Appeal No. UKEAT/0549/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 October 2013

Before

HIS HONOUR JEFFREY BURKE QC

MR I EZEKIEL

MR D J JENKINS OBE

MR S CALLAWAY — APPELLANT

(1) ROYAL MAIL GROUP LTD
(2) MR P LAIDLER — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTOINE TINNION (of Counsel) Instructed by: Gordon Brown Law Firm LLP 6th Floor, Hadrian House Higham Place Newcastle-upon-Tyne NE1 8AF
For the Respondents	MS REBECCA THOMAS (of Counsel) Instructed by: Eversheds LLP Solicitors 1 Royal Standard Place Nottingham NG1 6FZ

SUMMARY

DISABILITY DISCRIMINATION – Compensation

The appeal was only against the amount of awards of compensation for injury to feelings. The Appellant failed to show that the awards were made in error of principle or were perverse. Appeal dismissed.

HIS HONOUR JEFFREY BURKE QC

1. The appeal is brought against the decision of the Employment Tribunal sitting at Newcastle-upon-Tyne and presided over by Employment Judge Garnon, sent to the parties on 31 July 2012, as to the amount of compensation for injury to feelings to be awarded to the Claimant for a series of acts which can be described as victimisation or harassment; as the Tribunal pointed out, it matters little which label was attached to them.

2. The Claimant was, from 1994 until 2010, employed by the Respondent, Royal Mail Group, latterly as a mail sorter. In 1999 he suffered a severe head injury which caused lasting brain damage. One of the consequences of his brain damage was that working shifts other than simple day shifts caused him physical and mental problems. He asked to go off other shift patterns onto what were called static day shifts – that is to say, regular working on a daytime shift with fixed hours – but was refused. In December 2009 the Employment Tribunal at Newcastle, with the same Employment Judge, Employment Judge Garnon presiding but with different lay members, found that, in declining to provide him with the shift pattern he sought and in other respects the employers had failed to make reasonable adjustments for his disability. That failure occurred over a period which seems from the decision of the Tribunal sent to the parties in December 2009 to have been one of about a year, or certainly one of several months. At paragraph 4.5 in that decision the Tribunal described how the Claimant had been worn down over the course of the year in which the adjustments had not been made; they said he had been forced to beg for a quality of life which most people take for granted and had lost the enjoyment of going to work which he previously had. They awarded compensation for injury to feelings of £18,000, at the top of the middle of the three **Chief Constable of West Yorkshire Police v Vento (No.2)** [2002] IRLR 177 bands, to which we shall refer later. The Tribunal

recommended that the Respondent should by January 2010 give to the Claimant a static work pattern of fixed hours, Monday to Friday.

3. Between April 2010 and February 2011 the Claimant presented three further claims to the Tribunal. The Tribunal from whose judgment the present appeal is brought, presided over, as we have said, by the same Employment Judge as the first claim, heard all of those three new claims together over a period of three weeks in June 2012. They produced a judgment which is 79 pages long and deals in very great detail with a history which consists of many episodes. In the first of those three claims the Claimant claimed that there had been, both before and since the first judgment, a history of harassment and victimisation arising from the first claim or the complaints made by the Claimant which formed the basis of the first claim. Those complaints appear to have ranged from mid-2009 onwards to about April 2010. The Tribunal approached the first new claim on the basis that events which could have been included within the 2009 claim should have been included within that claim and were not going to be the subject matter of compensation in the new claim, the first of the three to which we have just referred. Although they considered the facts in very great detail and made substantial factual findings about them, at paragraph 6.21 they referred to the period prior to the point at which they were going to treat the acts of victimisation and/or harassment of the Claimant as compensatable as "the gap". They said at paragraph 6.21 that in the gap there had been some very hurtful treatment but that they could not compensate for it. It is relevant that they went on to say that, if they were compensating for those matters, their award for injury to feelings would have been well into the top of the three **Vento** bands. They also said in paragraph 6.20 that some – and it would seem to be quite a lot – of the activities which fell within the gap did not add a great deal to the injury to feelings which had been compensated for by the first Tribunal.

