Appeal No. UKEAT/0145/13/BA
UKEAT/0267/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 July 2013
Judgment handed down on 22 October 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

BARONESS DRAKE OF SHENE

MR S YEBOAH

MR MARTIN SYMONDS T/A SYMONDS SOLICITORS — APPELLANT

MISS S REDMOND-ORD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARTIN SYMONDS (Solicitor) Symonds Solicitors 4 The Crescent Plymouth Devon PL1 3AB
For the Respondent	MISS S REDMOND-ORD (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

The Respondent employer refused to permit the Claimant employee to return to work at the agreed date; and the Claimant, after attempting unsuccessfully to pursue a grievance, resigned. The Tribunal found that she was constructively and unfairly dismissed and awarded her compensation which included her loss of earnings from the date at which she should have been permitted to return to work. The Respondent employer sought to amend the notice of appeal to argue that compensation should have run only from date of dismissal (see **GAB Robins (UK) Limited v Triggs** [2008] ICR 829). In the circumstances permission to amend was refused; there was no substance in the other point taken on appeal, which related to the length of the period of compensation; and the appeal was dismissed.

The Claimant had applied successfully to the Tribunal for a review to correct errors of calculation in her compensation. The Respondent employer sought to renew at the review hearing an argument that compensation should run only from the date of dismissal. The Tribunal refused to entertain that argument. **Held**: in the circumstances the Tribunal did not err in law by refusing to entertain a review on the question.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. By a judgment dated 13 June 2012 the Employment Tribunal sitting in Exeter (Employment Judge Griffiths presiding) found that Miss Stephanie Redmond had been unfairly dismissed from her employment by Mr Martyn Symonds. The Tribunal awarded £7,922 by way of compensation. Later the Employment Tribunal held a review as to the amount of compensation. On review by judgment dated 31 October 2012 the amount of compensation was increased to £11,143.

2. We have before us appeals by Mr Symonds concerning these two judgments challenging the amount of compensation. His principal point flows fundamentally from the decision of the House of Lords in **Johnson v Unisys** [1999] ICR 809. This appeal is yet another illustration of the difficulties to which that decision gives rise.

3. Although the sums involved are not large, this appeal is the latest round in what has become lengthy and hard-fought litigation. As we shall see, the matter has been the subject of a hearing in the Employment Tribunal, an appeal, remission to a further hearing before the Employment Tribunal, a review hearing and now this further appeal. There has also been an unsuccessful civil claim by Mr Symonds which (he told us) is subject to appeal.

The background facts

4. Mr Symonds was a solicitor and the sole principal of his practice which was entitled Symonds Solicitors. Miss Redmond was employed by him as a secretary. The Tribunal found that she was an effective worker and that she and Mr Symonds worked closely together.

5. During 2009 Miss Redmond was affected by difficulties in her health and personal life. She proposed to take a number of months off work and away from the UK to help her recovery. She took unpaid leave with Mr Symonds' agreement.

6. On 16 October 2009 a meeting took place between them so that she could tell him her plans. There was a dispute as to what occurred at this meeting. The Tribunal, preferring Miss Redmond's account, found that the terms of her unpaid leave were that it would extend until her return from Nepal in February 2010.

7. On 15 February 2010 Miss Redmond went to see Mr Symonds, taking gifts from her travels. She informed him that she was ready to return to work. But Mr Symonds told her that he had employed a secretary in January on a six-month contract expiring in July and had no space for her. In a conversation a week or so later he told her that she could not come back to work immediately but would have to wait until July.

8. This left Miss Redmond in a difficult position. She was receiving no income but – still being employed – was not receiving any state benefits. She raised a formal grievance in a cogent and careful letter dated 16 March. A month passed. Mr Symonds took no steps to deal with the grievance. Miss Redmond resigned on 19 April. She claimed constructive dismissal. She found some temporary work and then permanent work at a comparable (but slightly lower) salary by 30 November 2010.

