Appeal No. UKEAT/0554/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 September 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MS V BRANNEY

MR G LEWIS

MRS S GRIFFIN APPELLANT

PLYMOUTH HOSPITAL NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Mishcon de Reya Solicitors Summit House 12 Red Lion Square London WC1R 4QD
For the Respondent	MS ELIZABETH CUNNINGHAM (of Counsel) Instructed by: Bevan Brittan LLP Solicitors Kings Orchard 1 Queen Street Bristol BS2 0HQ

SUMMARY

DISABILITY DISCRIMINATION – Loss/mitigation

An Employment Tribunal awarded 12 years' future loss for disability discrimination. It made no error in this factual assessment. It was not obliged to apply the Ogden Tables or the Guidance on pension loss.

HIS HONOUR JUDGE McMULLEN QC

1. This appeal is about the assessment of loss following statutory discrimination on the grounds of disability. This is a 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. This appeal is against a judgment on referral back by the EAT to an Employment Tribunal chaired by Employment Judge Carstairs sitting at Exeter. That belies the rather complicated adjectival route taken to that judgment. The Claimant first presented a claim of disability discrimination and unfair dismissal to the Employment Tribunal upon which she comprehensively succeeded. That is the judgment on liability following a hearing of five days at Plymouth and sent with Reasons to the parties on 31 August 2010; the liability judgment.

3. There was no appeal against that. The case went on then for a remedy hearing which was conducted over a day and a day in chambers where an award was made and Reasons were sent to the parties on 6 April 2011. The Claimant was awarded £105,643.00. She was dissatisfied with that. At the time the Claimant was represented by counsel, Mr Pullen, who will reappear in this judgment and the Respondent has been represented throughout by Ms Liz Cunningham, of counsel.

4. The Claimant appealed and the case came before Supperstone J with Mr Beynon and Mr Mallender. She succeeded in the short point she was making and achieved what the order of the court says is a review of the Tribunal's decision relating to continuing loss of earnings and pension loss and attention was drawn to paragraph 4.14(c) of the Guidance for Calculating

Pension Loss. The EAT division at that time was not satisfied the Tribunal gave proper consideration to and made proper findings of fact in relation to continuing loss she may suffer after she obtained suitable alternative employment which the Tribunal had found would be in a year of the Tribunal hearing. The matter was remitted together with the point about forward pension loss. That case which is before us at which the Claimant represented herself therefore enured into the judgment and an award was made of £140,799. That has been corrected upwards to take account of the omission by the Tribunal of its earlier figure so that she came out with a grossed up figure of £166,595, some £60,000 more than she had achieved at the first hearing.

5. Dissatisfied with that figure, the Claimant with assistance wrote a Notice of Appeal which includes the criticisms relating to pension loss. One aspect of this which we can dismiss straight away is an argument put before us today by Mr Milsom relating to the omission of the Tribunal to make a finding on whether the Claimant would receive a pension in the putative new job she would get. This is not a ground of appeal, it is not one which has been considered at the three stages in the EAT thus far because on the sift of this Notice of Appeal, Underhill P, as he then was, sent the matter to a preliminary hearing. The preliminary hearing was conducted by HHJ Peter Clark with Ms Branney, who sits with us today, who directed the case should go to a full hearing which is why we are here now.

6. No objection was taken to Ms Branney continuing to sit on this case, having sat on the preliminary hearing, and in case management in advance of today we are most grateful to both counsel putting their minds together to answer a question I put which as to the practical difference in money terms of the competing approaches on pension loss; that is simplified or substantial as those terms appear in the Guidance.

7. Given the amount of judicial time at EAT and ET which is unchallenged in today's hearing, we hope we can be forgiven for being sparing in the overall approach to this case. The essential issue is in summary whether the Tribunal erred in law in the calculations which it made as to the future losses of the Claimant following the discrimination which she suffered.

The legislation

8. The principles of compensation relating to unfair dismissal are found in section 123 of the **Employment Rights 1996** which makes the award of compensation such as is just and equitable having regard to the loss suffered. In respect of disability discrimination under the pre-**Equality Act** provisions, the approach is the same as the rule in tort as to damages.

9. The Employment Tribunal decided to award the figures set out above based upon its findings which are together the facts. The two remedy judgments and the single liability judgment are to be read as a whole. This is because the remission from the EAT was carefully tailored to the narrow points which had been argued before it and for which remission was necessary. That means that the Tribunal focused upon the evidence which was available to it at the first remedy hearing, harking back of course to the evidence which it had heard over some five days at the liability hearing.

