Appeal No. UKEAT/0077/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 19 August 2019
Judgment handed down 28 August 2019

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR LESLIE JOHN SMALL — APPELLANT

THE SHREWSBURY & TELFORD HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance, but written submissions relied on
For the Respondent	Mr Giles Powell (of counsel) Instructed by: Hill Dickinson LLP No. 1 St. Paul's Square Old Hall Street Liverpool L3 9SJ

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

PRACTICE AND PROCEDURE – Disposal of appeal including remission

The Court of Appeal had remitted back to the Tribunal the issue of a **Chagger** claim for damages for stigma loss, following the termination of the Appellant's contract as a worker after raising asbestos issues which had constituted a detriment under s.47B **Employment Rights Act 1996** (**Small v The Shrewsbury & Telford Hospitals NHS Trust** [2017] EWCA Civ 882). The ET had not awarded any future loss beyond 13 November 2013, the period when it found that the Appellant would no longer have been engaged by the Respondent in any event. But the Court of Appeal found that it had been incumbent on the Tribunal to consider the possibility of stigma damages in light of the Tribunal's findings that the effect of the Appellant's disclosure had been "career ending" for him. The Court of Appeal had expressly permitted the parties to adduce new evidence and advance new arguments at the Tribunal at the hearing of the remitted issue.

The Appellant sought to restrict the evidence before the Tribunal and challenge a third party discovery order made by the Tribunal in respect of the period prior to 13 November 2013, on the grounds that in making the order the Tribunal had exceeded the scope of the remission back by the Court of Appeal. His contention was that the evidence should be restricted to his job search post 13 November 2013.

The appeal was dismissed. The Tribunal has not sought to exceed its jurisdiction and go beyond the scope of the matter remitted to it by the Court of Appeal in making its order. It will be relevant to the consideration of stigma damages to explore his job seeking efforts and reasons for lack of success in the period both prior to, and post, the date that the Tribunal found he would have had his contract terminated by the Respondent if he had not made the protected disclosures. Those

issues have not yet been considered by the Tribunal and are different to the general mitigation issues considered in its original remedy decision.

HER HONOUR JUDGE STACEY

1. The issue to be determined in this appeal can be simply stated: did the ET exceed, or seek to exceed, the scope of the matter remitted to by the Court of Appeal, when it made orders concerning third party disclosure in advance of the remitted Remedy Hearing? The factual background and chronology however require more detailed explanation.

2. Since the Appellant (whom I will continue to refer to as the Claimant as he is before the Tribunal) was unable to attend today's hearing for health reasons, I reserved my judgment so that both parties will know the outcome simultaneously.

3. The Claimant was engaged as a worker on a temporary contract as a project manager in the estates department of the Respondent NHS Trust in May 2012. His engagement was ended by the Respondent on 23 July 2012, after he had tried, unsuccessfully, to get the Trust to notify previous occupiers of a group of properties owned by it that they might have been exposed to asbestos. On 17 December 2013 the ET upheld his claim that the termination of his contract as a worker constituted an unlawful detriment under s47B **Employment Rights Act 1996** (ERA 1996) which provides protection to workers from victimisation for public interest disclosures in certain circumstances.

4. At the remedy hearing which took place on 3 February 2014, the Claimant claimed past loss of earnings up to the date of the hearing, and future loss of earnings up to his expected date of retirement together with injury to feelings compensation. His future loss of earnings claim was predicated on his evidence that he had been led to expect that he would be offered a permanent position, which he was deprived of by having raised his asbestos concerns.

5. The Tribunal found that "the outcome of the dismissal has, it appears, been career ending for the Claimant." He had applied for 600 suitable positions by the date of the remedy hearing and had failed to achieve work other than for a few weeks.

6. He was awarded a total of £54,126 made up of £15,150 injury to feelings, £5,000 described as "aggravated damages" and £33,976 loss of earnings for a period of 16 months, since the Tribunal found that his work for the Respondent would have continued until 14 November 2013, but not beyond that date. The Respondent duly paid the compensation ordered in the Spring of 2014.

7. The Claimant appealed the remedy judgment, at first unsuccessfully to this Tribunal, but on further appeal to the Court of Appeal it was successfully argued that it had been incumbent on the Tribunal to consider a so-called **Chagger** head of damages for stigma loss and the matter was remitted back to the Tribunal to undertake that exercise. The Court of Appeal (**Small v The Shrewsbury & Telford NHS Trust** [2017] EWCA Civ 882 Underhill LJ) held that in the particular circumstances of the case, the Tribunal ought to have considered whether the Claimant had a claim in respect of the period after it had found his engagement would have ended (14 November 2013).