The Tribunal proceedings and reasons

9. In April 2010 Miss Redmond brought a claim of constructive unfair dismissal. She did not articulate any separate claim for breach of contract or unpaid wages: she did not, for example, tick the box on the claim form for "other claims". However she did say in clear terms that she was seeking compensation for her loss of earnings "from February 2010".

10. The claim was originally heard in October 2010. But it was remitted by the Employment Appeal Tribunal for rehearing. It came on again before a freshly constituted Tribunal on 6 and 7 June 2012.

11. The Tribunal found that Mr Symonds committed breaches of contract by preventing Miss Redmond from returning to work and by failing to deal with her grievances. It found that she was entitled to resign in April and had been unfairly dismissed. Based on a schedule provided by Miss Redmond the Tribunal calculated her compensation (including a 25% uplift) at £7,922.

12. Although not expressly stated in the Tribunal's reasons it can be seen by reference to the schedule of loss which Miss Redmond produced that the Tribunal took 22 February as its start date. That was common ground before us at the hearing of the appeal.

13. Mr Symonds argued that Miss Redmond's compensation ought to be limited to the period up to July 2010, because he had told Miss Redmond that her job would be available from that time. The Tribunal said:

> **"The respondent argues that in failing to return to work in July 2010, she has failed to mitigate her loss. We find it was reasonable, in all the circumstances for her to have accepted the breach of her employment contract and not to have been prepared to return to work in July. We find that she has acted reasonably in seeking to mitigate her loss."**

14. There were significant errors in the calculation of compensation to Miss Redmond's disadvantage. The Tribunal directed a review which was held on 31 October 2012. Based on revised calculations which were not, as calculations, in dispute the Tribunal increased the award to £11,143. Again, although it is not made explicit, the Tribunal took 22 February as its start date.

15. At the review hearing the Tribunal recorded a submission by Mr Symonds that "the date from which actual loss is sustained should be 19 April, when the claimant resigned and not 22 February when she was unable to return to work". The Tribunal said that the issue "was considered and dealt with at the substantive hearing and was not raised as a matter for this review".

Civil proceedings

16. For reasons which will shortly become apparent it is relevant to note that following the judgment of the Employment Tribunal in this case Mr Symonds brought a civil claim against Miss Redmond for the return of some £1300 which he said was the balance of a loan made to her during the employment. Miss Redmond disputed the claim on the basis that the sum was not a loan but an emolument of her employment. The claim was dismissed; but Mr Symonds informs us that the result is currently the subject of an appeal.

End date of loss

17. Essentially Mr Symonds took two points on this appeal. We can deal quite shortly with one of the points – a submission that Miss Redmond's loss should be limited to the period until July 2010.

18. Mr Symonds argued that Miss Redmond's job became open again for her in July 2010; that she chose not to return to work for him, and that her loss should be limited to that date. He says it would be unjust and inequitable for her to be awarded any loss after that date. He relies on section 123(1) of the **Employment Rights Act 1996**. He also referred us to the **Law Reform (Contributory Negligence) Act 1945**: the closest equivalent in unfair dismissal law is of course section 123(6) of the 1996 Act. The argument below seems to have been that Miss Redmond's loss was limited to the period up to July 2010 by reason of her failure to mitigate her loss: see section 123(2).

19. Section 123 of the 1996 Act, so far as relevant, provides –

> **"(1) Subject to the provisions of this section and sections 124 [124A and 126], 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 in so far as that loss is attributable to action taken by the employer**
>
> **.....**
>
> **(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.**
>
> **.....**
>
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

20. In our judgment there is no force in Mr Symonds' argument on this point. Miss Redmond had been constructively dismissed by Mr Symonds. On the Tribunal's finding she had accepted a repudiatory breach of contract on his part. By virtue of section 123(1) she was entitled to loss sustained in consequence of that dismissal in so far as it was just and equitable for that loss to be awarded. There would be no warrant for imposing a "cut-off" in July 2010 unless she behaved unreasonably in failing to return to work for him. This is the very question which the Tribunal considered and decided against Mr Symonds. In the context of this appeal it

makes no practical difference whether the matter was considered under section 123(1), (4) or (6) of the 1996 Act.

