Appeal No. UKEAT/0421/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 March 2014
Judgment handed down on 27 June 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MRS OLUWASERYI COKER — APPELLANT

WANDSWORTH BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	DR OLU COKER (Representative)
For the Respondent	MR JONATHAN DIXEY (of Counsel) Instructed by: Sharpe Pritchard Solicitors & Parliamentary Agents Elizabeth House Fulwood Place London WC1V 6HG

SUMMARY

UNFAIR DISMISSAL

This was an appeal on compensation for unfair constructive dismissal which was allowed in part by consent. Arguments relating to whether to apply the simplified substantial loss approach in relation to pension rights were dismissed on the facts. Furthermore the Employment Tribunal were entitled on the facts to refuse to award an uplift under section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992.**

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from a remedies hearing before an Employment Tribunal sitting at London (South) on 11 October 2012. The written reasons were sent to the parties on 14 December 2012.

2. The Employment Tribunal decided a number of issues relating to remedy, which arose following its judgment and reasons on liability, sent to the parties on 21 June 2012. That liability hearing decided that Mrs Coker had been constructively dismissed and that dismissal was unfair. The Employment Tribunal dismissed Mrs Coker's claims of (a) direct race discrimination; (b) racial harassment; and (c) victimisation.

3. The Appellant was represented by Dr Olu Coker, who is the Appellant's husband and who holds a PhD in Accounting. The Respondent was represented by Mr Jonathan Dixey of counsel. I am grateful to both advocates for their written and oral submissions.

The factual background

4. I can usefully take this from certain paragraphs of the Employment Tribunal's reasons. It said this:

> **"1. By a reserved judgment promulgated on 21 June 2012 the Tribunal found that the Claimant had been unfairly constructively dismissed. The Claimant's claims of direct race discrimination, harassment related to race and victimisation were however dismissed. The Tribunal found that the lengthy delays by the Respondent in its handling of the Claimant's grievance breached the implied term of trust and confidence and that she had resigned, at least in part, in response to that breach. Nonetheless the Tribunal found that, as to the substance of the Claimant's grievance there was in fact no race discrimination, harassment, or victimisation.**
>
> **2. In paragraph 103 of our written reasons following the liability hearing the Tribunal found as follows:-**
>
>> **'On the other hand, we are not critical of Ms Swaby for concluding, as she did, that there was in fact no race discrimination or victimisation. An issue therefore arises as to how long the Claimant would have remained in the Respondent's employment following an unsuccessful grievance outcome, given her continuing perception that there was race discrimination and bullying and that this had affected her health. This is a matter which will be considered at the remedy hearing.'**

3. The issues for the remedy hearing were therefore as follows:-

> **(i) How long would the Claimant have remained in employment in any event?**
>
> **(ii) What is the loss flowing from the Claimant's dismissal?**
>
> **(iii) Did the Claimant fail to mitigate her loss?**
>
> **(iv) Should any reduction be made for contributory conduct?**
>
> **(v) Should there be any increase to the compensatory award for the Respondent's failure to follow its own grievance procedure?**

....

10. The Claimant gave evidence that she had been ill since her dismissal and that because of her continuing illness had made no attempt to find further work. The Respondent disputed that the Claimant was unwell, saying that there was no evidence to support this.

11. The Claimant told the Tribunal that she continued 'to suffer the cumulative effect and progressive damage to my health as a direct result of the way I was treated whilst in the employment of the Respondent from which I was forced to resign'. She said that she was slowly getting better and was seeking medical advice to help her to recover fully. She was due to start a ten week treatment at the Croydon IAPT (Psychological Therapies and Wellbeing Service) at a date soon to be confirmed by the service and that following her treatment she would be in a position to actively search for work. The Claimant told us that she remained on medication for depression and that she had been ill.