4. In the Notice of Appeal the first ground sought to attack that approach of the Tribunal. Clearly, the Tribunal had excluded some – and it would seem from the detailed findings of fact quite a substantial proportion – of the Claimant's overall complaints and of the behaviour of the Respondents of which the Tribunal were very critical. However, ground 1 of the Notice of Appeal did not get past a rule 3(10) hearing in the Employment Appeal Tribunal, heard by the President; and, as Mr Tinnion, on behalf of the Claimant, candidly accepted, it cannot now be revived. Therefore the Tribunal were, when they came to assessing compensation for injury to feelings, only making that assessment in respect of a limited part of the Claimant's complaints, and indeed a limited part of the criticisms which they had made of the Respondents. In paragraph 7.7, section 7 of their Reasons being at the end of their very long judgment where they deal with remedy, the Tribunal referred expressly to a period of four months. It matters not whether it was or might have been a bit longer than four months; the precise dates are not important.

5. What is important is that, although in ground 2 of the Notice of Appeal, which attacks the Tribunal's assessment of compensation for injury to feelings, the grounds set out seek to embrace a longer period (for at that time of course ground 1 had not gone and was therefore live) it is now the case that ground 2, looking at the assessment of compensation for injury to feelings, must involve an assessment limited in the way the Tribunal limited it. Mr Tinnion bravely sought to suggest that, because the Notice of Appeal asserts that that assessment was in effect perverse, he could attack the finding that compensation was going to be awarded in respect of the four-month period only as perverse. It was pointed out to him that that particular point was not made in the Notice of Appeal at all. Perversity has to be particularised; that point had not been taken, and, in justice to Mr Tinnion, it is fair to say that he retreated. I am not going to say he abandoned the point entirely; but it is not a point which can make any headway

before us. The Tribunal were, in our judgment, entitled to base their assessment of compensation on consideration of the period which they adopted; or at least there is no ground of appeal before us that enables Mr Tinnion now to attack that approach.

6. The second of the new claims which the Claimant brought and which the same Tribunal was considering together with the first related to a different incident, which occurred in August 2010, when the Respondents falsely accused him of threatening a manager and found him guilty of that charge. The third claimed that he had been unfairly and wrongfully dismissed. The second claim succeeded; the third claim failed.

7. The Tribunal, as we have said, turned to remedy in section 7 of their judgment. They said in paragraph 7.1, again, that they were compensating for a four-month period, but that related to financial loss. They turned to compensation for injury to feelings from paragraph 7.2 onwards. They directed themselves as to the principles set out in **HM Prison Service v Johnson** [2007] IRLR 951 in terms which are not criticised. At paragraph 7.3 they set out what the three bands identified and set forth the guidance given by the Court of Appeal in **Vento**, having updated the **Vento** figures, as they were bound to do, in accordance with the Employment Appeal Tribunal's decision in **Da'Bell v NSPCC** [2010] IRLR 19. At paragraph 7.4 they correctly reminded themselves that they should make their award on the basis of the impact on the Claimant of the treatment to which he had been subjected and not on the basis of punishment of the Respondents, however bad their conduct had been. At the end of paragraph 7.5 they directed themselves to describe the conduct, as they had done throughout the decision, and asking, "How would we feel if it happened to us?" and, "Is that Claimant more or less likely than us to feel hurt having regard to all we know about him?" At paragraph 7.6 they

referred to a point about the distinction between injury to feelings and aggravated damages, which does not matter for present purposes, and then at paragraph 7.7 they said this:

> **"The claimant suffered frustration, humiliation and anger. He is a strong character but prolonged discrimination takes a heavy toll. His veracity as to his condition was questioned when there was no reason to do so. The experiences of the first Tribunal made his vulnerability to injury to feelings higher despite his ability to, as he puts it, 'stand up for himself [sic]'. The way in which his complaints were handled before and during the 'gap' is symptomatic of high handed behaviour which should attract an aggravated damage to claim 1. Although the duration of the pleaded case is only 4 months this is clearly a mid band case. We would assess injury to feelings at £12000 being a base figure of £10000 and an aggravated element of £2000."**

8. They then went on to deal separately with the separate incident which was the subject matter of the second claim. As to that, they said that the act complained of had been done maliciously to keep the Claimant in fear of losing his job for several weeks over something of which he was innocent. They awarded the total of £6,000, being £5,000 for injury to feelings and an aggravated element of £1,000. Thus the total was £18,000: £12,000 for claim one, and £6,000 for claim two, the £12,000 falling in the middle of the middle **Vento** band and the £6,000 falling at the top of the lower **Vento** band. They then, in paragraph 7.9, looked backwards to take an overview and to see whether as a whole the total of £18,000 was inappropriate and decided that it was not; they pointed out that the duration of the discrimination was shorter than that that had been the case before the 2009 Tribunal.

