Appeal No. UKEAT/0085/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 July 2013

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

TONI & GUYS (ST PAUL'S) LTD — APPELLANT

MRS M GEORGIOU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR DANIEL BISHOP (of Counsel) Instructed by: Cubism Law 116-118 Chancery Lane London WC2A 1PP

SUMMARY

UNFAIR DISMISSAL – Compensation

Correct method of calculating a week's pay for the purposes of (a) basic award and (b) compensatory award for unfair dismissal.

Appeal allowed in part; distinction drawn between the statutory regime applying to a week's pay for the basic award under Part XIV, Chapter II **Employment Rights Act 1996** and the greater discretion granted under s.123(1) ERA in respect of the compensatory award.

HIS HONOUR JUDGE PETER CLARK

1. This appeal raises questions as to the proper calculation of a week's pay for the purposes of both the basic and compensatory awards following a finding of unfair dismissal. The parties before the London Central Employment Tribunal were Mrs Georgiou (the Claimant) and Toni & Guys (St Paul's) Ltd (the Respondent). The factual background is that in 2002 the Claimant founded the Respondent company, a franchisee providing hairdressing services at 123-124 Newgate Street, London EC1. In early January 2011 the Claimant sold the shares in the Respondent to Ms Law; the two were then on good terms. It was a term of the sale agreement that the Claimant would be employed in the business as a hairstylist. Her remuneration was expressed in her statement of terms and conditions to be as follows:

> **"Remuneration**
>
> **Your earnings are variable and are on a commission only basis and you will receive 34% all your net takings payable monthly in arrears by cheque/credit transfer as detailed on your pay statement. We, however guarantee that your earnings will not fall short of the current minimum wage in force for the hours worked."**

2. Other stylists employed at the establishment earned commission on a similar basis but at a lower rate, typically between 25 per cent and 30 per cent.

3. Following the sale, relations between the Claimant and Ms Law deteriorated, culminating in the Claimant's dismissal on 24 June 2011. She brought a complaint of unfair dismissal before the Tribunal. That claim was fully defended and came on for hearing before Employment Judge Burns on 14 and 15 May 2012. By a Judgment with Reasons dated 18 June the complaint was upheld without deduction for contributory conduct on the Claimant's behalf. The Judge then went on to assess compensation. Without reference to any relevant statutory

provisions as to remedy, as opposed to liability (see paragraphs 37-41), the Judge dealt with the figures for gross and net pay at paragraph 56, where he said this:

> **"There was a dispute as to what the Claimants [sic] average weekly pay was, or should be assessed at. Her actual earnings as per the July 2011 payslip which in fact related to only the first 24 days of June 2011 was £741.57 net. This suggests a net rate of pay of about £220 per week. However the Claimant complains that her earnings during this period was [sic] artificially low because the Respondent had previously suspended her for two lengthy periods, during which she had her name blackened and lost goodwill with her own personal clients, and also as a result of the fact that work had been diverted away from her. I accept these complaints and the Claimant's contention that, absent these unfair factors, she would have been earning £265 net per week and £294 gross per week. In reaching this conclusion I have had regard to the figures produced by the Respondent showing the financial performance of other stylists in January, February and March 2012. During her employment the Claimant was the most senior and highly paid stylist and should have earned at a significantly higher rate than these comparables."**

The appeal

4. It is necessary to consider separately the statutory regimes that dictate the proper assessment of a week's pay (gross) for the purpose of calculating the basic award and the compensatory award payable following a finding of unfair dismissal. I shall consider each in turn.