12. The Claimant produced various bits of medical evidence to support her contention that she had been ill, none of which were conclusive. On 25th September 2012, her GP wrote that the Claimant had suffered from headaches. She was prescribed a drug for heartache and other stresses and that 'she currently says that her mood remains low'. She had seen a psychiatrist privately. (C25)

13.Dr Wood, consultant psychiatrist reported in February 2012 (on the basis of an examination of the Priory on 12 November 2011) that the Claimant was 'undoubtedly very depressed' though she had been untreated to date and that 'until the litigation period has been concluded then symptoms <u>may</u> persist and she may not be fit to resume accountancy work elsewhere until then'. She had not attended the follow up appointment at the end of November.

14. In a document only disclosed to the Respondent by Ms Tampion during an adjournment this morning it appeared that in the same month (November 2011) the Claimant had been examined by Ms Leigh, registered physiotherapist and disability analyst, to consider the continuation of her Employment and Support Allowance claim. Ms Leigh noted that the Claimant suffered from anxiety and depression related to her migraines, that 'she is on no medication for this and has not been referred to a specialist. At present it is unlikely to significantly impact on her function'. She had concluded that the Claimant 'does not have any significant function impairment and may return to work in the short term'. Thereafter her ESA was withdrawn.

15. The Claimant also gave evidence that had a meeting been arranged with Mr Buss to discuss her grievance in good time she would not have resigned. She said that if Mr Buss had sat down and called all the parties together to resolve her grievance she would have remained at work indefinitely. It would not have mattered if her grievance was not upheld. When asked what she meant by Mr Buss resolving the issues she said that she wanted more challenging work and a more conducive working environment.

16. Mrs Murray-Chen gave evidence as to the Respondent's sick pay scheme, their sickness absence management procedures and pension loss. She noted that if the Claimant had remained off sick she would have received full pay to 1st July and half pay to 4th December 2011. Sickness absence management absence procedures might have led to a dismissal for capability in November 2011."

The Employment Tribunal's conclusions

5. The Employment Tribunal said this:

> **"20. It was very difficult to make sensible findings of fact in relation to this remedy hearing, largely because we found that the Claimant's evidence was inherently unreliable. The medical evidence was also inconsistent. We did not accept the Claimant's evidence that all she had wanted was a meeting with Mr Buss and it would not have mattered what the outcome was. It was clear in the liability hearing that she believed that the Respondent perceived that she was being consistently less favourably treated that other employees in a whole variety of ways. We found that she was 'oversensitive to matters that happened at work and that she had a tendency to see shadows where there were none'. We did not accept that she would have simply accepted an unfavourable grievance outcome and returned to work, provided that she had seen Dr Buss.**
>
> **21. At the time that the Claimant resigned she had been signed off sick for a month. She gave evidence in the remedy hearing that she has continued to be off sick and she has not to date yet been well enough to look for work. Although the medical evidence in support of that has been unsatisfactory there was the evidence of Dr Woods that she suffered from depression and we were prepared to accept that. He does not however state unequivocally that she was not in a position to work, and given the ESA report, we find that by December 2011 the Claimant should have been in a position to look for and find work.**
>
> **22. The Claimant had been at pains to say that the illness which she suffered was a result of the discriminatory treatment that she received at the hands of the Respondent. As we have said there was no discriminatory treatment – although there was a breach of the duty of trust and confidence. Absent a successful discrimination complaint the Claimant cannot claim for loss of earnings resulting from her illness even had it been caused by the employer's breach of the implied term of trust and confidence. However, there was no medical evidence to establish any causal link between the failure to deal with the Claimant's grievance timeously and her headaches and/or low mood and we make no such connection.**
>
> **23. The Claimant had been ill. She was unable to work and had a reduced earning capacity. Had she not resigned when she did she would have remained off sick. (It is unlikely that when the investigation report was communicated to her [her] mood would have lifted and she would have returned to work.) Consequently, and giving the Claimant the benefit of the doubt that she would not have resigned on receipt of that report, the loss that flows from the dismissal is the loss of sick pay under the Respondent's sick pay scheme.**
>
> **24. Mrs Murray-Chen gave evidence, and it was not disputed, that the Claimant's entitlement to sick pay would have expired on 4 December 2011. The Claimant was already sick at the time of her constructive dismissal and any reduction in pay occasioned by receipt of sick pay rather than full pay was not a loss which flowed from the dismissal.**
>
> **25. Once the Claimant got better then she was under a duty to mitigate her loss. The Claimant says that she is still not better and, if that is so then there is no current loss flowing from the dismissal. However, given the report by Ms Leigh which is comprehensive we conclude that the Claimant was in a position to look for work after November 2011 and has failed to mitigate her loss.**
>
> **26. We have been given the Claimant the benefit of the doubt that she has in fact been ill but do not award any future loss or any loss after 4th December 2011. She says that she remains ill but there is no recent medical evidence of that. She was very vague as to her prospects for returning to work and as to when she might start her search.**
>
> **27. In any event, we are also satisfied that, following an unsuccessful grievance outcome the Claimant would not have returned to work. It seems likely that, at best, she would have remained off sick until her entitlement to sick pay had run out and then resigned.**
>
> **28. Given the above findings, we do not make a finding that there should be a reduction to the compensatory award in respect of the Claimant's contributory fault. Although it was indeed odd that the Claimant chose to resign at a time when she had been notified that the report was ready, as we said in our liability judgment we accepted the Claimant's evidence that the Claimant had by then lost faith.**
>
> **29. We therefore concluded that the loss flowing from the Claimant's dismissal was the amount of sick pay that the Claimant would have received under the Respondent's scheme.**