21. In our view the Tribunal committed no error of law. It applied the correct test and stated a conclusion which cannot possibly be described as perverse. It would have been helpful if it had added, in a sentence or two, an explanation of its conclusion, but it is plain from a reading of its reasons as a whole what the Tribunal thought. Mr Symonds had committed serious breaches of contract, refusing to allow Miss Redmond to return to work and entirely failing to deal with her grievance. It cannot sensibly be said that it was unreasonable for her to decide that she wished to work for someone else.

Start date of loss

22. Mr Symonds' other point, although it concerns only a relatively small sum of money (about £2727) requires fuller consideration.

23. He argued that loss should run from 19 April, not 22 February. This point was not taken in the notice of appeal against the original judgment. It was taken in the notice of appeal against the review judgment. The President, when directing a full hearing of the appeal against the review judgment, said that the ground had "an air of legal technicality interfering with delivering fair justice".

24. We drew to Mr Symonds' attention that the point was not taken in the notice of appeal against the original judgment. We pointed out to him that different considerations might apply to the two appeals. We gave him time to consider his position. He then applied for permission to amend the notice of appeal against the original judgment to take the point.

25. We must therefore consider (1) an application for permission to amend the notice of appeal against the original judgment, and if granted, the way in which the matter was dealt with in the original judgment and (2) in any event, the way in which the matter was dealt with on review.

The argument

26. It is first necessary to state the argument which Mr Symonds seeks to make. His argument is that (1) the contract terminated only with Miss Redmond's resignation on 19 April 2010, (2) loss prior to this date cannot be awarded as compensation for unfair dismissal – see **GAB Robins (UK) Limited v Triggs** [2008] ICR 829, and (3) the Employment Tribunal therefore erred in law awarding loss from 22 February 2010 in respect of the claim for unfair dismissal.

27. In our judgment Mr Symonds' argument is legally correct. The loss which can be claimed in respect of a constructive unfair dismissal does not include loss flowing from wrongs inflicted on an employee by the employer's conduct prior to termination for which she has an independent claim for breach of contract.

28. In **Triggs** the employers had conducted themselves in breach of the implied term of trust and confidence owed to an employee, essentially by bullying her and imposing an excessive workload upon her. She claimed that this behaviour had affected her health, by reason of which she had suffered loss of earnings and earning capacity. She resigned and successfully claimed that she had been constructively and unfairly dismissed. As part of her loss in respect of constructive unfair dismissal she claimed the loss of earnings and earning capacity resulting

from the breaches of contract which caused her to resign. It was held, following and applying the decision of the House of Lords in **Eastwood v Magnox Electric plc** [2004] ICR 1064, that she was not entitled to do so.

29. It is sufficient to cite the judgment of Rimer LJ at paragraph 34.

> **"To the question whether Mrs Trigg's reduced earning capacity by reason of her illness was a loss suffered by her "in consequence of the dismissal" (section 123), the answer is no. It is correct that the dismissal was a constructive one, that is that it was the result of, and followed upon, her acceptance of the employer's antecedent breaches of the implied term of trust and confidence that had caused her illness and, in turn, her reduced earning capacity. But it is fallacious to regard those antecedent breaches as constituting the dismissal. The dismissal was effected purely and simply by her decision in February 2005 that she wished to discontinue her employment. On a claim for unfair dismissal, that entitled her to compensation for whatever loss flowed from that dismissal. But that loss did not include loss (including future loss) flowing from wrongs *already* inflicted upon her by the employer's prior conduct: those losses (including any future lost income) were not caused by the dismissal. They were caused by the antecedent breaches of the implied term as to trust and confidence and Mrs Triggs had an already accrued right to sue for damages in respect of them before the dismissal. The ET's error in concluding that it was suffered in consequence of the dismissal was to treat the unfair dismissal claim as, in effect, a claim for damages for the employer's fundamental breach and repudiation of the employment contract that Mrs Triggs had accepted by her decision to leave. But her claim was not such a claim. It was simply a statutory claim for unfair dismissal."**

