Appeal No. UKEAT/0143/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 October 2013

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

STROUD RUGBY FOOTBALL CLUB — APPELLANT

MRS P MONKMAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR SIMON EMSLIE (of Counsel) Instructed by: Sherbornes Solicitors LLP 10 Royal Crescent Cheltenham GL50 3DA
For the Respondent	MR MICHAEL SPRACK (Representative) Free Representation Unit 60 Grays Inn Road London WC1X 8LU

SUMMARY

UNFAIR DISMISSAL - Compensation

The Employment Judge had not erred in concluding that if there had been a proper procedure followed, in the context of the factual matrix of a Rugby Club the probability was the Claimant would have accepted a job share. This was a question of fact (see paragraphs 7 & 12 of the judgment of Bean J in **Lionel Leventhal Ltd v Mr J North** UKEAT/0265/04/MAA). Likewise there was no error of law in Employment Judge not having adopted a percentage chance basis of assessing future loss.

HIS HONOUR JUDGE HAND QC

1. This is an appeal against the Judgment of an Employment Tribunal, Employment Judge Housego, sitting alone at Bristol on 19 November 2012, the written Judgment and Reasons having been sent to the parties on 12 December 2012 whereby it was held that the Respondent, the Claimant below, who I will call the Claimant, had been unfairly dismissed by her employer, the Appellant here, the Respondent below, who I will call the Club.

2. As a result compensation was awarded against the Club and this appeal is against aspects of that award of compensation. The Club is being represented by Mr Emslie of counsel and the Claimant has been represented by Mr Sprack under the auspices of the Free Representation Unit. I am grateful to both of them for their thoughtful analysis and helpful presentation.

3. The Claimant had worked behind the bar at the Club for 25 years albeit with a break for five years between 2002 and 2007 due to the Club's financial difficulties in that period. Apart from the Claimant there was one other employee, a groundsman. Although I understand it to have been common ground that there had been a written contract of employment neither party could produce a copy of it to the Employment Tribunal but that did not cause any difficulties; the case itself is a very simple one.

4. Financial difficulty was a recurrent theme for the Club. It ran an annual deficit and in June 2012 the Claimant was dismissed by the Club Chairman, Mr Hammonds, by telephone. Her work appears to have been taken over by a combination of volunteers and one paid casual employee, namely Ms O'Connor. There is an element of internal inconsistency about descriptions relating to Ms O'Connor and in particular to whether she was already doing paid

work before the Claimant's dismissal. On balance I think that it is clear from the terms of the Employment Tribunal's Judgment that she was doing some paid work before the dismisssal.

5. Employment Judge Housego concluded that the Claimant had been dismissed by reason of redundancy. He said this in the last two paragraphs of the Judgment at page 2:

> **"I am satisfied that the reason for her dismissal was redundancy, that the pool for selection could only have been her, accordingly that there is no necessity for consultation about the means of selection, and that had a fair procedure been followed Mrs Monkman's position would have been declared redundant.**
>
> **The procedure followed was brutal. She was simply informed, out of the blue, in a telephone call that she was dismissed. One would think that someone on the committee of the rugby club would have some knowledge of employment procedures, but it appears not, or if they did the procedures were not followed. This was an unfair dismissal. The reason was redundancy."**

6. Employment Judge Housego also concluded that the Claimant would have been dismissed within two weeks had a fair procedure been followed. Had she been offered a job share with Ms O'Connor on a casual basis Employment Judge Housego thought that was "likely to come about" (see page 3 of the Judgment). This then was the factual basis upon which the calculations of loss made by Employment Judge Housego rested.

7. As he recognised, it was not a very precise basis upon which to make calculations. His actual words at page 3 are worth quoting in full:

> **"Mrs Monkman was devoted to the rugby club which formed a large part of her entire life, and was not simply a job. There is every reason to think that she would have worked on a casual basis for less money. She was not offered the opportunity to do so. There is an ongoing loss arising from the lack of that opportunity. Ms O'Connor has continued much as before; the case of *Lionel Leventhal -v- North*, to which I referred the parties, indicates that before making someone redundant the employer should consider whether the job of another should be offered to the person whose job had been declared redundant. Ms O'Connor, has a son in the junior section, and has simply carried on with her existing casual hours, taking on other unpaid responsibilities. There would have been an effect on her of removing her casual hours. I will have to do the best I can to make an estimation of the possibility of Mrs Monkman undertaking that work. On balance it would have been sensible for the work to have been shared between them, because that would have given some resilience to the club. Had this been considered I think it likely to have come about. No one was able to tell me the amount earned by Ms O'Connor and so I have to fall back on just and equitable principles, the fact that the amount will have been considerably less than earned by Mrs Monkman, but discount the fact that Ms O'Connor is paid below national minimum wage."**

