Appeal No. UKEAT/0307/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 January 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

THE ROYAL BANK OF SCOTLAND — APPELLANT

MR P O'DOHERTY — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR TARIQ SADIQ (of Counsel) Instructed by: Brodies LLP Solicitors 15 Atholl Crescent Edinburgh EH3 8HA
For the Respondent	MISS AMY SMITH (of Counsel) Instructed by: Veritas LLP Solicitors City View House 5 Union Street Manchester M12 4JD

SUMMARY

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Compensation

DISABILITY DISCRIMINATION - Compensation

The Employment Tribunal was correct in not re-opening, at the remedy stage, the issue of contributory conduct which had been determined at an earlier Liability Hearing. 25 per cent uplift for non-compliance with the **ACAS Code** was permissible and sufficiently reasoned. Those grounds of appeal were dismissed.

The Employment Tribunal was wrong not to consider the question of half-pay sick absence when assessing Unfair Dismissal/disability discrimination loss of earnings. Case remitted to do so. Further, the Employment Tribunal omitted to issue a recoupment notice. To be remedied on remission to the same Employment Tribunal.

HIS HONOUR JUDGE PETER CLARK

1. This is the Full Hearing of an appeal by the Royal Bank of Scotland, Respondent before the Manchester Employment Tribunal, against the Remedy Judgment of a Tribunal chaired by Employment Judge Singleton dated 29 April 2014. In order to properly understand the context of that remedy appeal it is necessary to go back to the beginning of this litigation.

Background

2. The Claimant, Mr O'Doherty, commenced employment with the Respondent as a Branch Manager on 5 January 2009. Initially he covered branches at Hyde and Denton. In September 2009 he transferred to the Accrington branch, closer to his home. In late 2009 his marriage broke up and in November he consulted his doctor. He was diagnosed with depression and prescribed Prozac. He was put off work sick for two weeks. He returned to work in the first week of January 2010. He commenced a further period of sick leave on 25 January and never returned to work. However, he then became the subject of disciplinary proceedings arising out of two charges of misconduct which ultimately led to his dismissal with effect from 8 June 2010. The relevant disciplinary chronology is as follows: an investigation meeting with the Claimant was held by Mr Pryce on 23 March 2010. The Claimant was suspended on 8 April. A disciplinary hearing took place before Mr Taylor on 3 June, followed by a dismissal letter dated 4 June, taking effect, as I say, on 8 June. An appeal against dismissal was heard by Mr Crayston on 7 July 2010 and rejected.

3. In these proceedings the Claimant complained of unfair dismissal, breach of contract and disability discrimination by way of failure to make reasonable adjustments. Those claims were fully defended and came on for what is described as a Liability Hearing before Judge

Singleton's Tribunal on 14-17 May 2012. Judgment was reserved, and following deliberations in Chambers, that Tribunal delivered themselves of their Judgment with Reasons on 28 June 2012.

4. The list of issues raised for determination by the Tribunal on that occasion appears at paragraph 1.3 of their Reasons. It is relevant to note that in addition to the questions of the reason for dismissal and fairness of the dismissal raised by section 98 of the **Employment Rights Act 1996**, the Tribunal were also asked to determine the further questions of contributory conduct and **Polkey** deduction in the event of a finding of unfair dismissal. In addition, the breach of contract claim (wrongful dismissal) raised the question as to whether the Claimant's summary dismissal without full payment in lieu of notice was justified at common law. Finally, the reasonable adjustment claim related to the conduct of the disciplinary process, given the Respondent's concession that the Claimant was at all relevant times disabled by reason of his depression. By their Liability Judgment the Tribunal reached the following conclusions: first, that the Respondent's reason for dismissal related to the Claimant's conduct, a potentially fair reason, and, secondly, that dismissal for that reason was unfair: the Respondent did not carry out a reasonable investigation; the disciplinary process was unfair due to the Claimant's medical condition; the decision to dismiss was predetermined, that is to say was taken before the Claimant had a proper opportunity to defend himself. He disputed the suggestion that he had done anything wrong. Dismissal fell outside the band of reasonable responses.

