Appeal No. UKEATS/0010/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 21 June 2013

Before

THE HONOURABLE LADY STACEY

MR M SIBBALD

MRS G SMITH

CARR GOMM SCOTLAND LTD — APPELLANT

MR ANDREW SNEDDON — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR D MacKINNON (Solicitor) Law At Work Limited Kintyre House 205 West George Street Glasgow G2 2LW
For the Respondent	MR J DICKIE (Solicitor) Blackadder & McMonagle Solicitors 41 High Street Falkirk FK1 1EN

SUMMARY

UNFAIR DISMISSAL – Compensation

Unfair dismissal. The Claimant was dismissed by the Respondent. The Employment Tribunal found the dismissal unfair. On appeal the EAT allowed the appeal finding the dismissal fair. On appeal to the Court of Session the EAT decision was overturned and the ET decision was reinstated. The Respondent had sought to argue that the award made by the ET was excessive. The Court of Session remitted that matter to the EAT who in turn remitted to the ET to decide the matter on the basis of the facts already found. The ET determined a fresh award. The Respondents argued that the ET had failed to carry out the order of the EAT, as they had made fresh findings. Held that the ET had made findings in the second judgment which were contrary to those made by them in the first judgment. Appeal allowed and case remitted to the ET to determine the award in light of the findings made by them in the first judgment.

THE HONOURABLE LADY STACEY

Background

1. We shall refer to the parties as the Claimant and Respondent, as in the ET. This case has a complicated history in that it was decided by the ET that the Claimant had been unfairly dismissed. The Respondent appealed to the EAT which overturned the decision of the ET. The Claimant then appealed to the Court of Session which restored the decision of the ET. The appeal before us relates to the remedy.

2. The Claimant was employed as a care worker by the Respondent. The Respondent at the relevant time was a charity limited by guarantee, had 700 employees and provided social care for people with a wide range of impairments, health problems and ages. It was funded by local authorities. An allegation was made against the Claimant in connection with his care of a particular client. The Respondent dismissed him and after the procedure outlined above the Claimant was successful in a claim that that dismissal was unfair. The ET had found that the Claimant contributed to his dismissal to the extent of 35% and they made a reduction of that percentage from his compensation.

3. By a judgment copied to parties on 27 April 2010 the ET, sitting at Edinburgh found that the Claimant had been unfairly dismissed by the Respondent and ordered the Respondent to pay to the Claimant a monetary award in the sum of £27,227.60. That decision was the subject of a successful appeal to the EAT. That latter decision was the subject of a successful appeal to the Court of Session. By a judgment dated 20 March 2012, the Court of Session allowed the Claimant's appeal against the EAT decision and restored the finding of the ET that the dismissal was unfair. No question or dispute was raised concerning the amount of contribution. The Respondents did however raise an issue regarding the ET's calculation of compensation. The Court of Session accordingly stated:

> **"However, in their appeal to the EAT the respondents raised an issue respecting the ET's calculation of quantum, it being contended that the ET should have left out of account the patrimonial results stemming from the difficulties encountered by the appellant in obtaining employment because of the adverse information contained in his 'enhanced disclosure' that being, it is said, not a matter which was the responsibility of the employer. The EAT did not express a concluded view on that issue and in the circumstances both parties considered that the case would require to return to the EAT in order that it decide that aspect of the respondents' appeal to it. We shall therefore allow the appeal but return the case to the EAT for it to determine that particular aspect of the ET's assessment of quantum."**

4. As a result of that judgment, the EAT on 23 April 2012 made the following order:

> **"The tribunal orders that paragraphs 3, 4 and 5 of the judgment of the Employment Tribunal be set aside and that the case thereafter be remitted to the same tribunal to consider of new but on the facts already found, the issue of what compensation, if any, should be awarded to the claimant."**

5. The ET considered the matter in light of the order of the EAT and by a judgment copied to parties on 22 January 2013 decided that the Respondents shall pay to the Claimant a monetary award in the sum of £14,487.61. In so doing, it applied the same 35% deduction which it had in the first award. It is against that decision that appeal is now taken by the Respondent.

