Appeal No. UKEAT/0221/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR D BLEIMAN

MR S YEBOAH

MS I ANDERSON — APPELLANT

CHELTENHAM & GLOUCESTER PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS J ANDREWS (Representative) A2emc Ltd 53 Aldin Way Hinckley Leicestershire LE10 0GE
For the Respondent	MR J GIDNEY (of Counsel) Instructed by: Pinsent Masons LLP 3 Colmore Circus Birmingham West Midlands B4 6BH

SUMMARY

PRACTICE AND PROCEDURE – Costs

Claimant failed to beat earlier **Calderbank** offer at remedy stage. Employment Tribunal made costs order against her limited to £10,000. On consideration of EAT authorities, EAT concluded that ET had failed to take into account relevant factors. Having done so, costs order set aside and appeal allowed.

Observations made about setting off costs order against compensatory award.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This case has been proceeding in the Birmingham Employment Tribunal. The parties are Ms Anderson, Claimant, and Cheltenham and Gloucester plc, Respondent. We have before us a costs appeal by the Claimant in the following circumstances. The Claimant was employed by the Respondent as Branch Manager of their Leamington Spa branch from 21 April 2008 until her dismissal on conduct grounds on 22 July 2011. The incident leading to her dismissal occurred on 22 December 2010. She left the branch safe open and then left the branch to collect a prescription. She ought not to have done that.

2. She brought complaints of unlawful sex and race discrimination, unfair dismissal, and wrongful dismissal before the Employment Tribunal. Those claims were resisted.

3. On 13 April 2012 the Respondent made an offer to compromise the claims in the sum of £25,000 subject to an appropriately worded COT3 agreement. That offer was rejected by the Claimant on 16 April. She asked the Respondent to put forward a reasonable offer close to her Schedule of Loss figure. That then totalled £1.2 million, including a whole career loss of earnings claim. No further offer was at that point made by the Respondent.

Liability hearing

4. A liability hearing took place on 28 May until 1 June 2012 before an Employment Tribunal chaired by Employment Judge Tickle. At the end of the hearing the Tribunal announced their decision. The discrimination claims were dismissed and the unfair dismissal complaint upheld subject to a deduction of two-thirds contribution to reflect the Claimant's own contribution to her dismissal by her own conduct. The liability Judgment is dated 2 July. Reasons were provided in writing on 25 July 2012. Remedy was adjourned.

Remedy hearing

5. Following the liability hearing the Respondent made a revised offer of £7,000 on 20 June. That was not accepted by the Claimant. The remedy hearing finally took place on 6 November 2012. The Claimant was awarded compensation totalling £18,073.75 after the two-thirds deduction was applied. The Respondent then applied for costs on the basis that the Claimant had acted unreasonably in refusing the original offer of £25,000 contained in what the Tribunal described (see remedy Reasons, paragraph 14) as a **Calderbank** letter.

6. The Respondent's Schedule of Costs totalled just over £37,000 from 13 April 2012. We see from that schedule that some £30,000 was incurred between 13 April and 20 June 2012. The application was limited to then maximum assessed figure of £10,000 permitted under the ET Rules 2004.

Case law

7. The effect of a **Calderbank**-style letter in the Employment Tribunal jurisdiction was considered by Lindsay J (President) in **Monaghan v Close Thornton Solicitors** EAT 3/01, 20 February 2002. At paragraph 25 the President said:

> **"Moreover we confess to some unease about the consequence of the use of what was, in effect, a *Calderbank* offer in the Employment Tribunal context. We do not doubt that where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked against that party if it were persisted in, the Tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably. But this was far from being an extreme case of that nature.**

The President then goes on to deal with the circumstances of the **Monaghan** case itself. That is a passage relied on by Mr Gidney for the Respondent to this appeal. Ms Andrews relies on this later passage in the same paragraph of the President's Judgment.

