Appeal No. UKEAT/0059/11/CEA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 November 2011
Judgment handed down on 13 March 2012

Before

HIS HONOUR JUDGE BIRTLES

MRS L TINSLEY

MR M WORTHINGTON

MR G HILL — APPELLANT

G & R POLLARD ENGINEERING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES HATT (of Counsel) Instructed by: National Legal Solutions 7 Tideway Yard 125 Morlake High Street London SW14 8SN
For the Respondent	MR R G GREEN (Solicitor) Harrison Clark LLP 5 Deansway Worcester Worcestershire WR1 2JG

SUMMARY

UNFAIR DISMISSAL – Compensation

Appeal alleged Employment Tribunal wrong in assessing compensation under s.31 **Employment Act 2002** and also in applying a particular cut off date. Appeal dismissed on the basis that there was adequate material upon which the Employment Tribunal could reach the conclusions it did. Cross appeal also dismissed for the same reason.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment of an Employment Tribunal sitting in Bristol on 25 October 2010. The Judgment was sent to the parties on 1 November 2010. The Employment Tribunal had previously found that Mr Hill was constructively unfairly dismissed and awarded him compensation. The Judgment sent to the parties on 1 November 2010 was a review following a successful appeal to the Employment Appeal Tribunal. The Employment Tribunal on the second occasion awarded Mr Hill £9,069 compensation. He appeals against that assessment and the Respondent has a cross-appeal on one point of the compensation award.

The factual background

2. Mr Hill left his employment with the Respondent on 8 January 2009. He brought a claim for constructive unfair dismissal. At a hearing on 16-17 November 2009, the Employment Tribunal decided (Reasons for Judgment dated 17 February 2010) that Mr Hill had been constructively unfairly dismissed. He was found to have contributed to his dismissal by a factor of 70% (the "Discount Decision") and he was awarded a 10% uplift under section 31 of the **Employment Act 2002** (the "Uplift Decision"). Subject to that discount and uplift his loss of earnings were assessed as being £3,600 for the period up to 31 December 2009 (the "Cut-Off Date Decision").

3. Mr Hill appealed that decision on the basis that the Discount Decision, the Uplift Decision and the Cut-Off Date Decision were not **Meek** compliant. The Employment Appeal Tribunal (HHJ Reid QC presiding) allowed the appeal on 15 June 2010 and remitted the matter to the same Employment Tribunal.

4. A further remedies hearing was held by the Tribunal on 25 October 2010 and a Judgment on review was sent to the parties on 1 November 2010. The Employment Tribunal revised the Discount Decision from a reduction of 70% to 50% and revised the Uplift Decision from a 10% uplift to 40%. The Employment Tribunal found that Mr Hill's loss was £76 per week (a finding on the evidence against which there is no appeal from Mr Hill, although the Respondent cross-appeals on that point). However, the Cut-Off Date Decision was unchanged.

5. Mr Hill again appealed against all three decisions. The appeal against the Uplift Decision was dismissed by HHJ Serota QC on 11 February 2011 (although that decision is subject to challenge), but the appeal was against the Discount Decision and the Cut-Off Date Decision remained before the Employment Appeal Tribunal.

The Employment Tribunal's Judgment

6. This appeal is against the Judgment on review, sent to the parties on 1 November 2010. At that review hearing on 25 October 2010, the same parties appeared before the Employment Tribunal, as appeared before us. The material parts of the Judgment are as follows:

> **"Findings**
>
> **We adopt the findings of fact made in our original Judgment which were not the subject of criticism by the Employment Appeal Tribunal.**
>
> **The Law**
>
> **The relevant law is the ER 1996 s.123 in particular and EA 2002 s.31. In considering these we have had particular regard to the cases cited to us by Mr Hatt which we have detailed above.**
>
> **Decision**
>
> **1. Calculation of Loss**
>
> **In our original calculations, we had concluded that the proper basis for such calculation was the difference between the contractual basis of the Claimant's earnings with the Respondent with his new employer. The thinking behind this decision was that in both employments there were likely to be opportunities on occasions for overtime or night work but with the uncertain state of the economy at the relevant time (and indeed at present) it was inappropriate to rely on such opportunities - small engineering companies were undoubtedly experiencing difficult times. We calculate the difference in contractual pay net as £76 pw.**

We now consider the period upon which such calculation should be made. Mr Hatt suggested that it should be until retirement in 15 years time. We are not persuaded by this submission and noting that since obtaining his new employment the Claimant has made no effort to seek or obtain higher paid employment elsewhere in the Cheltenham area have decided that the period to which our original calculation was made i.e. to 31 December 2009 is correct. The calculation is accordingly:

8 January 2009 to 31 December 2009 51 weeks at £76 pw £3,876.

2. Contribution. S.123 ERA 2002

We have reviewed our original decision and have regard to the fact that the Claimant was the senior representative of the Respondent present at the pre-Christmas celebrations, this certainly places him in a different position to his co-workers who may be seen as following his lead when he failed to "clock off" at the conclusion of the authorised break period. However, it was Christmas and we are satisfied that it was not a deliberate attempt on the part of the Claimant to defraud the Respondent by claiming payment for time which had not been worked but rather an error of judgement. In these circumstances, we review our findings as to contribution reducing it from 70% to 50%.