5. Returning to the list of issues, having found the dismissal unfair, it is plain to me that the Tribunal addressed the **Polkey** question at paragraph 4.3 and held that no deduction was appropriate. However that is a reading of the Tribunal's Liability Decision to which I must

return. As to contribution, there is a clear and unequivocal finding that the Claimant was not guilty of contributory conduct (see paragraph 4.5). Finally, the breach of contract and reasonable adjustment claims were upheld.

6. Against the Liability Judgment the Respondent appealed to the EAT. That appeal (EAT/0489/12/RN) came before a full division of the Tribunal presided over by Mitting J on 6 November 2013. Reading the Judgment of the Tribunal delivered on that day it appears that the Respondent's appeal was directed to two issues. First, that the Tribunal was wrong to find that the Respondent had prejudged the decision to dismiss the Claimant and secondly a challenge to the reasonable adjustment finding on the basis that the Tribunal had failed to identify the relevant PCP.

7. Both of those grounds of appeal were rejected by the EAT and the appeal was dismissed. Strictly, that concluded the EAT's remit: to hear and determine the Grounds of Appeal raised before them. The appeal failed. However, at paragraph 12 of the Judgment the EAT went on to make certain observations which were strictly unnecessary for their decision; as we used to say, *obiter dicta*.

8. At paragraph 12 the EAT recognised that:

> **"The Tribunal found that the Claimant did not contribute to its conduct [sic]. There is no appeal against that finding."**

Pausing there, it seems to me that the question of contribution had been conclusively determined. The ET said so and so too did the EAT.

9. However, the EAT appears to have formed the view that, notwithstanding paragraph 4.3, the ET had expressed itself equivocally about the **Polkey** issue. They added:

> **"It has therefore not decided the *Polkey* issue. If the employers insist at the remedies hearing that the Claimant did do either or both of the two acts of alleged gross misconduct and so should receive no compensation for future loss, then it is an issue which the Tribunal will have to determine."**

10. Emboldened by those observations the Respondent then made application to the Tribunal on 17 December 2013 for reconsideration of the Tribunal's Liability Decision relating to the Claimant's contributory conduct. I have read that application, which seems to me to conflate the EAT's observations as to the **Polkey** question with the already decided contribution question. That application was opposed by the Claimant and was effectively determined by the Singleton Tribunal at their Remedy Hearing, which took place on 28 March 2014.

11. Again, Judgment was reserved and the Remedy Judgment promulgated with Reasons on 29 April 2014.

12. As to the Respondent's reconsideration application (see paragraph 1.3) the ET observed that it was 18 months out of time and time was not extended; substantively they confirmed that, at the liability stage, they had found that the Claimant had not, by his own conduct, contributed to his dismissal. They believed that it was implicit in that finding that the Claimant did not by his conduct contribute to his dismissal. Actually, the finding was express and was not subject to challenge in the liability appeal.

13. However, notwithstanding their earlier **Polkey** finding they felt constrained, perhaps, to receive further evidence on the **Polkey** issue as a result of the EAT's observations at paragraph

12 of the Judgment dismissing the Respondent's appeal (see paragraph 1.4 of the Remedy Reasons).

14. Having revisited the **Polkey** issue (paragraph 3.3) the Tribunal made no deduction from the full compensation assessment made. They awarded compensation totalling £126,348.29. I note, relevant to the present appeal, that the Tribunal omitted to include with their Judgment a recoupment notice, entitling the Department for Work and Pensions to recover any relevant benefits paid to the Claimant out of the gross compensation ordered.