10. It may seem at first sight slightly surprising that when a Tribunal is looking at remedy it should take the date of the first remedy hearing rather than the second in its assessment, but this is easily exigible from the terms of the order of the EAT and from the self direction because it did not hear any new evidence. What it heard were arguments obviously directed to the evidence which had been heard and as is often the question in compensation decisions the assessment date for the compensation is the date of the first remedy hearing; that was 15 December 2010 or more accurately the time of the judgment, 6 April 2011.

The facts

11. The Claimant worked for the Respondent in a job known as DEXA. This is in Band 6 of the NHS and movement out of it is unlikely to occur. The Tribunal found that the Claimant was likely to stay in that job, to the extent that there was only a 20% chance that she would leave.

12. She was born on Christmas Day 1974, was 24 at the time she started work for the Respondent and was 34 at the date of her resignation which was the effective date of termination on 30 September 2009. Thus four years on we are now coming to a final conclusion, we hope, of this long running dispute between the parties.

13. The focus of the Tribunal was the decision it had made as to forward losses based on one year and the outcome was forward losses of 12 years. At first sight this is a very substantial achievement for the Claimant in the proceedings. Several questions arise; the first was a procedural issue as to whether she could introduce new evidence relating to what she had done between the first and the second remedy hearings and what she had done was to work as a volunteer at Shelter.

14. This matter seemed to take on a disproportionate aspect because in her written submission she referred simply to doing that. She was obviously telling the truth about this; that she wanted to show that she was able to do some work, it was not paid and it was in the voluntary sector and she was herself a volunteer. That is all she put to the Tribunal because it excluded the material in it. We have been asked to look at this material, in fact I was asked to look at it because I made a judgment in respect of this material prior to the hearing before Supperstone J's EAT but I have been reminded of it. It does not include any material relating to the nature of the work that she was doing; it is office work and she is to be supported by

other people there. The work is tailored to her particular condition which is Lupus and the work she is undertaking appears to fit that. What the Tribunal did however was to record this:

> **"3.8 Furthermore, the Tribunal has noted from paragraph 51 of the claimant's submission that she has been accepted as a volunteer at Shelter. That organisation helps people in the most desperate situations and it is, therefore, likely that it is a stressful occupation. This suggests that the claimant is able to deal with stress so that there is no reason why she should not be able to achieve a level in another occupation commensurate with the position she occupied with the respondent."**

15. There are several criticisms which are made of this. The first is that it shows the judgment of the Tribunal about its own view of what working as a volunteer at Shelter is. There is the impression that this material has been used to dampen the aspiration of the Claimant in her compensation in the eyes of the Tribunal and the Tribunal says that this is stressful and that she is able to deal with stress. However, only in the previous passage does the Employment Tribunal record that her consultant, Dr Reckert, had noted the Claimant was suffering from stress. Juxtaposed therefore is the Tribunal's approach to its knowledge of Shelter and the consultant's finding as to the Claimant's stress and psychological distress as she put it. This is the subject of paragraph 3.7 which says the following:

> **"3.7 During the course of further discussion as to the approach to be taken, the claimant highlighted the fact that a medical report before the tribunal at the first remedy hearing indicated that the claimant would not be able to take on a management position because of the stress involved. The only report the Tribunal had, so far as it can recall, is the report of Dr Reckert of 5 October 2010. On the last page, the second paragraph states: *'Stress, poor social support and psychological distress are associated with metal and physical health of SLE patients. It is very difficult to measure these phases of disease activity but I do think in this case we do have objective facts such as the loss of weight, the incapacity to walk unsupported, findings including an elevation in her LFT's and PV in August 2010, loss of voice during the time of the phase 3 hearing and the neuro-psychiatric symptoms".***

16. The criticism is that, as Mr Milsom graphically points out, Dr Reckert was not the only medical evidence, there were seven medical reports and the Tribunal has erred in drawing upon its recall of only one report. The medical evidence in context with the findings of the Tribunal indicated very significant difficulties in the Claimant's condition and the limitations which that placed upon her ability to work anywhere else. We accept what Mr Milsom identifies in

paragraphs 16 and 17 of his skeleton argument as being ten matters from which there is no dispute as to the findings.