3. Uplift. S.31 ERA 2002

In respect of this we have had particular regard to the authorities cited to us and having the opportunity to re-visit our original decision willingly do so for that decision had been made hurriedly. We had not fully taken into account the Respondent's conduct following the Claimant's resignation which we are persuaded is relevant. They had produced a forged document for the purpose of these proceedings to seek to cover up the fact that they had utterly disregarded the Statutory Disciplinary Procedures in place of that time. We conclude that the 10% uplift should be increased to 40%.

Our amended award is accordingly:

Basic award:		**£4,200**
Compensation Award		
51 x £76 (8.1.09 – 31.12.09)	**£3,876**	
Loss of statutory rights	**£ 330**	
Bonus payable	**£ 350**	
	£4,556	
Less 50% contribution	**£2,278**	
		£2,278
		£6,478
Plus 40% s.31 EA 2002		**£2,591**
		£9,069"

The Notice of Appeal

7. The Notice of Appeal raises three grounds of appeal and we take each in turn before turning to the cross appeal.

Ground 1: The Cut-Off Date Decision

8. Mr Hatt submits that the Tribunal failed to give adequate reasons for its decision and/or erred in law and/or exercises discretion on an improper basis. He submits that the only basis given for the Cut-Off Date Decision was that Mr Hill could have mitigated his loss of earnings by obtaining higher paid employment. This was not put to Mr Hill by Mr Green for Pollard at the hearing on 25 October 2010.

9. Furthermore, Mr Hatt submits there was no evidence upon which the Tribunal could have concluded that higher paid employment was available or reasonably available to Mr Hill. The only relevant evidence was given by Mr Nowasielski (a witness for the Respondent) that there were many other engineering employers in the area. Finally, Mr Hatt submits that there is no reasoning apparent in the Judgment to link the possibility of Mr Hill mitigating his loss to the date of 31 December 2009.

10. Mr Green opposes this ground of appeal and submits that there was adequate evidence before the Tribunal which enabled it to reach its decision, and it was a decision which it was entitled to make. The cross-appeal also is about ground 1, but we deal with that later in this Judgment.

Decision

11. There is nothing in the first Judgment, sent to the parties on 7 January 2010 which deals with this issue of compensation. We have been supplied with the Employment Judge's notes for the hearing on 25 October 2010. Those notes show that Mr Hill gave evidence in chief and was cross-examined. In particular (a) he was referred to a list of wages prepared by the Respondents; (b) in cross-examination he said he thought he would be unlikely to find another

job. However, it is not disputed that Mr Hill obtained fresh employment shortly after his leaving the Respondent company.

12. The other witness at the hearing on 25 October 2010 was a Mr Nowasielski, who was an employee of the Respondent. He gave clear evidence to the effect that Mr Hill was now better off at his new employers, Specialist Engineering Services. Thus, at question 20 (examination in chief), he said this:

> **"20. What is document NI attached to your statement?**
>
> **A. This is a document showing a summary of payslips and shows losses of wages. The Claimant is better off where he is with Specialist Engineering Services (his new employers) than he would have been with the Respondent."**

13. At question 33 (cross examination) he said this:

> **"33. Is the Respondents' the best pay in the area?**
>
> **A. No, there are others in the area which pay the same or better."**
>
> **34. The Claimant's basic pay is still less.**
>
> **A. Yes, but he has been earning more at Specialist Engineering Services."**

14. We have not seen the witness statements of either Mr Hill or Mr Nowasielski. Neither have we seen the documentary evidence referred to in those answers.

15. The Tribunal was entitled to raise the question of mitigation of loss in its Judgment on the figures, sent to the parties on 2 December 2009. In that Judgment it awarded Mr Hill loss of earnings to 31 December 2009 amounting to £3,600. That was subject to appeal to the Employment Appeal Tribunal and was revisited by the Tribunal on 25 October 2010. At that hearing, before it reached its decision, there was evidence before it that Mr Hill was now being paid at a higher rate of pay than he had when employed by the Respondent. We have set out that evidence above. Furthermore, on Mr Hill's own evidence, he had not sought to look for

other work. That fact is specifically recorded in the relevant part of the Tribunal Judgment. Finally, we note that it is trite law that the Tribunal is entitled to use its local knowledge. It clearly did so in this case.