30. The existence of a rigid and sometimes counter-intuitive demarcation line between what can be claimed for anterior breaches of contract and what can be claimed in respect of dismissal follows from the decision of the House of Lords in **Johnson v Unisys Limited** [1999] ICR 809, applied by the House of Lords itself in **Eastwood** and by the Court of Appeal in **Triggs**.

31. The difficulties caused by **Johnson v Unisys** are well known: see, for example, Lord Nicholls in **Eastwood** at paragraphs 30-33, where he described the demarcation line as producing "awkward and unfortunate consequences" and said that it merited "urgent attention by the Government and the legislature". In **Triggs** itself Rimer LJ said that he had "instinctive sympathy" for the position of Mrs Triggs. Recently the application of **Johnson v Unisys** led to sharp divergences of approach in the Supreme Court: see **Edwards v Chesterfield Royal Hospital NHS Trust** [2012] ICR 201. It continues to produce strange and apparently unfair

results: see **Smith v Trafford Housing Trust** [2013] IRLR 86, especially at paragraph 103 (demoted employee was in effect dismissed and therefore could not claim damages in contract for consequences of demotion).

32. Speaking for ourselves, we doubt whether Parliament, when it passed the unfair dismissal legislation with a power to award compensation on a broad just and equitable basis, intended consequences such as these: see the criticisms of **Johnson v Unisys** in *Deakin & Morris, Labour Law* (6th ed) at para 5.43. The law is, however, now well established.

33. If we were simply to allow the appeal on the ground which Mr Symonds seeks to argue, Miss Redmond would in our opinion suffer an injustice. As we have seen Miss Redmond's claim form included an express claim for compensation running from February 2010. The whole basis of her claim for constructive unfair dismissal was an assertion that Mr Symonds was in breach of contract by failing to employ her between February and April 2010. On the Tribunal's findings, Mr Symonds was in breach of contract by failing to employ her between February and April 2010. Miss Redmond, who is not a lawyer, can be forgiven for thinking that her claim for constructive unfair dismissal would include losses caused by the very breaches which gave her the right to resign and make the claim. Her only remedy would be a claim in the small claims court - yet another set of proceedings over a very small sum.

Permission to amend the Notice of Appeal

34. As we have said, the notice of appeal against the original judgment did not take the point which Mr Symonds now takes. When we pointed this out to him he applied orally for permission to amend the notice of appeal. Miss Redmond opposed that application.

35. The Employment Appeal Tribunal has a wide discretionary power to allow a Notice of Appeal to be amended. General principles governing the exercise of this discretion are set out in **Kudados v Leggate** [2005] ICR 1013 at paragraphs 79-87, especially paragraph 86. We have borne those principles in mind. Each case, however, turns on its own facts. We will set out below the considerations which appear to us to be important in this case.

36. Firstly, we think it is relevant to take into account whether and to what extent Mr Symonds argued the point at the Tribunal hearing which he now seeks to argue on appeal. We accept his assertion that he raised with the Tribunal the question whether loss should begin only from the date of dismissal: this is borne out by the Tribunal's own reasons given at the time of review, which we have already quoted.

37. Equally, however, it is plain that he did not know of, or cite to the Tribunal, **Triggs** or the line of cases leading to **Triggs**. If he had done so the Tribunal would have seen the point and explained to Miss Redmond that her claim in respect of the period from February 2010 to April 2010 had to be put as a claim of breach of contract.

