfair dismissal and appealing against the current order. No-one has suggested to me that these matters are of any relevance to the issue that I have to decide today.

7. In relation to the unfair dismissal claim, it is unclear to me what significant difference this might make to the Claimant's compensation for loss of earnings. He may, if he is successful, succeed in obtaining a basic award and something for loss of his statutory rights

together with, one assumes, something for having suffered detriment as the result of having made a disclosure. However, it will not make any difference to his claims for loss of earnings.

8. In considering compensation for loss of future earnings, it is well recognised that there has to be an element of speculation, albeit informed speculation (see, for example, the Decision in **Wardle v Credit Agricole** [2011] IRLR 604). That case is also authority for the principle, which is not in any way controversial, that loss of future of earnings should generally be addressed only up to the point where there is a more than 50% chance that the employee would have gained a job at an equivalent salary level.

9. Dr Moosa's evidence, which was accepted by the Employment Tribunal, was that, after the determination of litigation, the healing process could begin. The first stage of the healing process was a course of cognitive behavioural therapy. Dr Moosa and the Employment Tribunal accepted that the Claimant would be able to return to his work or the equivalent as a Mental Health Nurse within six months of the termination of the cognitive behavioural therapy. The time for the cognitive behavioural therapy, on the unchallenged evidence of the Claimant who had previously undergone such therapy, together with a further six months would be between 58 and 66 weeks. The Employment Tribunal's decision was that the Claimant would have been able to recover his equivalent earnings between 15 and 24 months, that is between 65 and 104 weeks. The Claimant had, I think, contended for the fact that one needed to add to the period of the cognitive behavioural therapy a further 12 months or so before the Claimant could recover his pre-termination earnings. However, the Respondent has submitted that Dr Moosa's evidence, coupled with that of the Claimant, is entirely consistent with the finding of the Employment Tribunal that he would recover the equivalent earnings 15-24 months after, and therefore that is entirely consistent with what Dr Moosa had said, but leaves open two

questions: firstly, the quality of the evidence that he would be able to recover the salary within 15-24 months and, secondly, about his loss of earnings for the period prior to recovery of his full salary. The two points are separate.

The Claimant's Case

Lack of evidence

10. The Claimant's first ground of appeal, ground B, was that the evidence supporting the proposition he would be able to find equivalent work within that period was so poor that it could not properly be relied upon. Against that the Respondent says "Well, the question of evidence in a case where there is necessarily a substantial speculative element is for the Employment Tribunal in cases where there is some evidence to support the finding".

11. The evidence that was before the Employment Tribunal comprised evidence that was given very much at the last minute by the Head of Workforce, Miss Clare Shaw. Miss Shaw is effectively in charge of Human Resources for what I apprehend is a substantial NHS Trust and one might reasonably expect her to be familiar with the availability of posts within the National Health Service and with charities or private organisations with a need to employ medical professionals such as nurses, whether general or mental health.

12. In her evidence, which was made without a witness statement (I believe that she was called to give evidence at very short notice), she informed the Tribunal that charities, private employers, substance abuse services and acute Trusts all had roles for Mental Health Nurses. She identified the following: Mental Health Matters, MIND, Cyrenians, TP, Necca, Adaction and BUPA as well as Care UK. Furthermore the Respondent produced a substantial list of posts that appeared to have been advertised at about the time of the hearing. This is criticised

by the Claimant on the basis that, for example, it includes a number of posts that were no longer available. It is true that if in fact the purpose of this exercise was to demonstrate posts that were immediately available that might be regarded as a significant defect, but in fact the object of this exercise was to show generally speaking what number and kind of posts are available at any one time. It has to be said, and I do not wish to go through this in any great detail, that very few of the posts were posts for Mental Health Nurses. Most of them were Registered General Nurses, although they were all in the North East. It was agreed, I think, that the Claimant should not be expected to have to move home to find a job.

13. The case has been put that the evidence was simply too exiguous and impoverished to support a finding that there would have been an equivalent job available to the Claimant within 12 to 15 months. There is considerable force in that argument, but the other side of the coin is this. The Employment Appeal Tribunal is not here, in any way, to substitute its views for those of the Employment Tribunal. I am particularly now referring to a Decision of Underhill LJ, as he now is, in **Griffin v Plymouth Hospital NHS Trust** [2014] EWCA Civ 1240. He described the exercise of establishing future loss as bound to be, in his words, to a considerable extent an exercise in speculation based on its assessment of the Claimant, his attitude and abilities and the local job market. Underhill LJ observed, as has been observed in other cases, I think by Langstaff J in **NCP Services Ltd v Topliss** UKEAT/0147/09/SM, this exercise is something that an Employment Tribunal which includes lay members is much better qualified to perform than this Tribunal or the Court of Appeal, which has never seen the Claimant and has no experience of local conditions. Although in the **Griffin** case, Underhill LJ described the very extensive evidence about kinds of work that might be available, which differs from the present case, there was some evidence of work that might be available. This was evidence given by someone experienced in the Health Service, with knowledge of the locality and the availability