Discussion

17. We can dispose of the ground of appeal that relates to this criticism shortly. The Tribunal was under no duty to rehearse all of the evidence relating to the medical condition. As Mr Milsom has demonstrated, there are unchallenged findings by the Tribunal as to her condition. The Tribunal went through in great detail a number of the medical reports including the one on 5 October. Why did it do that? It relied particularly on the submissions made to it which had majored on Dr Reckert's two reports and it is hardly surprising that the Tribunal could recall in great detail what Dr Reckert said because that was the one put in prominence before it.

18. The Tribunal cannot be criticised for recording that against the other findings which it made in its first remedy judgment and in its liability judgment it was well aware of the medical evidence in this case.

19. We then turn to the findings as to compensation and as we have indicated, the Tribunal has extended the forward losses. To use Mr Milsom's helpful phrase, it set out a 12 year plan. What it was doing was to calculate the losses based upon the evidence it had as to what chance the Claimant would have in the labour market of obtaining work at such and such a rate and for how long before she moved up. In the course of its findings, which we divided into two five year periods and then a two year further period before she attained a position of management at around £30,000 a year, it explained how it is the Claimant could be in such a position notwithstanding the condition which she presented medically. The answer is in part to do with how she presented at the Employment Tribunal.

20. This is not an infallible guide. A Tribunal must take care not to base its opinion in disability cases on how a person presents at a hearing; there may be ups and downs in their medical condition. But that is not the sole basis upon which the Tribunal acquitted the Claimant in such glowing terms that she was a confident person. It is because of what she herself said in her evidence and was put on her behalf when she was represented by counsel at the two previous hearings. The finding that the Claimant is very intelligent and capable and a determined individual is one which it formed from her evidence, from the evidence of the managers who gave evidence and from how she showed herself. The Claimant may ultimately be not very happy with the outcome but there is a glowing testimonial to her even after the injury she suffered as a result of the discrimination in this case.

21. The Tribunal rehearsed its earlier findings about when she would obtain work and mitigation and so on and came to the conclusion as to the losses which it set out in tabular form according to the findings of the Tribunal. It also considered pension loss and the criticism is that it failed to apply the Ogden Tables. We accept the argument of Ms Cunningham that a Tribunal is not required to adopt the Ogden Tables.

22. In the authorities to which we have been taken the presumption (see for example **Donaghey (No.3)** [2004] ICR 227) is that a prima facie case for using the Ogden Tables will arise where there a career loss, but otherwise the matter can be dealt with by the Employment Tribunal. Nor is the Guidance to employment judges determinative. It for the Tribunal to determine how it is to work out the pension. True it is that certain guidance may be obtained from the authorities as to how long the Claimant had been employed, how long she was likely to be employed in the same job and how far she was off retirement. It is unlikely to yield an error of law where a Tribunal has given thought to the alternative methods of calculating forward losses and has shown its reasoning. In this case the Tribunal, the authorities show us,

was entitled to take a structured approach to each of the periods, recognising that a person may in their working life sometimes progress up the ladder. The five year rests in this case are an example of the Tribunal wrestling with that.

23. The Tribunal was also concerned with the submission made to it by counsel below as to whether she would obtain a job with a pension and that was contained in his submission as to the four year period with which counsel was concerned. That is the reason why it seems to us there was no argument in the Notice of Appeal about this. The matter was dealt with by the Employment Tribunal in its award.

24. In our judgment the scholarly arguments addressed to us by Mr Milsom fail to get over Ms Cunningham's point which is this really is a perversity argument. In the full spotlight of a remission from the Employment Tribunal on very limited grounds this Tribunal has gone back to the task with an open mind. It has awarded very substantially more compensation than it was minded to do, it has considered the very full submissions the Claimant made to it in writing and those, of course, of Ms Cunningham and has made an award which cannot be categorised as perverse or wrong in principle. The assessment of forward losses over a period of 12 years is one which is bound to involve some speculation based on what the Tribunal knows of the Claimant, of her abilities, of the labour market and so on. Those are questions of fact for it and not for an appellate court.

25. No error of law has been committed on either of the two substantive grounds before us and we will dismiss the appeal. In doing so, we are very grateful to both counsel for the substantial help they have given us and for completing the case within the window and, in particular, we would very much like to thank Mr Milsom and Mischon de Reya, his instructing solicitors, because we know that they have given of their time for nothing.