38. If this point had been appreciated at the hearing below, the Tribunal would have had power to amend the claim form so that Miss Redmond could make a breach of contract claim. Jurisdiction to entertain such a claim exists: see article 3 of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**. It is true that the time limit for bringing a complaint of breach of contract had expired (see article 7) but on well established principles the Tribunal still had power to grant the amendment, especially where as here the amendment involved putting a new label on facts already pleaded. In our judgment the arguments in favour of allowing an amendment would have been very powerful indeed.

39. Secondly, we think it is relevant to take into account the lateness of the application for permission to amend. The point did not surface at all until the notice of appeal against the review decision, and the application to amend the notice of appeal against the original judgment was only made at the hearing of this appeal. If the **Triggs** point had been identified at the outset of the appeal process Miss Redmond might have raised her breach of contract claim as a cross claim in the civil proceedings which Mr Symonds brought. Those proceedings have now been decided, subject only to Mr Symonds' outstanding appeal.

40. Thirdly, we think it is relevant to take into account that on the Tribunal's findings Miss Redmond is entitled to compensation for the period from February to April. In substance the Tribunal has heard both sides on the question whether there was a breach of contract by Mr Symonds causing loss to Miss Redmond, and it has found on the facts that there was. The issue has in substance been decided and is binding upon Mr Symonds.

41. The significant point which tells in Mr Symonds' favour on the question of permission to amend is that the point he seeks to argue is, as we have found, a good point. But we agree with the way the President put it: in the context of this case, the point is a legal technicality standing in the way of doing substantial justice between the parties. For the reasons we have explained, Mr Symonds would benefit unduly from the lateness with which he has raised and placed reliance on **Triggs**. Allowing him to take the point might lead to yet another round of civil litigation to no good purpose. For these reasons we refuse permission to amend.

42. In passing, we would observe that if we had granted permission to amend the notice of appeal an interesting question would have arisen as to whether the Appeal Tribunal itself, in

exercise of powers under section 35 of the **Employment Tribunals Act 1996**, might have granted permission to amend the claim form and awarded compensation for breach of contract. It is arguable that, given the Tribunal's findings on the question of breach of contract and loss, the Appeal Tribunal's powers would have been wide enough to permit this course to be taken; and (subject to giving the parties an opportunity to argue the matter) we might have been minded to take it. However, since we have refused the application for permission to amend, we need consider this no further.

The review

43. As we have already explained, Mr Symonds sought to raise the question of the start date for loss at the review hearing. He did not refer to **Triggs** or to the line of cases leading to it. The Tribunal dealt with this matter briefly, saying that the issue "was considered and dealt with at the substantive hearing and was not raised as a matter for this review".

44. By the time he instituted his appeal against the review decision Mr Symonds had become aware of **Triggs** and he took the point in terms for the first time in his notice of appeal against the review decision.

45. It is, however, important to keep in mind the difference between the original hearing and the review hearing. Miss Redmond had applied for the review hearing to correct errors of calculation. The Tribunal had granted a review for this purpose. It does not follow that the Tribunal was bound to consider other aspects of the case at the review hearing. It was fully entitled to restrict the review hearing to the purpose for which it had been granted and committed no error of law in doing so.

46. A Tribunal has, of course, power to correct an obvious error of law by way of review: see **Trimble v Supertravel Ltd** [1982] ICR 440. But it should not generally entertain a review for the purpose of entertaining essentially the same argument a second time. Mr Symonds renewed his argument about the start date for loss but he did not cite any authority. The Tribunal committed no error of law by declining to re-open the matter. The Tribunal's error in failing to recognise the principle in **Triggs** occurred at the substantive hearing and the notice of appeal in which it should have been challenged was the notice of appeal concerning the substantive hearing.

47. For these reasons the application to amend the notice of appeal against the original judgment will be refused and both appeals will be dismissed.