of jobs. I cannot say therefore that there was no evidence that would justify the Employment Tribunal in coming to its conclusion that it was likely within 12 months, having regard to the Claimant's abilities and the job market in the North East for Mental Health Nurses, that he would be able, on the balance of probabilities, to recover his earnings.

14. There has been some debate today about whether the Employment Tribunal was entitled to say that the Claimant might have been able to find a job at an equivalent salary in some other post. I think is perhaps more relevant when one comes to consider the second ground of appeal, to which I shall come shortly. But it seems to me that it would be wrong for me to try to second-guess the Employment Tribunal. It had evidence that would justify its finding. I cannot say that it was not a permissible option and I cannot say that the finding was unsupported by evidence.

15. In those circumstances I do not consider that I could allow ground B of the Notice of Appeal, although I hasten to say I have some sympathy with it. But it is not my views as to the matter that counts but whether the Employment Tribunal came to a permissible conclusion.

Earnings

16. The second ground of appeal relates to the earnings that the Claimant might expect to earn in the 12 months or so prior to recovering his full salary. It is in this respect that I think that the reasoning of the Employment Tribunal is unsatisfactory. I do not find anywhere any suggestion as to what job the Claimant might have undertaken during that period or as to what the earnings might have been. It was never put to the Claimant that there was some other job that he might have obtained. In a Schedule that was prepared, I believe by the Claimant, he gave credit for earnings at the national minimum wage for a 12-month period, I think. But

there is simply nothing to substantiate the Employment Tribunal's conclusion as to how much he might have earned prior to recovering his full earning capacity. What the Employment Tribunal had done is to take a very broad-brush approach indeed, albeit a broad-brush approach is entirely appropriate, as one can tell from the Decision to which I have already referred in the **Griffin** case. But to take a broad-brush approach is one thing. To take an approach without there being an evidential basis to support it is a quite different matter. I have no idea, and I do not believe the Claimant has any idea, neither do I know whether the Respondent has any idea, exactly what it was that the Employment Tribunal had in mind. It seems to me, in those circumstances, that the question of the Claimant's earning capacity prior to recovering his full earning capacity needs to be looked at again by the Employment Tribunal. The parties are agreed that I should remit this for reconsideration by the same Employment Tribunal.

17. There were certain difficulties so far as the Claimant was concerned. I do not know if these were taken account of by the Employment Tribunal because they do not tell us in relation to its findings about alternative employment. Although the Employment Tribunal discounted and rejected the suggestion that he would be unable to obtain another National Health Service post for having previously taken a National Health Service Trust to a Tribunal. But the reality of the matter is that for perfectly good and understandable reasons the Claimant, having suffered at the hands of this National Health Trust was justified in saying that he would be unable to return to work there. This National Health Trust must be by the far the largest National Health Trust in the North East of England. That in itself would reduce the pool of available opportunities. I think in those circumstances it would be desirable if this matter were to be remitted to the same Employment Tribunal to determine what the Claimant's earnings might have been on the basis of such evidence as they have prior to the period within which he might be expected to recover his full earning capacity. Whether in those circumstances it may

be necessary to reconsider the lump sum which he was awarded, which takes account of the earnings prior to achieving full earnings, I do not know. It will depend upon the decision of the Employment Tribunal.

Conclusions

18. I would dismiss the first (B) ground of appeal. I would allow the second (A) ground of appeal and remit to the Employment Tribunal the question of determining the earnings that the Claimant might reasonably be expected to have made prior to his regaining the earning capacity he had at the time of the determination of his employment.

19. I would like to add one more thing. I am somewhat concerned at the fact that the parties are not only going to have look at this matter again (I did invite them to see if they could come to some agreement, but sadly that was not possible), but also because there are further Employment Tribunal proceedings. It might, in my opinion, have led to an economy in time and expense if this matter could be joined together with the other proceedings and heard by a Tribunal similarly constituted. But I think there are significant practical difficulties in doing that, not least because the Claimant has instructed a different legal team in the new proceedings, as I shall call them. In those circumstances, although I do invite the parties to give consideration to what could be done to lessen the expense, I do not think there is any further order I can make other than the fact that I can recommend and direct that the parties consider ACAS arbitration.