> **"Whilst we would not want to deter the making and the acceptance of sensible offers, if it became a practice such that an Applicant who recovered no more than two-thirds of the sum offered in a rejected *Calderbank* offer was, without more, bound to be visited with the costs of the remedies hearing or some part of it, *Calderbank* offers would be so frequently used that one would soon be in a regime in which costs would not uncommonly treated as they are in the High Court and other courts. Yet it is plain that throughout the life of the Employment Tribunals the legislature has never so provided. It can only be that that was deliberate."**

8. That approach was considered and endorsed by Mitting J in **Kopel v Safeway Stores plc** [2003] IRLR 753 (see paragraphs 17-21) and the principles emerging from the earlier cases are helpfully distilled by Slade J in **Raggett v John Lewis plc** UKEAT 0082/12 sent in August 2012 at paragraph 43. In short, the conduct of a claimant in rejecting a **Calderbank**-type offer of settlement can be taken into account in determining whether the threshold in rule 40(3) of the then 2004 ET Rules is triggered. However, failure to beat the offer will not of itself justify an order for costs in the ET.

The Claimant's case

9. Having considered those principles, we agree with Ms Andrews, appearing on behalf of the Claimant before us, the Claimant having represented herself below, that looking at the Tribunal's Reasons as a whole, they do not extend beyond finding that the Claimant acted unreasonably in refusing the offer of £25,000 against the background of a claim calculated at £1.2 million. Mr Gidney relies on the size of the claim advanced by the Claimant. However, at paragraph 16 of their Reasons, the Tribunal simply refer to the problem of the Claimant's expectation of a career loss finding as explaining her apparently large claim.

10. Factors not apparently considered by the Tribunal on the face of their Reasons were that, although the discrimination claims failed, there was no suggestion by the Respondent nor finding by the Tribunal that they were misconceived. Secondly, that her subsequent job search would be assisted by a finding of unfair dismissal (see Reasons, paragraph 5), she being

entitled, as a matter of law, to pursue a declaration of unfair dismissal in the absence of any admission by the Respondent; see **Telephone Information Service v Wilkinson** [1991] IRLR 148, approved by the Court of Appeal in **Gibb v Maidstone and Tunbridge Wells NHS Trust** [2010] IRLR 786. And finally, the difficulty in predicting the likely level of contribution as ultimately found by the ET.

Conclusion

11. On this basis we are satisfied that the Tribunal's reasoning cannot stand in relation to costs. On taking those factors into account, having been asked by both parties to exercise our powers under section 35 of the **Employment Tribunals Act 1996** and resolve the matter without remitting it back to the Tribunal, we reject Mr Gidney's submissions that costs were properly ordered on these facts. In our collective judgment, no costs order should have been made. We shall therefore set aside the costs order. The Claimant is entitled to compensation in the sum of £18,073.75.

12. A point arose in the appeal as to whether the form of order made by the Tribunal in their remedy Judgment was permissible under the then ET Rules. The costs order was set off and compensation ordered, leaving a balance of £8,073.75 to be paid by the Respondent. Although that point is strictly rendered moot by our decision in the appeal, we are not persuaded by Mr Gidney that the power to set off costs against damages in the civil jurisdiction (see **Lockley v National Blood Transfusion Service** [1992] 1 WLR 492 (CA), considered in the Chancery Division case of **Fearns v Anglo-Dutch Paint and Chemical Co Ltd** [2011] 1 WLR 366, paragraphs 74-77 per Mr George Leggatt QC, sitting as a deputy High Court judge) can be transposed into the ET jurisdiction. However, we think the point is purely technical. Had the Judgment specified separately the compensation order in favour of the Claimant and the costs order in favour of the Respondent, it would, practically speaking, have then been open to the

Respondent to simply pay the difference. Any attempt in those circumstances, subject to appeal, by the Claimant to enforce the full compensatory award in the county court, would have been bound to fail, with adverse costs consequences for her.