Appeal No. UKEATPA/0368/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 June 2013
Judgment handed down on 10 September 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

DR A ABEGAZE — APPELLANT

SHREWSBURY COLLEGE OF ARTS AND TECHNOLOGY — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	DR A ABEGAZE (The Appellant in Person)

SUMMARY

RACE DISCRIMINATION – Direct

For a one-off act of race discrimination in refusing to employ him in 1999, an Employment Tribunal in 2012 awarded the Claimant a total of £25,787. While below the £1.6m figure (before interest) sought, the awards were within the **Vento** and other proper scales. The Employment Tribunal correctly moderated the award to reflect the contemporaneous disappointment the Claimant would have felt at the rejection of his other job applications, and the large number of Employment Tribunal claims dismissed. It did not err in stopping his award for loss of earnings when he obtained new work from which he was dismissed for misleading the new employer. **Dench** applied.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about compensation for race discrimination. I pre-read the papers including all of the medical reports. I will refer to the parties as the Claimant and the Respondent.

Introduction

2. On 1 September 1999 the Respondent rejected the Claimant for a job for which he had applied. By a Judgment sent on 20 November 2000, an Employment Tribunal under the chairmanship of Mr DP Thompson, by a majority, held that the Respondent had discriminated against him on racial grounds. He is Ethiopian. This is an appeal by the Claimant in those proceedings against the remedies Judgment of a different Employment Tribunal sitting at Birmingham over eight days under the chairmanship of Employment Judge Kearsley sent to the parties on 23 January 2012. The Claimant represented himself; the Respondent was represented by counsel.

3. The Tribunal awarded the Claimant the following sums: for personal injury £4,000; injury to feelings £4,000; interest £4,906; loss of earnings £10,581; interest on loss of earnings £2,300.

4. All of the background is reflected in a Judgment I gave when there was an appeal against the striking out of the Claimant's case by Judge Thompson in Shrewsbury in 2006 because the Claimant had not carried out the directions of the Tribunal and a fair trial was impossible. My decision at the EAT on 4 March 2008 upheld the Judgment, but on appeal to the Court of Appeal, [2010] IRLR 238, the strike out was set aside. The principal relevant holding of the Court of Appeal was that it was appropriate for the Claimant to be sent an unless order prior to the striking out. That Judgment was given on 20 February 2009 and so 14 years later the

Birmingham Tribunal completed the process begun in 1999 and awarded the sums that I have set out above.

5. My 2008 Judgment is relevant to the chronology, to the conduct of the Claimant, to the difficulties faced in the case, and to other matters, and I incorporate that Judgment in this.

6. The Claimant was dissatisfied with the Judgment of the Birmingham Tribunal. His figures, as recorded by the Tribunal, were markedly different from those of the Respondent and ultimately awarded. His claim was for £533,000 for injury to feelings and a career loss of earnings amounting to £529,000. The Respondent's case was that the Claimant was entitled to £6,000 at the most for injury to feelings and £1,000 for personal injury, and a figure for loss of earnings that, at its worst, was about £10,000.

EAT procedure

7. In **Haritaki v South East England Development Agency** [2008] IRLR 945, paragraphs 1 to 13, I have set out my approach to appeal hearings such as this. It should be read with this Judgment. That approach has been approved by the Court of Appeal in, for example, **Hooper v Sherborne School** [2010] EWCA Civ 1266 and **Evans v University of Oxford** [2010] EWCA Civ 1240. On the sift of this Notice of Appeal in accordance with Practice Direction, paragraph 9, HHJ Peter Clark exercised his power under rule 3(7) and said the following, on 20 July 2012:

> **"The amended grounds of appeal raise principally factual questions which were for the fact-finding Employment Tribunal; in particular, which medical opinion they preferred doing the best they could in circumstances where the doctors were not called to give evidence.**
>
> **Based on their findings as to attributability (the index event occurred on 1 September 1999) and the fact of his employment in July 2000 (terminated due to Appellant's non-disclosure). I can see no error of law in the Employment Tribunal's fully reasoned assessment of loss. Nor can I see any arguable case of procedural irregularity/bias (Grounds of Appeal; para 15) despite the Appellant's conduct of the remedy hearing (reasons, paras. 22-25)."**

8. In accordance with rule 3(8), the Claimant put a fresh Notice of Appeal in, which met with the following response, again from Judge Clark:

> **"The fresh Notice of Appeal is open to the same observation as I made in relation to the original Notice: it seeks to challenge the fact-finding Employment Tribunal's assessment of the medical evidence. That is not a permissible basis for an appeal on a point of law.**
>
> **I can see no misapplication of the principles emerging from the cases cited to the facts found in this case."**

Where no point of law is found in the Notice of Appeal the EAT is deprived of jurisdiction (see s.21 of the **Employment Right Act 1996** where jurisdiction is confined to questions of law).