The issue

6. When the Claimant was dismissed by the Respondent he was told that the type of behaviour which the Respondent believed he had indulged in was a serious breach of the Carr Gomm Scotland Code of Conduct. A report of the matter was made by the Respondent to the Social Services Committee of the local authority and they had involved the police. As a result of that an entry was made against the Claimant by the local authority to Disclosure Scotland (an executive agency) which was available to prospective employers seeking enhanced disclosure in connection with future employment. That entry was in the following terms:

> **"Central Scotland Police confirm that in November 2008 the applicant was the subject of an investigation after his conduct towards a client had been reported by an independent party as aggressive. The enquiry established that no crime had been committed, however it was agreed**

that it would be appropriate that he would not care for the client mentioned and his working practices would be monitored."

7. It was accepted that the Respondent and the local authority were under a duty to make the report which led to the entry being available under enhanced disclosure.

8. At the ET the remedy sought by the Claimant was that of reinstatement. There was however evidence before the ET that reinstatement would not be a practical proposition as the Respondent had lost trust in the Claimant. The ET accepted that evidence. At paragraph 81 of its original judgment the ET accepted that the Claimant had made numerous applications for further employment since dismissal but had been unsuccessful. The ET stated:

"He continued searching for any available job including care work. He recognised the disclosure form militated against obtaining work in that field. He had sought work in landscaping, joinery, process operation and driving. At termination he earned with the respondents £362.33 gross and £284.74 net per week. He considered that if he achieved work in landscaping/joinery/process operation he may earn approximately £100 less per week. He had been on Job seeker's Allowance since dismissal. He felt that his age also was against him but with the summer coming it may be more likely he was able to obtain some employment."

9. The ET noted at paragraph 96 the following submission made on behalf of the Respondents:

"So far as mitigation was concerned it was not the respondents who had put on the note on the disclosure form. They were legally obliged to make a report and it was thereafter out with their hands. It was accepted that given the terms of the report it would be difficult for the claimant to obtain alternative employment within the care field."

10. There is no note in the judgment of any particular submission made by the solicitor for the Claimant on the subject of the enhanced disclosure form. In paragraphs 175 to 188 the ET set out its decision on remedy. It began by noting that the Claimant sought reinstatement but as the ET found that the Claimant had contributed to the extent of 35% to his own dismissal it found that it would not be appropriate to make an order of reinstatement. At paragraph 183 the ET stated as follows:

> **"Thus the remedy is compensation. The tribunal accepted the evidence from the claimant that he had sought to do as much as he could to obtain alternative employment. There was no prospect of work for the claimant in the care sector in light of the comments made on the Enhanced Disclosure document. It seemed more likely to the tribunal that landscape work, fencing or joinery work the likely employment (sic) for the claimant and that such work would become more available in the summer season from May 2010. The tribunal therefore judged that the claimant may well be able to find employment from 1 May 2010. The tribunal did not consider that the wage payable to the claimant at that time would be comparable to that paid to him at termination of his employment with the respondent. They accepted his evidence that there may be a net difference of £100 per week. So far as loss from May 2010 was concerned given the age of the claimant it was thought that it may take some time for him to recover to a position where he was in receipt of earnings comparable to that earned with the respondent. The tribunal thought that it may be that for a period of 3 years from May 2010 the claimant would earn £100 per week less than he earned with the respondents which would take him to age 60. The tribunal thought for a further 2 years thereafter that the difference in earning may be at the rate of £50 per week."**

11. The Tribunal decided that it was reasonable to order a future loss up to the age of 62. The Tribunal therefore made a basic award of nine weeks gross pay and a compensatory award of wage loss for the period between 12 February 2009 and 1 May 2010 being a period in which they found that the Claimant was likely to be without a wage; and thereafter a wage loss for 3 years of £100 per week and thereafter a wage loss for 2 years of £50 per week.