8. The grounds of appeal annexed to the Notice of Appeal take three points but the second is not pursued. The first is that the Employment Tribunal had erred by awarding compensation for future loss based on a period of three years when Employment Judge Housego had found that if a fair procedure had been followed there would have been two weeks of consultation followed by a further period of notice. In respect of the period of notice the Claimant has been compensated by the award made and that is not the subject of challenge.

9. So Mr Emslie submitted that the further two weeks during which consultation should have taken place would have been the limit of any future loss. The third point, which is now the second point, is an allied point; namely that the award of future loss of compensation did not arise out of the unfair dismissal; these combined points have come to be called the causation point in the course of this hearing. If I accept this was the correct approach then there will be no need for a remission. Mr Emslie's alternative position is that Employment Judge Housego erred by adopting a balance of probability approach to future loss, he should have approached future loss by assessing the chances of casual work and he should have assessed those changes on a percentage basis; this has come to be called the percentage basis point. He submitted the approach of Employment Judge Housego to the question of future loss by in effect reference to a balance of probability was wrong in the circumstances. Such assessments are essentially speculative and therefore should have been dealt with by an assessment of the chances or, putting it in more practical terms, by assessing the percentage chance of the Claimant accepting a job share and Ms O'Connor agreeing to a job share. If Mr Emslie succeeds on that alternative basis then the matter will have to be remitted to an Employment Tribunal for the reconsideration.

10. I turn then to the causation point. Mr Emslie's combined point is that although there is no appeal against the finding of unfair dismissal, what Employment Judge Housego has done is

to conflate the concept of what he referred to in his skeleton argument and in his submissions as "bumping", which relates to the redundancy reason for dismissal, with the fairness of dismissal. Having made no findings that the dismissal was procedurally unfair because of a failure to consider alternative employment the Employment Tribunal could not base compensation on procedural failure. It could only base compensation on the redundancy reason for dismissal and on a failure of procedure curing which have taken two weeks. Any further award based on any future period beyond that could only be a relevant consideration if the dismissal had been found unfair on the grounds that a reasonable employer would have considered a job share instead of dismissing the Claimant.

11. On this argument, the Employment Tribunal have made too much of a statement by a division of this Tribunal, presided over on that occasion by Bean J in the case of **Lionel Leventhal Ltd v Mr J North** UKEAT/0265/04/MAA. At paragraph this Tribunal said:

> **"Nevertheless, it is quite apparent from the case law and indeed Mr Norbat did not suggest the contrary, that it can be unfair not to give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy. It is a question of fact for the Employment Tribunal; see among many decisions to like affect *Thomas & Betts Manufacturing Ltd v Harding*."**

12. In his skeleton argument, and to an extent in his oral argument, Mr Emslie points out that this concept of unfairness relating to alternative employment is by no means a hard and fast rule. In **Samuels v University of Creative Arts** [2012] EWCA Civ 1152, Arden LJ said at paragraph 31:

> **"But the key is that it is not compulsory for an employer to consider whether he should bump an employee. It is in essence a voluntary procedure."**

13. And at paragraph 18 of the Judgment of this Tribunal in **Byrne v Arvin Meritor LVS (UK) Ltd** UKEAT/239/02 the then President Burton J said this:

> **"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"**

14. Had Employment Judge Housego thought to do so, he could also have referred to paragraph 12 of the **Lionel Leventhal Ltd v Mr J North** decision where the following appears:

