Appeal No. UKEAT/0503/12/JOJ
UKEAT/0504/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 April 2013

Before

HIS HONOUR JUDGE McMULLEN QC

DR B V FITZGERALD MBE LLD FRSA

PROFESSOR K C MOHANTY JP

UCATT (UNION OF CONSTRUCTION ALLIED TRADES & TECHNOLOGY) — APPELLANT

MR D SHORT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR HARI MENON (of Counsel) Instructed by: O H Parsons & Partners 3rd Floor, Sovereign House 212-224 Shaftesbury Avenue London WC2H 8PR
For the Respondent	MR DAVID BERKLEY (One of Her Majesty's Counsel) Instructed by: Langridge Employment Law Milburn House Dean Street Newcastle upon Tyne NE1 1LE

SUMMARY

DISABILITY DISCRIMINATION

UNFAIR DISMISSAL – Compensation

An Employment Tribunal did not err in not using the Ogden tables in calculating future loss for disability discrimination and unfair dismissal. **Wardle** applied.

The use of the word inflation, once, in context with references to wage increases on 13 occasions, did not mean the Employment Tribunal impermissibly took account of inflation at 2.5% pa. This was the estimated figure for wage increases and promotions by a trade union to its officer.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the assessment of future losses in a successful claim for disability discrimination. This is the judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We will refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Respondent in those proceedings against a judgment of an Employment Tribunal sitting at Newcastle-upon-Tyne under the chairmanship of Employment Judge Hunter. In a reserved judgment of 15 December 2011 the Tribunal upheld the Claimant's case for constructive unfair dismissal and discrimination contrary to the **Equality Act 2010**. The case went on to a remedies hearing before the same constitution and for reasons sent to the parties on 25 June 2012 a sum of £390,272.40 was awarded to the Claimant. Within that is an award, reduced for contingencies, of £194,950 for future loss of earnings. The issue in the appeal is as to the way in which that figure was arrived at. Since we are practical people here the competing contentions are the Claimant's submission to us that the Tribunal reached the correct conclusion, that it should be upheld. If the Tribunal were wrong and should have applied the Ogden tables then the figure is either £160,236 or about £164,000 since there are different ways of applying the Ogden tables. So at stake on appeal is around £35,000.

3. The remainder of the awards to the Claimant remain undisturbed and we are pleased to note that the Respondent has paid the full award of the Employment Tribunal. Broadly speaking therefore the issue in the case is as to about 10% of the award made, although it is of course a very substantial sum.

4. The Claimant had been represented by a solicitor who today instructs Mr David Berkley QC, the Respondent throughout by Mr Hari Menon of counsel. The appeal was sifted to a full hearing by Mr Recorder Luba QC on the single issue which he regarded as straightforward and well argued.

The legislation

5. The legislation is not in dispute, we have not been referred to it. It is just and equitable to make an award for constructive unfair dismissal and disability discrimination.

The facts

6. So far as is necessary to explain the sole issue in dispute, the Claimant was 46 at the date of the assessment of compensation. He had been employed by UCATT, a major national trade union and had been there for about five years as a development officer. He was constructively unfairly dismissed as a result of anxiety and stress and was found by the Employment Tribunal to have suffered a career loss; his expectation of working for UCATT until he was 65 was confounded by the unlawful acts of the Respondent.

7. Having received the most careful written submissions by the parties the Employment Tribunal descended upon two aspects of loss which are relevant today. We include the first which is pension, although it is not in dispute, because it does give some signposts to the decision on loss of earnings. The Tribunal said the following:

> **"2 The tribunal has adopted the substantial loss approach as set out in the booklet "Compensation for Loss of Pension Rights - 3rd edition." The tribunal considers t his to be appropriate, notwithstanding that the claimant's length of service was only 5 years, because the claimant's employment was reasonably stable; he is likely to suffer a career long reduction in income as a result of the discrimination and he is not likely to find another job with a final salary pension scheme. The substantial loss approach is to capitalise the pension he would**

have received had he worked to age 65 calculated by reference to current salary levels ("the full pension") and to deduct from that the capitalised value of the pension he will receive at age 65 ("the deferred pension"). The respondent urged us to adopt a method based on the Ogden tables using figures for pensions calculated for us based on current salary levels. It seems to us that this is a similar approach to the substantial loss approach and we see no good reason to depart from the guidance in the booklet. Although the tables in the booklet may now be out of date, they still produce a result which appears to us to be fair."