12. The ET having had its decision restored by the Court of Session was required, as set out above, by the EAT to consider of new but on the facts already found the issue of what compensation if any should be awarded to the Claimant. The EAT in a supplementary judgment dated 23 April 2012 stated:

> **"On the findings in fact the reason why the claimant could not obtain alternative employment in the care sector was not his dismissal but the entry in the Disclosure Scotland records. That was a matter over which the respondents had no control and from (sic) which they could not be held responsible. That being so the tribunal plainly erred in their approach to compensation. They expressly proceeded on the basis that the claimant could not find a job in that sector because of the comments in the Disclosure Scotland records (see paragraph 183 of their reasons) but then calculated compensation on the basis that the claimant's difficulty in obtaining fresh employment was wholly attributable to his dismissal and also on the basis of the shortfall between what he would have earned working in the care sector and what he in fact earned when he did obtain alternative work. That was plainly an error. They failed to have regard to their earlier finding that it was the entry in the Disclosure Scotland records which caused the problem for the Claimant so far as care sector work was concerned."**

13. In its decision of the 22 January 2013 the ET quoted the judgment of the EAT set out above and decided that it would not be appropriate to hear any further evidence given the terms

of the order. The ET reminded itself that the case had been remitted to it to consider "of new but on the facts already found" the issue of compensation. At paragraph 15 of its judgment the ET noted that "the tribunal required to look at the matter afresh on the basis that 'if there was no entry in the claimant's enhanced disclosure form how long would it have taken to get work in the care sector.' "

14. The ET then decided that there had been no facts found by them to the effect that the Claimant would have got work had it not been for the enhanced disclosure entry. They stated that the Claimant's evidence had been that he had searched for employment in the care sector after dismissal. He had made application to First Home Care in June 2009. They had sought disclosure and he then heard no more about it. He also said in evidence that when he completed an application form and answered the common question "have you ever been dismissed from previous employment" and responded with his position, the application was taken no further. The ET found at paragraph 20 that there was no evidence that it was the sight of the enhanced disclosure form which meant that the Claimant was not employed at First Home Care. The ET stated that the appropriate approach was for them to put themselves in the position they were in at the original hearing and, ignoring what was said in the enhanced disclosure form consider what were the chances of the Claimant obtaining employment in the care sector subsequent to dismissal. The ET stated that the approach would be on the basis of the Claimant requiring to disclose to a prospective employer that he had been dismissed for gross misconduct involving aggressive behaviour to a service user.

15. At paragraph 23 the ET found the following:

> **"The action taken by the employer in this case was the dismissal. In those circumstances the Tribunal would not have considered it easy for the claimant to obtain further employment in the care sector. Any employer would be wary of an individual making application to them who had been summarily dismissed by a care provider for aggressive actions and abuse towards a service user. The Tribunal were aware that the claimant had made effort to obtain alternative employment but at the final date of that hearing had been unable to do so. They**

would not have considered that fact to be unusual for an individual dismissed by reason of gross misconduct. They would not have considered that there must be some other reason at play, namely what was said on the enhanced disclosure. The Tribunal considered that ignoring what was said on enhanced disclosure there would still have been no job opportunity available for the claimant at that time given the finding of gross misconduct by the respondents remaining in place."

16. The ET went on to consider that when the original decision was issued on 27 April 2010 the Claimant would then be able to approach prospective employers on the basis that he had been dismissed for gross misconduct but that the Tribunal had found that the dismissal was an unfair dismissal. The Tribunal considered that that would have an impact on prospective employers and that the opportunities for the Claimant would be increased to the extent that he was likely to have found employment by a care provider at approximately the same rate of pay as he had been getting at the date of his dismissal.

17. The Tribunal went on to make a compensatory award consisting of wage loss between 12 February 2009 and 1 May 2010 at the full rate, and then at a differential of £100 per week between 1 May 2010 and 27 July 2010. The basic award remained the same and the deduction for contributory fault remained constant at 35%.

18. Mr MacKinnon who had appeared throughout for the Respondents submitted that the ET had not followed the order of the EAT. The Tribunal had been told to consider the matter in light of the findings already made. It was therefore not open to them to decide that the reason for the Claimant's inability to get a job in the care sector was that he had been dismissed due to gross misconduct rather than that he had the disadvantage of the entry made in the enhanced disclosure form. Mr MacKinnon argued that the original ET judgment was clear that the enhanced disclosure was the problem. He argued that it was well known that enhanced disclosure was available to a prospective employer only if he had reason to obtain it and that he had to pay a fee for it. Employers therefore were able to get enhanced disclosure only for

people to whom they were offering a job. Therefore First Home Care were prepared to offer the Claimant a job until they discovered what was on the enhanced disclosure form. Thus, he argued, as a matter of fact, it was the enhanced disclosure form which had prevented the Claimant getting employment. In any event, he argued that the ET had made a finding broadly to that effect in their first judgment and that they were not in a position to review that as a result of the order from the EAT.