Thereafter there was no ongoing loss because, assuming the Claimant was better, she should have been in a position to obtain another job. If not then there was in any event no loss.

30. In relation to the uplift, Dr Coker gave no particulars as to why there should be an uplift or in what particulars the ACAS code was not complied with. The ACAS Code of Practice on handling grievances provides that 'Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received'. There had in fact been a number of meetings arranged under the grievance process, so that it is not clear that there had been a breach of this provision, though there had been a breach of the Respondent's internal processes, in that no meeting with Dr Buss had been arranged. While it was true that there had been significant delays in the handling of the grievance process, some of the delays were caused by the Claimant and some investigatory meetings had taken place. Even if there was a breach of the code, then having regard to all the circumstances of the case we do not think it would be just and equitable to increase the award because of any failures of the ACAS code.

31. We set out in this Judgment the calculation of loss. This includes pension loss [which] has been calculated using the simplified method, which is the method to be used in most cases. We do not consider that this is a question of career long loss. The Claimant was 46 when she resigned. We have made no award for loss of enhancement of accrued pension rights given that the short period of loss and the fact that the Claimant's employment would have ended in any event within a year. Guidelines issued for Tribunals by a committee of Employment Tribunal Judges and the Government Actuary for the calculation of pension loss advocate that in assessing loss to the date of hearing, the Tribunal should not look at the additional contingent benefits that would have accrued but rather at the contributions that the employer would have made to the pension fund during this period. We therefore have based our loss on the notional contributions that the employer would have made towards the Claimant's pension had she still been in employment until 4 December 2011."

<u>The grounds of appeal</u>

6. At a rule 3(10) hearing on 24 July 2013 HHJ Shanks gave permission for three grounds of appeal only to go through to a full hearing.

7. I take each ground of appeal in turn.

Ground 1: whether the ET were right to award only 75% of the performance-related pay (without giving reasons).

8. This ground of appeal has been conceded by the Respondent, and the Respondent has made a payment to the Appellant in respect of this item.

9. The parties are agreed that I should dismiss the first ground of appeal on its withdrawal.

Ground 2: whether the ET were right to award only "employer pension contributions" and, if so, whether it was right to award 19% of sick pay rather than 19% of full pay in respect thereof?