> **"Whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal. It depends as we see it on factors such as 1) whether or not there is a vacancy; 2) how different the two jobs are; 3) the difference in remuneration between them; 4) the relative length of service of the two employees; 5) the qualifications of the employee and danger of redundancy. No doubt there are other factors which may apply in a particular case. Here the Tribunal considered that the Applicant was not given the opportunity to say whether he would have accepted Mr Palmer's position. Mr Palmer was not approached to see whether he was interested in voluntary redundancy. The Tribunal found that this was unfair and it seems to us that is a finding with which this Appeal Tribunal cannot interfere. There is no rule of law which leads us to the conclusion that this finding of the Employment Tribunal was wrong in law. Paragraph 50 can be fairly said to be somewhat compressed reasoning but nevertheless we find it a sufficient basis to uphold the finding that the dismissal, albeit for redundancy, was unfair."**

15. This was referred to as guidance by a division of this Tribunal presided over HHJ Ansell at paragraph 29 of the Judgment in the case of **Fulcrum Pharma (Europe) Ltd v Bonassera** UKEAT/0198/10/DM the Tribunal agreed and said:

> **"With that approach I would only add that the starting point may be to determine within the consultation process whether the more senior employee would be prepared to consider a more junior role at the reduced salary."**

16. Clearly both cases are helpful to employment tribunals but facts alter cases and guidance is just that; it is guidance. It is not a statutory consideration. What seems to me important as a matter of principle in the **Leventhal** case is the opening sentence of paragraph 12 and the reference in paragraph 7 to the issue being a question of fact; I will return to that later.

17. Mr Emslie argued that the Employment Tribunal had ignored the fact that the Claimant was the only employee who fell within the pool and that therefore made it doubtful that failure to consult could be a relevant consideration at all; see **Wrexham Golf Club Ltd v Ingham**

UKEAT/0190/12/RN. This was not pressed during the course of the oral submissions and it seems to me untenable having regard to the passages from the Judgment referred to above, in particular those at page 2 of the Judgment where specific reference is made to consultation about means of selection. Consultation as to the means of selection might well have been otiose and it seems to me Employment Judge Housego accepted as much in the passage I have just referred to, but that does not mean consultation in the form of discussion about some other paid work in the future was in an irrelevant consideration. Plainly Employment Judge Housego did not think so and I do not think that he was wrong to take it into account.

18. Mr Sprack submitted that the question of causation is answered by paragraph 22 of the Judgment of a division of this Tribunal presided over by the current President in the case of **Johnson v Rollerworld** UKEAT/0237/10/JOJ. On the percentage point Mr Sprack submitted that paragraphs 45 to 53 of the Judgment of the Court of Appeal in **O'Donoghue v Redcar & Cleveland Borough Council** [2001] IRLR 615 was authority for the proposition that the percentage chance approach is not a necessary approach in all cases. I do not find the passage at paragraph 22 of the Judgment in **Johnson v Rollerworld** as compelling as does Mr Sprack. It seems to me a straightforward proposition that considering whether a future dismissal might occur has an impact on the calculation of future loss and it will not be always possible to conclude that the future dismissal would be a fair dismissal. The President is not alone in that sentiment, it has been articulated in a number of other cases including a case called **Panama v London Borough of Hackney** [2003] IRLR 278 where the Court of Appeal accepted that the evidence was sufficient to conclude that there would have been a disciplinary hearing in the future but insufficient to conclude that the result would have been a fair dismissal. Here Mr Emslie's argument depends on the inevitability of a future fair dismissal and that point rests not on what the President said in **Johnson** but on the facts as found by Employment Judge Housego.

19. Nor do I think that the passage in **O'Donoghue v Redcar & Cleveland Borough Council**, a relatively long passage referred to Mr Sprack, does anything more than illustrate that in some cases it will be possible on a balance of probability to reach the conclusion that there could be no loss beyond the particular future event and in some other cases it will be necessary to assess the possibility of that occurring in terms of the loss of a chance computed on a percentage basis. What I do accept in Mr Sprack's submissions, however, is that what the Employment Tribunal has done here is made a rough and ready assessment on a balance of probability. The question is whether that was an approach open to it on the facts of the case on the percentage basis point?

20. Indeed, it seems to me that the fundamental question in this case is whether there was a sufficient evidential factual matrix to support the conclusion reached by Employment Judge Housego that the Claimant would have stayed on working for the club in a casual capacity and had some income in the future if a fair procedure had been followed. In other words the question to my mind is whether this is all a matter of fact for the Employment Tribunal.