9. The Claimant was given the opportunity to have an oral hearing, which is before me. At the outset of the hearing I offered to make reasonable adjustments for the Claimant's medical condition and all he sought was to remain seated and for any judgment to be reserved so he need not listen to it. I granted both and give this judgment the same day in his absence. I indicated to Dr Abegaze that I have read the relevant papers and the medical reports which are in issue in this case and his skeleton argument and had refreshed my recollection of the earlier proceedings. As I said in 2008, I have been case managing Dr Abegaze's matters since 2003. It will be noted that he is a prolific litigator.

The facts

10. The Claimant having eventually submitted to medical examination, the Employment Tribunal met to consider the medical material and the financial losses. The medical evidence was voluminous (see the summary in paragraph 13 of the Judgment). The Tribunal made findings on all of the heads of loss. The Tribunal made the following finding:

> **"The Tribunal concludes that the Claimant has used his best efforts to prevent these claims reaching a conclusion, that those attempts have failed and the Tribunal is in a position to make its findings of fact."**

The Tribunal made very substantial criticisms of the Claimant's conduct before the Tribunal and his accusations against the Judge and counsel as being racists.

11. Broadly speaking the competing medical evidence was between Dr Holden for the Respondent and Dr Ndegwa for the Claimant, although there are a number of other reports. The Tribunal adverted to the very substantial litigation conducted by the Claimant and it had before it 11 Employment Tribunal Judgments in connection with claims brought by the Claimant. A brief look at the BAILII website indicates at least 20 Judgments at EAT and Court of Appeal level in respect of the Claimant's cases. Again, broadly speaking, the Claimant made a very large number of applications to employers and to colleges and when he was rejected he contended that this was on the ground of race.

12. The Tribunal set about making conclusions on the medical evidence. It preferred Dr Holden's account of the medical history, and his opinion, to that of Dr Ndegwa. It gave cogent reasons for deciding that. I have myself looked at the competing medical materials and can see no error in the Tribunal's decision to prefer one over the other. This was a question of fact for the Employment Tribunal to decide; it had evidence from different medical experts and it was its duty to decide which was to be preferred.

13. One criticism the Claimant makes is that the Tribunal found that the Claimant was attempting to influence Dr Ndegwa and refers to Dr Ndegwa's own report that the Claimant was seeking for Dr Ndegwa to change his report. There are references to other doctors where

the same thing has occurred. The Tribunal attached less weight for that reason to Dr Ndegwa's material.

14. In my judgment, the Tribunal committed no error in its decision. It based it findings in respect of the medical evidence upon what Dr Holden said about the state of the Claimant's condition, which started with mild depression. There was a reference to his pre-existing anxiety. The Claimant continues to assert that there was no medication and no formal record of this, but Dr Tasker did report in 1989 the Claimant as being extremely anxious and verging on chronic hypochondriasis over his medical problems. There was therefore a basis for the fragile nature of the Claimant prior to 1 September 1999.

15. The second issue related to contributing events. In other words, the Tribunal looked at the effect of the rejection of the Claimant in 1999 upon his existing condition and whether there were other contributing factors and it found there were. In particular, there was this:

> **"64. The medical records show that the Claimant had a fragile personality before the events in September 1999 although there was no previous diagnosis of depression. At around the time that he was rejected by the Respondent for the post he learnt that his Employment Tribunal Claim against BT had been struck out because of his scandalous behaviour. He lost his award of £5,000. He subsequently became possessed of the belief that any college who rejected him, did so, on racial grounds, and that those seeking to offer medical assistance, were also acting in a racially discriminatory manner."**

That refers to a case which the Claimant then appealed to the EAT, where Lindsay P, reflected upon an Employment Tribunal Judgment sent to the parties on 13 May 1999, and, again, as the Claimant told me, a further Judgment sent on 27 September 1999. This latter was to reverse its earlier decision at the instance of the Respondent. In those proceedings against BT, the EAT found the Claimant to have suffered a considerable blow by reason of this event (see [2000] EAT 1450/99/1205). The Claimant presented his claim form in the current appeal at the end of September 1999.