16. We find the Tribunal was entitled to reach the decision it did that the appropriate cut-off date was 31 December 2009.

Ground 2: The Discount Decision

17. Mr Hatt submits that although the Employment Tribunal reduced Mr Hill's contribution from 70% to 50%, it failed to address a highly relevant factor, namely Mr Hill's eight and a half years unblemished employment record. If it had done so, it would have reduced the contribution yet further, probably to a finding in the bracket of 10% to 25%. Mr Green submits that there is no error of law.

Discussion

18. The question of contribution is found in s.123 of the **Employment Rights Act 1996**. The following are the material parts:

> **"123. Compensatory Award.**
>
> **(1) Subject to the provisions of this section […] 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.**
>
> **[…]**
>
> **(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."**

19. It is clear that if the Tribunal makes a finding under s.123(6), it is not entitled to take account of the employer's conduct. In this case the allegation that the Respondent produced a

forged document at the original Tribunal hearing. That was made clear by HHJ Reid at paragraph 11 of his Judgment on the first appeal on 15 June 2010. We agree.

20. In this case the Tribunal did revisit the facts of the case, having made findings in its first Judgment as to what happened on the night of 23 December 2008, which was that Mr Hill was the foreman of the nightshift and four of the nightshift workers and the Claimant had an unauthorised extended break. In the case of Mr Hill, it was an extension of one hour and in the case of the four workmen, it was one and a half hours. There was therefore loss of time to that extent.

21. In its second Judgment, dated 20 October 2010, the Tribunal gave two clear reasons why they reduced the contribution from 70% to 50%. The first reason was that Mr Hill was the senior representative of the Respondent present at the pre-Christmas celebrations which placed him in a different position to his co-workers "who may be seen as following his lead when he failed to 'clock off' at the conclusion of the authorised break period". That cuts against Mr Hill.

22. However, the Tribunal went on to point out that it was Christmas:

> **"[…] and we are satisfied that it was not a deliberate attempt on the part of the Claimant to defraud the Respondent by claiming payment for time which had not been worked but rather an error of judgement."**

23. In our view there was adequate evidence before the Tribunal on 25 October 2009 which enabled it to reach the conclusion it did. It was a conclusion which was open to it on the facts it found.

Ground 3: The Uplift Decision

24. In its Judgment sent to the parties on 1 November 2010, the Tribunal accepted that it had not fully taken into account the Respondent's conduct, following the Claimant's resignation. It said this:

> **"They had produced a forged document for the purposes of these proceedings to seek to cover up the fact that they had utterly disregarded the Statutory Disciplinary Procedure in place at that time. We conclude that the 10% uplift should be increased to 40%."**

25. Section 31(3) of the **Employment Act 2002** says this:

> **"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –**
>
> **(a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,**
>
> **(b) the statutory procedure was not completed before the proceedings were begun, and**
>
> **(c) the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure.**
>
> **it must, subject to subsection (4), increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50 per cent."**

26. Mr Green resists this ground of appeal.

Discussion

27. Essentially, this is a matter for the Employment Tribunal. It heard Mr Hill, the Claimant, at both hearings. At the first hearing it heard Mr Richard Pollard, the principal director of the Respondent, whose evidence was "unreliable and inconsistent". At both hearings it heard Mr Lorenzo Nowasielski, whose evidence was "clear and we have no difficulty in accepting that he was seeking to assist us in establishing the relevant facts." At the first hearing the Tribunal also heard expert evidence from Mr Michael Handy, who identified the "opt out

agreement" in the bundle, dated 14 June 2006 as a forgery, and that evidence was not challenged by Mr Green appearing for the Respondent.

28. Although Mr Hatt does not put the matter this way, in order to succeed he would have to show perversity on the part of the Tribunal. The test for perversity is well-known: see **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 93-95 per Mummery LJ. This ground of appeal does not begin to meet the test set out in **Yeboah**.