19. In his submission on disposal, Mr MacKinnon argued that the ET had already decided the case twice and that they should not have another opportunity so to do. His primary motion was to have the appeal allowed and the case remitted to a freshly constituted employment tribunal. Failing that he sought clear directions as to what the original tribunal was to do if the case was remitted back to them.

20. Mr Dickie, who had also appeared throughout argued that we should refuse the appeal and adhere to the decision of the ET. He made reference to the cases of **Simrad Ltd v Scott** [1997] IRLR 147, **Dignity Funerals Ltd v Bruce** [2005] IRLR 189, **Leonard v Strathclyde Buses Ltd** [1998] IRLR 693 and **Balmoral Group Ltd v Glenn Athol Rae** ET 638/99. He referred to **Employment Rights Act 1996** (ERA) section 123:-

> **"… 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."**

21. He argued that the ET had found as a fact that the Claimant had sustained loss because he was dismissed by the Respondent. The ET should not have findings in fact disturbed by the EAT. Mr Dickie did concede that the judgment of the ET posed certain difficulties for him. It was not as clear as he would have wished. He submitted however that we should not have

regard to Mr MacKinnon's submission that the reason why the Claimant had not got the job with First Home Care was because of the enhanced disclosure as there was no finding to that effect. Had the Respondents wanted to lead evidence to that effect they could have called the person from First Home Care who made the decision to give evidence as a witness. They did not do so. Thus there was no evidence that First Home Care were prepared to offer a job to a person dismissed due to gross misconduct, but then changed its mind when it became aware of the enhanced disclosure. He concluded by submitting that the decision from the ET, while it could have been better expressed, was in essence correct. He urged us not to interfere with that unless it was clear that an error in law had been made and he submitted that no such error had been made.

Discussion and decision

22. We came to the view that the ET had not adhered to the order of the EAT when the case was remitted to it. It was at least tolerably clear from the first judgment of the ET that the information on the enhanced disclosure form was found by them as the reason for the Claimant not being employed by First Home Care. In their second judgment the ET appeared to change that and to find that it was the fact of dismissal for gross misconduct which prevented the Claimant from getting employment. It is necessary for an ET to make findings in fact to explain the compensatory award which they make. In this case it seemed to us that the ET had made new findings in fact in the second judgment, which they were specifically told not to do by the order from the EAT. We can see that there could have been an argument that there was more than one cause of the Claimant's loss. We had some sympathy with Mr Dickie's submission that no evidence was led from the decision maker at First Home Care. These are matters, however, that should have been raised in argument before the ET in the first hearing. The order from the EAT was clearly to the effect that no new findings were to be made. We

have decided that the ET has in its second judgment failed to have regard to that; it has made a decision which is different on the facts from the first decision.

23. We therefore allow this appeal and have decided that the appropriate course is to remit to the same tribunal with instructions, which we trust are clear, that they are to reconsider the remedy in light of the findings which they made in their first judgment, in particular noting that in that judgment at paragraphs 81 and 183 they have effectively found that the comments in the enhanced disclosure document were the cause of the Claimant's inability to get work. It is not in dispute that that document was not, in this context, something for which the Respondent had to take responsibility. Thus the ET should reconsider compensation in light of their original findings.

24. We regret that our decision has taken some time to come out. We also noted that the events with which this case is concerned took place as long ago as 2009. It is unfortunate that the matters have had to be considered by the ET, the EAT and the Court of Session; it is especially unfortunate that after that course of appeal, the outcome has remained uncertain. We are conscious that the Claimant has been vindicated by the judgment of the Court of Session in so far as his dismissal has been found to be unfair, but he has not received any compensation. We can understand that he has found the whole process to be baffling. We are also mindful that the Respondents have been put to trouble and expense. We would express our hope that parties might be able to conciliate and make arrangements to settle this matter without further procedure.