10. In his submissions Mr Dixey concedes that the pension payments that the Appellant would have received but for her resignation would have (i) included the higher performance-related pay accepted previously and (ii) been calculated on her full pay rather than sick pay. This leaves open as a live issue between the parties what Dr Coker has called ground 2a: was the ET right to award only "employer pension contributions"?

11. In support of his submission that the Employment Tribunal was wrong, Dr Coker makes a number of arguments.

12. His first argument is that the loss had been quantified in the Respondent's evidence, which was not disputed. That is the evidence of Ms Murray-Chen at paragraphs 25-26 of her witness statement: supplementary bundle, pages 131-132, and her second exhibit AMC/2: supplementary bundle pages 133-138. Dr Coker's argument is based on the *Compensation for Loss of Pension Rights Guidelines* (third edition, 2003), which provide "an approximate simple formula which might be useful to chairmen in the absence of expert evidence": Appendix 2: TB8. Dr Coker goes on to argue that the expert evidence produced by the Respondent was ignored by the Employment Tribunal and it embarked on its own assessment without giving reasons why it rejected the evidence.

13. I accept Mr Dixey's argument that Ms Murray-Chen's evidence did not directly address the hypothetical situation found by the Employment Tribunal and therefore the Employment Tribunal was required to consider the matter by reference to the evidence which

was available to it and the submissions of the parties. The point is that none of the pension loss assessments produced by Ms Murray-Chen dealt with the finding by the Employment Tribunal (paragraphs 20 and 26-27) of its reasons that the Appellant would have resigned on 4 December in any event when her entitlement to sick pay would have expired.

14. In those circumstances the Employment Tribunal properly referred to and considered the Guidelines, and its approach was consistent with that guidance.

15. Dr Coker then argues that the Employment Tribunal were in error in using the simplified approach in the Guidelines: Introduction, paragraph 1.3, and Chapters 5-7. He argues that the Employment Tribunal should have used the substantial loss approach set out in the Guidelines at Chapter 8. This is because of the Appellant's circumstance. However, as the Employment Tribunal found that the Appellant would have resigned in the near future, there is no substantive loss of pension rights and therefore the substantial loss approach is inapplicable.

16. Dr Coker then argues that, even if the simplified approach was the correct one to use, the Employment Appeal Tribunal made three further errors in applying it. The first error is in making no award for loss of enhancement of accrued pension rights. The short answer to that is that the Employment Tribunal found (and were entitled to find on the facts) that the Appellant's employment would have ended, in any event, on 4 December 2011. That is a finding of fact which is unchallengeable. Mr Coker's reliance on **Software 2000 Ltd v Andrews & Ors** [2007] ICR 825 and **Johnson v Rollerworld** [2010] UKEAT/0237/10/JOJ are misplaced. There was evidence before the Employment Tribunal which entitled it to make its finding of fact that the Appellant would have resigned on December 4 in any event, and it had specifically rejected any claim of race discrimination or harassment. Mrs Coker's perception is irrelevant. I also reject the arguments put forward by Dr Coker that there was a breach of the ACAS Code

(paragraph 38) and an assertion of statutory rights under section 104(1)(b) of the **Employment Rights Act 1996**. They were not raised before the Employment Tribunal and they cannot be raised before me.

17. Dr Coker then argues that the Employment Tribunal ignored the evidence that the letter of 25 February 2011 was sent to Mrs Coker on that date because she resigned on the previous day. He submits that the letter would not have been sent to her if she had not resigned. In those circumstances, if there had been a grievance meeting, there would have been a grievance outcome, and that might not be for one or two years after 4 December 2011. I agree with Mr Dixey that this is a perversity argument. It simply does not surmount the high hurdle set by **Yeboah v Crofton** [2002] IRLR 634. Dr Coker then argues that the Employment Tribunal failed to follow the simplified approach properly, which required them to award compensation for loss of pension rights up to the hearing date. The hearing took place on 11 October 2012.