9. We turn to the principles of appellate consideration of an appeal in which an award for injury to feelings is under consideration. Those principles are not in dispute; and they are wholly familiar. We shall refer briefly to three decisions to which we have been referred. The first is **Gbaja-Biamila v DHL (UK) Ltd and Ors** [2000] ICR 730, in which the Employment Appeal Tribunal, presided over by Lindsay J, said at paragraph 36:

> **"An appellate court, when reviewing the quantification of compensation by an Employment Tribunal, should not act as it would when reviewing an award of damages by a jury. In contrast to a jury, the Tribunal is expected to give reasons and hence can be judged by those**

reasons – *Skyrail Oceanic Ltd v Coleman* [1981] ICR 864 at 872. That is not to say that the Employment Tribunal's sovereignty as to facts is here in question. Only, firstly, if a Tribunal's given reasons expressly indicate that it has adopted a wrong principle of assessment or, secondly (that not appearing by reason of its either correctly stating the principles or stating none) where it has arrived at a figure at which no Tribunal properly directing itself by reference to the applicable principles could have arrived, will the assessment demonstrate an error of law, the only class of error which this Appeal Tribunal can correct. That second category may fairly be described as one where the award has been perverse, an award so high or low as to prompt in those aware of the relevant facts found and the applicable principles a reaction that the award was wholly erroneous, even outrageous – see also the collection of definitions of perversity in *Stewart v Cleveland Guest (Engineering) Ltd* [1994] IRLR 440 at 443. In a case such as the one before us where it is only this second category which requires to be considered (as the principles were here correctly stated by the Employment Tribunal) the Employment Tribunal should be careful not to be seduced by a feeling that 'They've given more (or less) than I think we would have done' or 'That was rather on the low (or high) side' into the setting aside the award in question. In this second category nothing short of perversity – a clear view that the award is wholly erroneous – enables the Employment Tribunal to interfere. As the point is put in *North West Thames R.H.A. v Noone* [1988] ICR 813 at 825 per May LJ:-

> **'The Appellate Tribunal should interfere only if the award by the [Employment] Tribunal is so out of the normal run that it can properly be described as a wholly erroneous estimate of the damage suffered by the complainant.'"**

10. What can be derived from that paragraph is that an appellate Tribunal can interfere if the Employment Tribunal has applied a wrong principle or has reached a figure which is so high or so low that no reasonable Tribunal could reach it or can be regarded as wholly erroneous. The word "outrageous" that appears there has not been manifest in subsequent decisions, and I will not say any more about it.

11. The next decision is another Employment Appeal Tribunal decision, and a well-known one, **Tchoula v ICTS UK Ltd** [2000] ICR 1191, the Employment Appeal Tribunal on that occasion being presided over by HHJ Peter Clark. At page 1203D reference is made to the permissible margin of error which ceases to exist if the Tribunal:

> **"[…]has acted on a wrong principle of law or misapprehended the facts or made a wholly erroneous estimate of the damage suffered."**

That quotation is from a decision of a slightly different type, but, in summation at page 1203H of the EAT in **Tchoula** said, to the same effect:

> **"We should not interfere with this Tribunal's award unless satisfied that it is a wholly erroneous estimate of the damage suffered by the applicant. In short, does it fall outside the principal bracket?"**

12. In **Vento** at paragraph 51 Mummery LJ, giving the judgment of the court, said:

> **"It has to be established that the tribunal has acted on a wrong principle of law, has misapprehended the facts or made a wholly erroneous estimate of the loss suffered. Striking the right balance between awarding too much and too little is obviously not easy."**

13. Mr Tinnion submits, as to the £12,000 assessed by the Tribunal as compensation for injury to feelings in relation to the first of the claims with which the Tribunal was dealing, that that award should have been in the higher band and that the Tribunal erred in principle in failing to consider the band definitions or characteristics described in **Vento**. For example, in **Vento** at paragraph 65 the Court of Appeal said, "The top band should normally be between £15,000 and £25,000"; that has of course now been up-rated in the light of **Da'Bell**. They went on (paragraph 65):

> **"i) Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race [or disability, we would add to that]. This case falls within that band. […]**
>
> **ii) The middle band should be used for serious cases which do not merit an award of the highest band."**

They then referred to the characteristics of the lower band appropriate for less serious cases, "such as where the act of discrimination is an isolated or one-off occurrence".