The cross-appeal

29. The cross-appeal is in the following terms:

> **"The Employment Tribunal's Judgment that the Claimant had suffered a loss of £3,876 was perverse when the evidence before it at the time of its decision was that the Claimant has in fact suffered no loss. The evidence was set out in the Respondent's alternative schedule of loss at pages 17 to 19 of the Appellant's bundle and shows that the Claimant did not suffer the losses awarded to him by the Tribunal."**

30. Both the Employment Appeal Tribunal and Mr Hatt understood that cross-appeal to relate to the issue of calculation of future loss: Mr Hill's financial loss from 8 January 2009, when he left the Respondent's employment, to 31 December 2009, which was the cut-off date applied by the Tribunal. The basis for that belief was that it was the Respondent's case that Mr Hill was earning more from Specialist Engineering Systems than he would have earned had he continued at the Respondent's employment. That is certainly the way in which the Employment Tribunal saw the matter (see the first part of its Judgment on calculation of loss).

31. However, as Mr Green made his submissions to us on the cross-appeal, it became clear that that was a mistaken belief. Mr Green submitted in his alternative schedule of loss before the Tribunal that on the figures for the Tribunal, Mr Hill had earned £119.57 per week, more than he could have at the Respondent, and should therefore give credit for the sum of £5,141.51

(42 weeks at £119.57). It followed that he had suffered no loss. Indeed, Mr Green went further and submitted that "excess" earnings received by Mr Hill in 2010 from his new employer fell to be deducted from the loss of earnings, which he suffered in 2009.

32. Mr Hatt submitted that there could be no appeal against the Tribunal's assessment of the continuing loss of £76 per week, to 31 December 2009, which was a finding of fact made after considering a large volume of evidence and also for reasons fully set out in his supplementary written submissions that the second point raised by the Respondent was wrong in law.

Discussion

33. There was a plethora of material before the Tribunal when it made its assessment of the continuing loss of £76 per week. They approached the matter on the basis that the calculation "was the difference between the contractual basis of the Claimant's earnings with the Respondent and with his new employer". That loss is the Employment Tribunal's calculation of the difference between 38 hours at the daytime rate of £15.50 per hour, which Mr Hill received at his new employer, and the daytime rate of £17.52 per hour that he was entitled to receive at the Respondent, with overtime and nightshifts (the Respondent) or twilight shifts (the new employer) being disregarded. In our judgement, on the material before it, the Tribunal was entitled to reach the decision that it did, that there was a continuing difference in contractual pay net at £76 per week to 31 December 2009.

34. We reject Mr Green's submission that the Tribunal were wrong not to take account of the fact that on its own decision, there would be no difference of pay after 31 December 2009. The Tribunal made no findings as to Mr Hill's earnings in 2010 other than drawing the inference that from 1 January 2010, Mr Hill would earn at least the same net pay as he had earned with

the Respondent. They did not make any findings of fact that he would have earned more, simply that he would have not have earned less from that date.

35. It seems to us that this case clearly falls within the ratio of **Whelan and Another v Richardson** [1998] IRLR 114 where HHJ Clark said this at paragraphs 42-46:

> **"42. The assessment of loss must be judged on the basis of the facts as they appear at the date of the Assessment Hearing ("the assessment date").**
>
> **43. Where the Applicant has been unemployed between dismissal and the assessment date then, subject to his duty to mitigate and the operation of the Recoupment Rules, he will recover his net loss of earnings based on the pre-dismissal rate. Further, the Industrial Tribunal will consider for how long the loss is likely to continue, so as to assess future loss.**
>
> **44. The same principle applies where the Applicant has secured permanent alternative employment at a lower level of earnings than he received before his unfair dismissal. He will be compensated on the basis of full loss until the date on which he obtained the new employment, and thereafter for partial loss, being the difference between the pre-dismissal earnings and those in the new employment. All figures will be based on net earnings.**
>
> **45. Where the Applicant takes alternative employment on the basis that it will be for a limited duration, he will not then be precluded from claiming a loss down to the assessment date, or the date on which he secures further permanent employment, whichever is the sooner, giving credit for earnings received from the temporary employment.**
>
> **46. As soon as the Applicant obtains permanent alternative employment paying the same or more than his pre-dismissal earnings, his loss attributable to the action taken by the Respondent employer ceases. It cannot be revived if he then loses that employment, either through his own action or that of his new employer. Neither can the Respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to his taking the new employment. The chain of causation has been broken."**

36. These propositions were described as helpful by the Court of Appeal in **Dench v Flynn and Partners** [1998] IRLR 653, although the Court considered that the obtaining of permanent employment at the same or a greater salary would not in all cases break the chain of causation. The Tribunal was not wrong to consider that securing subsequent employment terminated a loss.

37. Applying those principles to this case, the Tribunal were not in error of law in taking no account of Mr Hill's increased salary in 2010. On the particular facts of this case, we have held that the Tribunal were entitled to conclude that the net loss of pay terminated on 31 December 2009.

Conclusion

38. For these reasons, the appeal and cross-appeal are both dismissed.