8. A deduction of 30% was made for general contingencies. The Tribunal then under the heading of loss of earnings dealt with the losses up to the date of the hearing. No issue turns on that. Then future loss is described in the following holdings:

"6 The claimant is unfit for work for the foreseeable future and no-one can say for certain when he will be fit to work again. It is unlikely that he will ever be able to secure work at the same remuneration as his job with the respondent. It is possible that the claimant will work again, although he will suffer an income deficit to his 65th birthday (his planned retirement date).

7 It would be inappropriate to award loss of earnings to age 65 (19 years): we should factor in the possibility of earlier death and accelerated payment. The respondent suggested that an appropriate multiplier, assuming a 2.5% annual rise in income would be 14.67 years. We accept that this is reasonable. Rather than calculate loss to age 65 and then reduce it, we have calculated loss of income up to 31 December 2026, which broadly achieves the same result.

8 We consider a fair approach is to award the claimant his full net salary for 5 years and to award a reduced salary for the remainder of the period. The schedule shows the calculation. We have assumed a year on year increase in salary of 2.5%. The appropriate deduction is the national minimum wage which we have also increased year on year by 2.5%.

9 After calculating the future loss to December 2026, we have reduced the sum by 30% to cover contingencies other than mortality and accelerated payment (e.g. inability to work because of sickness; redundancy etc)."

Submissions and conclusions

9. The principal argument addressed by Mr Menon for the employer is that the Employment Tribunal should have applied the Ogden tables. These are the tables used for the calculation of losses in personal injury cases. He submits that this is a straightforward personal injury case, it is based upon the statutory tort of disability discrimination and the standard approach of the courts in the uniformed branch of our office is to apply the Ogden tables. He acknowledges that in the Employment Tribunal the approach to pension loss is to consider using the substantial loss approach where there is a long term loss: see a judgment I gave in **Orthet Ltd v**

Vince-Cain, [2004] IRLR 857. A Tribunal which uses the Handbook for assessment of loss will not go wrong or at least cannot be impugned for having erred in law.

10. The principal objection of UCATT is that the Tribunal has recorded a mistaken account of inflation in its judgment and for this it is necessary to look at the response given by the Judge when refusing an application to review on the grounds of the interests of justice. The Judge said this:

> **"1 The application relates to the assessment by the Tribunal of compensation for the claimant's future loss of earnings.**
>
> **2 The tribunal considered that it was appropriate to make an allowance for mor[t]ality and accelerated receipt. They believe that a fair allowance was to limit loss of earnings to the period ending December 2026, notwithstanding that the claimant will suffer a loss of income until his 65th birthday.**
>
> **3 It follows that there has been no error in the calculation. The interests of justice do not require a review."**

11. The glaring error submitted by Mr Menon appears in the use of "inflation". It is the sole place within the documents where that word occurs. On the basis of that, the submission is made that the Tribunal mistook the rate of return which, is properly headlined and documented in the Ogden tables at 2.5%, for the inclusion of a 2.5% rate of inflation. On his submission, on authority, it is wrong to include an uplift for inflation, for the calculation of loss is based upon a multiplicand as at the date of trial and is not to be increased in line with inflation: see **Cooke v United Bristol Healthcare NHS Trust** [2003] EWCA Civ 1370 at paragraphs 8 and 10 per Lloyd LJ citing Lord Diplock in **Cookson's** case [1979] AC 556 at 571 to 572 and paragraph 11 applying it. He also relied upon **Wells v Wells** [1999] 1 AC 345 HL in the speech of Lord Lloyd of Berwick at page 379F for the proposition that a Judge should not be a slave to the tables but special factors would be required before departing from them.

12. In fairness, it was pointed out that in **Wardle v Credit Agricole** [2011] ICR 1290 CA Elias LJ held that it would be a rare case where it was appropriate for a court to assess compensation over a career lifetime but it could yet do so: see paragraph 50. Mr Menon contends that there is a number of ways of assessing loss and some are correct but there is one error in this which is the inclusion of inflation.