The Appeal

15. Against that background I turn now to the six grounds of appeal advanced by Mr Sadiq on behalf of the Respondent.

16. The first three grounds may be taken together. This is an attempt to reopen the question of contributory conduct and the factual question as to whether or not the Claimant was guilty of either or both of the disciplinary charges which he faced. In my judgment that is not permissible. First, because the Respondent's contribution argument was rejected at the liability stage (see paragraph 4.5 of the Liability Reasons). That was confirmed by the ET at the remedy stage (paragraph 1.3). It was also acknowledged by Mitting J at paragraph 12 of the first EAT Judgment. That finding was not appealed in the first appeal. The Respondent's application for reconsideration was made 18 months out of time. For all these reasons the Tribunal was plainly right not to reopen the question at the remedy stage, notwithstanding the *obiter* comments by the EAT concerning the factual question as to the Claimant's guilt or otherwise. The Tribunal were not satisfied, on the evidence, of his guilt.

17. For completeness that conclusion also covers the Respondent's application to adduce fresh evidence from Mr Crayston as to the Claimant's culpability at the Remedy Hearing. He gave evidence at the Liability Hearing. The Tribunal made their findings. It is not permissible at the remedy stage to recall a witness to deal with the Tribunal's earlier liability findings. In short, I see no merit whatsoever in the first three grounds of appeal.

18. Similarly I reject Ground 5. The finding of a 25% maximum uplift for non-compliance with the **ACAS Code** at paragraph 3.5 of the Remedy Reasons must be read in the context of the earlier findings by the Tribunal as to the procedural failings of the Respondent during the disciplinary process in their Liability Judgment. Read as a whole the Reasons are **Meek**-compliant.

19. Ground 6 relates to the Tribunal's failure to issue a recoupment notice. It is common ground that omission ought to be remedied. How that is to be done depends on my conclusion on Ground 4.

20. Ground 4 focuses on paragraph 3.3 of the Remedy Reasons. The Tribunal awarded the Claimant his full loss of earnings from 8 June 2010 (the effective date of termination) until the Remedy Hearing on 28 March 2014 and a further 26 weeks for future loss thereafter. That is just over four years loss of earnings at the full rate.

21. The reason for making that award appears to be the Tribunal's finding that the Claimant's incapacity for work throughout that period (subject to his finding some alternative employment paying a total of £4,000) (see Reasons paragraph 3.6) was wholly attributable to the Respondent's treatment of him during the disciplinary process starting March 2010. However,

as the Tribunal observed at paragraph 2.4 of their Liability Reasons, following the Claimant's marriage breakdown he suffered from depression, causing him to be off sick from November 2009 until the new year and then continuously from 25 January 2010. Thus his initial illness arose before the disciplinary process began. The first question raised by the Respondent was whether, absent the disciplinary process, the Claimant would have been dismissed on capability grounds in any event. The Tribunal rejected that argument on the basis of Mr Crayston's evidence that the Claimant would not have been dismissed whilst his employment was covered by the Respondent's disability cover policy, which allowed for up to five years' payment at 50% of salary. However, that leads into a second question which in my judgment the Tribunal failed to address, namely, for how long would the Claimant have remained off sick but for the disciplinary process as a result of his earlier illness. The significance of the answer to that question is that, if it is found that he would have remained on long-term sick leave, a point would come at which he dropped to 50% of salary, and that would be the relevant weekly loss figure for the purpose of the loss of earnings calculation; not the full salary which the Tribunal awarded throughout the four-year loss period.

22. It is this question, in my judgment, which should have been but was not addressed in the Tribunal's calculation of loss. Their failure to do so amounted to an error of law.

Disposal

23. It follows that Grounds 1-3 and 5 are dismissed. The appeal on Ground 4 is allowed, as is that on Ground 6.

24. Mr Sadiq submits that the proper course is to remit those two questions to a fresh Tribunal. Miss Smith argues that they should go back to the same Tribunal. I agree with Miss

Smith. The narrow question of the appropriate weekly loss figure is eminently suitable for determination by the original Tribunal based on the evidence which it has heard. No further evidence will be allowed. The remitted hearing will proceed on the basis of submissions only. In addition, the Tribunal should issue the necessary recoupment notice.