21. It is at that point that I return to what was said by Bean J division of this Tribunal in case of **Leventhal v North** at paragraph 7 and again at paragraph 12. I repeat what he said in the first sentence at paragraph 12:

> **"Whether it is fair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal."**

22. I do not consider this case to really have involved what is sometimes called "bumping". In my judgment that concept is not really relevant here. What Employment Judge Housego did was to make the only finding that he needed to make both in relation to the unfairness of the dismissal and in relation to what consequences might have flowed from it; namely that there

had been an inadequate consultation. The answer to Mr Emslie's causation point seems to me to lie, as is very often the case in this jurisdiction, in the statutory rubric of the section that gives the Employment Tribunal its jurisdiction over the matter at issue. Here that is section 123 of **Employment Rights Act 1996**; it is headed "Compensatory Award" and subsection 1 reads as follows:

> **"Subject to the provisions of this section and other sections, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."**

23. To my mind, thoughtful and penetrating though Mr Emslie's analysis was, the fact that if there had been adequate consultation and redundancy dismissal was inevitable does not automatically mean that is the cut off point so far as future compensation is concerned. If the result of a failure to consult is that an appropriate solution has been excluded, even if that solution does not mean that redundancy will be avoided, then that is a source of future loss flowing from the dismissal. Putting it in terms of the statute, the loss is sustained in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. I do not accept the causation point which lies at the heart of Mr Emslie's argument. It seems to me that in the passage which I have quoted above, see again page 3 of the appeal bundle, Employment Judge Housego correctly directs himself in terms of section 123 when he says there is an ongoing loss arising from the lack of that opportunity.

24. Accordingly, I do not accept that there was any error of law made by the Employment Judge. It seems to me that, with the one reservation that I would have preferred it if Employment Judge Housego had numbered his paragraphs, his approach to this case entirely exemplifies how an Employment Judge should approach a simple case.

25. I have already indicated that I agree with Mr Sprack's analysis that the assessment of future loss is a rough and ready matter. It always has been and it always will be. Sometimes it will be more appropriate for the Employment Tribunal to adopt the approach of assessing the chances of a particular event happening. Here Employment Judge Housego thought that what the Claimant had lost was the opportunity to discuss ways in which she might have continued to earn some remuneration at the Club. He concluded, as it seems to me on a reading of page 3 of the Judgment and the passage that I have referred to more than once before, that it was probable that had there been such consultation some kind of accommodation would have been arrived at in terms of both Ms O'Connor and the Claimant earning a little, but not very much, out of working behind the bar. It seems to me that was a conclusion open to him on the factual material before him.

26. I do have some reservation about the choice of language adopted by Employment Judge Housego when he describes it has been, "sensible for the work to have been shared between them". If that is taken in isolation out of the context in which it appears it might suggest the learned Judge was putting forward his own solution to the problem which clearly cannot be right either in terms of unfair dismissal or of the compensation that flows from it. But it seems to me that when it is set into the factual matrix that surrounds it he was really meaning to say that it would have been a reasonable conclusion likely to have emerged from the consultation.

27. I have been concerned about what Lord Prosser in **King and others v Eaton [No. 2]** [1998] IRLR 686 called reconstructing the world as it might have been and embarking on a sea of speculation and I accept to an extent Mr Emslie's submission that to a degree this was plucking figures out of the air. But in some circumstances in some factual situations it is justifiable to do so and I have come the conclusion that in what I have described as the simple

case, dealt with shortly and with clarity by Employment Judge Housego it was permissible for him to indulge in that exercise.

28. Even if I were minded to accept Mr Emslie's alternative submission, which I am not, I would have very grave reservations about whether if this matter were to be assessed on a percentage basis it really would be an appropriate matter for remission to the Employment Tribunal. The difference between Mr Emslie's submission on the causation point and what he says is the appropriate compensation that follows, were I to have accepted it, would be something around £5,000 and deducting that from the actual outcome before the Employment Tribunal of something just around £9,500 makes a difference of just over £4,000. Application of a percentage chance of half to that might reduce it to £2,250. In justice perhaps one would have to remit the matter but it does seem to me to illustrate that in some circumstances ultimately what an appeal might be about would make it very questionable whether it was fulfilling the overriding objective for an employment tribunals to have a further about that sum. I, of course, accept that it may be that the matter would be compromised in some way in order to save the expense and inconvenience of a further hearing.

29. As it is, I take the view that there was no error and so no question of remission arises. Accordingly I will dismiss this appeal.