16. In addition to that event, the Claimant had made a number of other complaints against colleges, all of which resulted in his rejections at around this time.

17. In due course the Claimant secured a post with South East Essex College, which he occupied between July and October 2000. He was earning less than he would have earned had he got the job at the Respondent.

18. The Claimant made a large number of claims for different forms of injury. The Tribunal accepted that the Respondent acknowledged that some injury to feelings and some personal injury was to be compensated, and it did so in each case in the sum of £4,000.

19. In my judgment £4,000 was properly assessed in accordance with the scale in **Chief Constable of West Yorkshire Police v Vento (No 2)** [2003] IRLR 102 as updated. This was a single act of discrimination and the Tribunal warned itself against double counting. There was a host of contributing factors which led to the Claimant's deterioration as evidenced by medical diagnosis at that time. But it concluded that that deterioration was not caused by the action of the Respondent (see paragraph 73). The Tribunal was looking at a direct causal link between the act of discrimination and the injury - whether personal injury or injury to feelings - which occurred. The Tribunal dismissed a number of other claims which the Claimant made for personal injury and also for loss of expenses.

20. The Tribunal then turned to the loss of earnings. It stopped the loss at 17 July 2000 when the Claimant obtained the job at South East Essex College. The problem was that the job was given on the basis of satisfactory references. These were not satisfactory and the Claimant was

dismissed in October 2000. The Respondent had contended in its final position that there was no continuing loss from the beginning of the time when he got that job.

21. The Tribunal considered the Judgment of the Court of Appeal in **Dench v Flynn & Partners** [1996] IRLR 653 and did not make the mistake the Tribunal had made in that case of regarding new employment as always putting an end to losses. But, in this case, the Tribunal found that it was not just and equitable to award him any losses after the time he secured the new job because the Claimant had misled that new employer as to his qualifications and so on. As a matter of causation, it was the Claimant who caused the loss after that date and it was not attributable to the Respondent's tort. The Claimant was compensated for the difference between the salary offered by the Respondent and that by South East Essex College.

The Claimant's submissions

22. In relation to each of these the Claimant made very substantial submissions. In my judgment, the Employment Tribunal was correct to reject the Claimant's contention that his injury to feelings should be compensated for at the rate of £533,000. This is way outside the **Vento** range. For the one-off act of race discrimination, the Employment Tribunal directed itself in accordance with **Vento**, and applied the **Vento** scales. Where within the scale was a matter of it. I see no error of law in its attachment of the figure of £4,000.

23. As to personal injury, the Claimant has lost sight of the fact that he did persuade the Tribunal that his depression and some of the deterioration of it was attributable to the race discrimination. But separating out the various contributory causes at that time, the latter part of 1999, was a matter of measurement for the Employment Tribunal to perform. It decided that in the light of the other Employment Tribunal claims the Claimant was making and failing in, and in respect of his likely contemporaneous disappointment in the BT case, the figure for personal

injury would be £4,000. It addressed the relevant guidelines for compensation for personal injury set out by the professions. I see no error in its approach or in its conclusions. There is certainly no question of law.

24. As to the claim for loss of earnings, the Claimant is right in that a new job does not automatically put a cap on forward losses, but that was not what the Tribunal decided. It did consider the relevant law and made a decision which was just and equitable. The reason why he lost that job was because he had not been straightforward with the new employer. Looking at the matter as whole, the Tribunal was entitled to find that he had been well enough to obtain a job and to hold it down and that, therefore, personal injury on the lines that he had sought of over £500,000 was out of the question. Again, I can see no error in its approach to the loss of earnings. I reject the Claimant's argument based on **Dench** and would uphold the Tribunal's Judgment.

Conclusion

25. In those circumstances, I come to the same conclusion as to the outcome as did HHJ Peter Clark on twice looking at the papers. The application is dismissed and with it the appeal.

26. The Claimant told me at the outset of today that this was the longest running race discrimination claim ever and that this will go on and on. I imagine that he means that this appeal against the remedy will go further. He will have 14 days from the sending of this Judgment to make an application to me, or he has 21 days to make an application to the Court of Appeal, for permission to appeal.