18. The short answer to this argument is that the Employment Tribunal's finding was that the employment would have ceased on 4 December 2011 in any event. There is therefore no justification for awarding compensation for loss of pension rights after that date.

19. Finally, Dr Coker argues that the Employment Tribunal was in error in not awarding compensation for loss of future pension rights. The reason they gave was that she "was in a position to look for work after November 2011 and has failed to mitigate her loss". He relies on **Savage v Saxena** [1998] ICR 357 at 365B-D.

20. In my judgment, the Employment Tribunal dealt with this at paragraphs 20, 24 and 26 of its reasons and gave an adequate explanation as to why it reached the decision it did. There was no error of law.

Ground 3: whether the ET was right to conclude at paragraph 30 of the Remedies Judgment that there had been no breach of the ACAS Code and that, even if there had been, it was not just and equitable to increase the award (without giving reasons for that conclusion)

21. Dr Coker submits that the Respondent had its own grievance procedure but failed to follow it. That is accepted by the Respondent. He submits that there were breaches of paragraphs 2, 4, 38 and 39 of the ACAS Code.

22. Section 207A of the **Trade Union and Labour Relations (Consolidation) Act 199**2 provides that an uplift may be awarded where an employer fails unreasonably to comply with "a relevant Code of Practice": section 207A(2) and (3).

23. I agree with Mr Dixey's submission that this is a challenge to the Employment Tribunal's findings of fact and amounts to a perversity challenge. The following matters are to be noted:

(a) The Employment Tribunal's findings of fact were that the Respondent failed to act in accordance with its own procedures, timeframes for which are "set in days rather than in weeks or months": liability reasons, paragraph 97. The Employment Tribunal was entitled to conclude, on the evidence, that the Respondent had not breached the ACAS Code.

(b) A number of meetings had been arranged: remedies reasons, paragraph 30.

(c) Some of the delays in the handling of the grievance process were caused by the Appellant herself: remedies reasons, paragraph 30, and liability reasons, paragraph 99.

(d) Some investigatory meetings had taken place: remedies reasons, paragraph 30.

(e) The Employment Tribunal found that it was: "difficult to make sensible findings of fact in relation to this remedy hearing, largely because we find the Claimant's evidence was inherently unreliable" : remedies reasons, paragraph 20.

(f) The Employment Tribunal "did not accept the Claimant's evidence that all that she had wanted was a meeting with Mr Buss and it would not have mattered what the outcome was": remedies reasons, paragraph 20.

24. In my judgment the Employment Tribunal was entitled to reach these conclusions of fact and decide that the ACAS Code had not been breached. There was no perversity.

25. In any event, the Employment Tribunal went on to consider that if it were wrong about that, then "having regard to all the circumstances of the case, we do not think it would be just and equitable to increase the award because of any failures of the ACAS code": reasons, paragraph 34.

26. Dr Coker submits, in view of what he calls the "multiple breaches" of the ACAS Code the Employment Tribunal should have given reasons for reaching that conclusion.

27. In my judgment, the short answer to this is in what the Tribunal said that "Dr Coker gave no particulars as to why there should be an uplift or in what particulars the ACAS code was not complied with. It is necessary to read the Employment Tribunal's remedies reasons together with its judgment and reasons on liability. There is no perversity. It was a decision which, on the evidence, the Employment Tribunal was entitled to take. There is no failure in **Meek** reasoning.

Conclusion

28. My conclusions therefore are as follows:

(i) Ground 1 is dismissed on withdrawal.

(ii) The first part of Ground 2 is dismissed. The appeal is allowed on the second part of Ground 2. It is quite impossible for me, on the facts, to determine the correct award. The matter will therefore be remitted to the same Employment Tribunal to reconsider its award under this head.

(iii) Ground 3 is dismissed.