13. On behalf of the Claimant, Mr Berkley QC contends that the simple proposition to be derived from the judgment of Elias LJ in **Wardle** is that it is open to a Tribunal to take the Ogden tables approach or to do what is just and equitable by another approach so long its method is demonstrable. There is no question of law which says that a Tribunal will err if it does one or the other. The matter must be considered globally: see the judgment of Steyn LJ in **Blamire v South Cumbria Health Authority** [1993] PIQR Q1 CA.

14. We can, we think, deal with the main submission about the use of the word "inflation". True it is that in the judge-alone refusal to review that word appears. However, there are 13 other expressions of salary, earnings and cognate words which indicate that the increase awarded year on year was not for inflation, which would be wrong, but was for the expectation that in each of those years this trade union would have awarded its officer a 2.5% wage increase. The reference to that occurs first in the loss of earnings headline in the Judgment, then in paragraphs 6 to 8 there are nine reiterations of the linkage between the increase in money.

15. The sole basis where Mr Menon makes any headway at all is in paragraph 8 where the Employment Tribunal talks about the increase in the national minimum wage which is increased by 2.5% but this submission suffers from the same defect. It is focused upon wages

and increasing wages. While there may be a connection in the Commission's mind to the rate of inflation when it recommends an increase in the national minimum wage the point is it is to increase wages. So as a matter of construction what the Tribunal was doing in those paragraphs was making an award for future loss of earnings which earnings would increase annually by 2.5%. That is also clear by reference to the schedule which is incorporated into the Judgment where there is express reference to salary loss and to 2.5% increases in salary.

16. If that were not sufficient, there are 12 or 13 references plainly to salary. The Employment Judge in the refusal to review says the same thing on a further three occasions: see above.

17. Appellate courts are enjoined by, for example, the majority judgment of Mummery LJ in **Fuller v London Borough of Brent** [2011] IRLR 414 not to take a fussy, pernickety approach to the reasons of an Employment Tribunal. We know that a Judge can be wholly wrong on paper and yet be rescued: see **Stringfellows v Quashie** [2013] IRLR 99 CA per Elias LJ. So when a Tribunal says on one occasion inflation and on 13 occasions loss of salary, loss of wages and so on, the question is: has the Tribunal gone wrong and is it really focusing on inflation or is this a slip which a pernickety and over fussy examination of its reasons would allow but which this court does not?

18. In our judgment this is what has occurred here. The representations made to the Tribunal by way of schedules are to do with future loss of earnings and there is no mention of inflation or increasing impermissibly the multiplicand by reference to inflation. It is accepted by both counsel that it is appropriate to make an award for future losses which takes account of future increases in wages. In this very case there were submissions about the career prospect of this

officer who might have risen to a higher position in the union. It seems to us that the Tribunal might well have had in mind, as the Employment Judge himself says, that a *generous* increase of 2.5% a year for its officers would yield that figure but that is still to do with what he is paid rather than the external feature of how much inflation goes up. With respect to Mr Menon although the starting point is there for this submission based on the one use of the word "inflation" it is not borne out on a true reading of the reasons as a whole and for this we put together the refusal to review and the reasons as a whole since they are both the subject of an appeal.

19. A minor issue is to do with the recognition of accelerated receipt and as Mr Menon rightly says there should not be double counting. In our judgment the refusal to acknowledge the whole of the Claimant's case on future losses (as recorded in its paragraph 6 to 8 above) indicates that the Tribunal had in mind such factors as contingencies, mortality and accelerated receipt. It made no error in so doing.

20. If we were to take the matter further, contrary to our view that the Tribunal reached a permissible conclusion, we note that the joint position of counsel before us is that the matter need not be remitted to an Employment Tribunal and that the dispute on this footing as between £194000 and £160,000 or £164,000 would be resolved by us directing that if it were wrong not to use Ogden, and Ogden were applied, it would yield either £160,000 or £164,000. We would have invited counsel to reflect carefully upon that matter and to make a submission to us since it was their joint ambition that this matter could be determined here and not by remission.

21. We would very much like to thank both counsel for their succinct submissions today.