Basic award

5. The calculation of a week's pay for this purpose is circumscribed by Part XIV Chapter II of the **Employment Rights Act 1996** (ERA). Section 220 provides:

> **"The amount of a week's pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter."**

6. Material for present purposes are section 221(3), which provides:

> **"Subject to section 222, if the employee's remuneration for employment in normal working hours […] does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of 12 weeks ending—**
>
> **(a) where the calculation date is the last day of a week with that week, and**
>
> **(b) otherwise, for the last complete week before the calculation date."**

7. And by section 223(1):

> **"For the purposes of section 221 and 222 in arriving at the average hourly rate of remuneration, only—**
>
> **(a) the hours when the employee was working, and**
>
> **(b) the remuneration payable for or apportionable to those hours,**
>
> **shall be brought in."**

8. Based on those provisions, Mr Rees submits that in this case, where the Claimant's remuneration under her contract of employment is dependent on commission earned at the agreed rate of 34 per cent, the position is both clear and mandatory. The Claimant's actual earnings during the relevant pre-termination 12-week period are to be ascertained and averaged out. That gives a week's pay for the purpose of the basic award. No variation from that formula is permitted. What is impermissible is the speculative figure adopted by the Judge based on what she might have earned had Ms Law not suspended her, blackened her name, caused her to lose the goodwill of her clients and diverted work away from her, as the Judge found she had done.

9. In response, Mr Bishop submits that in essence the Judge found a breach of the implied term of mutual trust and confidence on the part of the Respondent and that, but for that breach, the Claimant would have been remunerated on the basis found by the Judge. That was therefore the remuneration to which the Claimant was contractually entitled.

10. Attractively as the argument was put by Mr Bishop, I am unable to accept it on the basis of the Judge's findings; in particular, far from finding a breach, the Judge made clear first at paragraph 9 that in the contract collateral to the same agreement the Claimant was given no

express assurance as to security of employment, nor was she guaranteed a minimum amount of work (I pause to observe that is plainly true of the express term as to remuneration in the Claimant's statement of terms and conditions of employment). Secondly, at paragraph 11 the Judge held that in deliberately restricting work going to the Claimant Ms Law breached the spirit, if not the letter, of the share sale agreement. There is no finding of a breach of the implied term of the contract of employment.

11. These facts seem to me to be distinguishable from those in **Kinzley v Minories Finance Ltd** [1988] ICR 113, on which Mr Bishop relied, where the EAT remitted a case to the then Industrial Tribunal to determine whether the claimant was right in asserting an assurance given by her employer as to a higher level of salary for the purposes of calculating the compensatory award under what is now section 123(1) ERA. In these circumstances, given the clear formula set out in Chapter II of Part XIV ERA, I am driven to conclude that the Judge fell into error in his assessment of a week's pay for the purposes of calculating the basic award, and I uphold Mr Rees' submission on this part of the appeal. I shall hear the parties later on how that translates in terms of the basic award made below.

Compensatory award

12. There is no equivalent provision for ascertaining the level of net pay for the purpose of assessing loss of earnings as part of the compensatory award, although in practice it will normally be the netted-down weekly gross pay caculated for the purposes of the basic award (see my observation in **Whelan v Richardson** [1998] IRLR 114, paragraph 43, and the approach of HHJ Birtles in **Contract Security Services v Adebayo** UKEAT/0192/12, 11 December 2012, paragraph 24). Relying on that approach, Mr Rees submits that the net weekly pay for the purposes of a compensatory award should simply be the gross pay properly

assessed for the purpose of the basic award netted down. However, the Tribunal's discretion in calculating the compensatory award is expressed in section 123(1) ERA in this way:

> **"The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

13. That wide discretion, in my judgment, covers the Judge's approach to the calculation of the compensatory award in this case. I am not here concerned with the manner of dismissal of itself, which is not to be separately compensated, rather with the loss sustained by the Claimant as a result of her dismissal attributable to action taken by the Respondent. Here, the action taken by the Respondent as found by the Judge included capriciously diverting away from the Claimant work on which she would have earned additional commission. In these circumstances, as Mr Bishop put it, it would not be just and equitable to permit the Respondent to benefit from behaviour that formed a part of the unfairness of the dismissal. In order to correct that injustice, it seems to me that the Judge was entitled to compensate the Claimant for her lost earnings post-dismissal on the basis of what she would have earned but for her unfair dismissal. That is a quite different assessment from the prescribed calculation of a week's pay for the purposes of the basic award. It follows, therefore, that in relation to the compensatory award this appeal fails and is dismissed.

Conclusion

14. The appeal is allowed in part. The basic award is to be reassessed on remission to the Employment Tribunal unless within 14 days of this order the parties provide an agreed variation in writing to the EAT.