14. We do not take the view that the Tribunal erred in principle in this case. The fact that the Tribunal did not set out the characteristics of each band does not begin to indicate that they did not take into consideration the characteristics of each band. The Tribunal was wholly familiar with the nature and breadth of each band; indeed, we have already referred to paragraph 6.21, which shows that the Tribunal had the top band in mind. There is nothing to show that the

Tribunal, in deciding in which band to put this case, misunderstood in any way what was covered by each band; and we therefore see no error of principle on the part of the Tribunal.

15. Was, the award of £12,000 so low as to be perverse or erroneous? Mr Tinnion submitted that in this case there were multiple acts over a substantial period of time involving numerous members of the Royal Mail staff. There was a finding of conspiracy and malice in one particular respect, at paragraph 6.16. A particular act, namely refusing the Claimant work on Good Friday was said to have been "evidence of a determination to make Mr Callaway's work environment as hostile as possible". Mr Tinnion emphasised the Claimant's vulnerability and other features: the extent to which the Claimant had suffered a heavy toll, had put up with all of what was happening to him for a substantial period of time, was humiliated and was caused to be angry. He mentioned, but only to dangle it in front of us and then withdraw it, a suggestion that at one stage the Claimant had thought in terms of a more serious type of act towards himself, which it is not necessary to say any more about and which we do not take into account, because it was not shown that that resulted from the acts of the Respondents.

16. In our judgment, all of these matters were considered by the Tribunal. They refer expressly to the Claimant's frustration, humiliation and anger; they said that discrimination "takes a heavy toll". They could not possibly have forgotten the very serious and cumulative criticisms which they had made of the Respondents passim in the judgment of many, many pages, with recitation of fact and recitation of criticism. However, the question for us is not whether the Tribunal forgot to take those matters into account; it is whether when one looks at the figure as a whole, it is so out of line as to be wholly erroneous or perverse? In our judgment, that has simply not been established. Perversity has to be overwhelmingly demonstrated (**Yeboah v Crofton** [2002] IRLR 634). A wholly erroneous estimate has to be

similarly demonstrated; and, while this award may appear to some to be on the low side, it is not an award that is so far outside what would be expected as to entitle us to interfere. It should be noted that the Tribunal expressly made the point that the duration of what they were compensating for was less than the duration of that which they compensated for in the first case; and we are far from satisfied that the award of £12,000 was perverse or wholly erroneous.

17. Mr Tinnion referred us to some of the reported cases by way of an invitation to us to compare awards made in those cases with the award in this case. That is not a wholly impermissible exercise. It seems to have been contemplated as a possible way to arrive at the right figure in **Gbaja-Biamila** at paragraph 37, but it is a difficult exercise, because of course the facts of each case are different; and the appellate Tribunal does not have the opportunity of seeing and hearing the witnesses which this Tribunal had over a very substantial period of time and which that the Employment Judge had had over the previous lengthy hearing.

18. In particular, by way of comparison, Mr Tinnion took us to the case of **Gilbank v Miles** [2006] IRLR 538, in which an award for injury to feelings of £25,000 was made for sex discrimination which lasted something like five months. The Tribunal's findings were said, in the Employment Appeal Tribunal's decision on an appeal against that assessment of compensation for injury to feelings to have been in very damning terms. Those terms are set out in paragraph 20 of the EAT's judgment; and we do not propose to repeat them; but the claimant was found to have been very shocked and embarrassed, caused to think that she had done something wrong, was distraught at the end of each day and was publicly reprimanded; and there was a particular aggravating feature, which was that she was pregnant and expecting a child and felt for the safety of her child by the treatment to which she was subjected. That element, of course, was not and could not have been present in the present case; because it

could not have been, the difficulty of comparing the two is made very clear; and, while the award in **Gilbank** was obviously a high one, looking at it does not persuade us that the award in the present case was wholly erroneously too low. Similarly, looking at other cases to which we were invited to have regard, such as **Tchoula**, does not persuade us of that either.

19. We have considered all of Mr Tinnion's extremely helpful submissions and those made by way of response by Ms Thomas; I do not mean to say that they were not equally helpful; but it was Mr Tinnion, of course, who had to take on the difficulty of persuading us that this award was so far out of the bracket that we should interfere. Much as we admire the attempts he has made to do so, he has not succeeded; and the appeal is therefore dismissed.