8. **Chagger** damages is a shorthand term for the case of **Chagger v Abbey National plc** [2010] ICR 397 which establishes that a Claimant can recover for the consequences of any disadvantage he or she suffers on the labour market, by reason not only of having been dismissed by his or her previous employer, but also for the stigma of having been dismissed and having brought proceedings, so that a claimant's losses can therefore potentially extend beyond the period when a claimant would have worked for a respondent absent the victimisation.

9. The Court of Appeal made the following Order:

> **"1. The appeal is allowed.**
>
> **2. The following issue to be remitted to the Tribunal for further consideration and determination: whether, as a result of the detriment which the Tribunal in its judgment of 17 December 2013 found the Appellant to have suffered, the Appellant has suffered or will suffer a compensable loss of earnings after 14 November 2013 and, if so, what amount should be awarded as compensation for that loss. For the avoidance of doubt:**
>
> > **(1). the finding in the remedies judgment that the Appellant would have been dismissed from his project manager role with the Respondent on 14 November 2013 shall stand and shall not be reconsidered; and**
> >
> > **(2). the parties shall be permitted to adduce new evidence and to advance new arguments upon the hearing of the remitted issue."**

10. The Court of Appeal urged the parties to consider compromise or mediation given the many uncertainties attending the quantification of a **Chagger** award. The parties tried, but no agreement was reached. A Preliminary Hearing (Case Management) took place before REJ Findlay on 30 October 2017 which repeated the precise terms of the Court of Appeal's Order and ordered the parties to exchange all documents relevant to the remitted issues, whether they support or damage their case, by 27 November 2017. Thereafter both parties complained that the other had not complied with the directions and a further Preliminary Hearing was convened on 24 January 2018 before EJ Broughton. EJ Broughton accurately noted the scope of the order remitting the matter back as follows:

> **"3. The remitted remedy issue in this case is limited to consideration of whether and if so, to what extent, the Claimant should have been awarded future loss taking into account any stigma suffered by the Claimant as a result of his difficulties with the Respondent.**
>
> **4. In that context it may be appropriate for the tribunal to have regard to the entire history of the Claimant's search for new employment, including the number of jobs applied for, how well targeted and presented the applications were, the number of interviews obtained and any reasons given for rejection. Whilst each application may be relevant. The job search as a whole will need to be considered.**
>
> **5. As a result the respondent was seeking full disclosure of each and every application made by the claimant in the period since the termination of his employment."**

11. The disclosure issues remained contentious and on the Respondent's dissatisfaction with the disclosure provided by the Claimant and his failure to provide authority and consent for them to approach the various agencies, potential employers and job portals that the Claimant had been

in contact with in his search for work, they sought an order from the Tribunal for third party disclosure from the Tribunal and a postponement of the remedy hearing which had now become imminent.

12. Regional Employment Judge Findlay considered the application on paper and made what I shall refer to as the Findlay Order on 26 July 2018. In it she directed the parties to comply with the directions previously made. She refused the postponement request and application for third party disclosure with the explanation that the Respondent would be able to cross examine the Claimant at the hearing and it would not be proportionate to grant the applications at that stage. The directions went on to state that if the Respondent had further information to support such an application it could be reviewed at the remedy hearing listed for 3 days commencing 1st August 2018.

13. At the remedy hearing on 1 August before EJ Lloyd and members the Claimant was represented by Mr Philip Jones who had represented him before this Tribunal and the Court of Appeal. The Respondent was represented by Mr Giles Powell who had also been involved in all the appellate stages and also the initial remedy hearing on 3 February 2014. At the outset of the hearing the Tribunal understood that the parties had both agreed and consented to an adjournment of the remedy hearing, to be relisted with an increased 5 day hearing and for an order for third party disclosure to be made. In the event however the Claimant did not agree to the final terms of the consent order thought to have been agreed and it is not necessary for the purposes of this judgment to explore or decide whether the Claimant changed his mind after the hearing, if his counsel exceeded his authority, or if the Respondent and the Tribunal misunderstood. Suffice to say it was a case of many a slip twixt cup and lip, and with hindsight it would have been better if

A the parties had not been released from the Tribunal building before they had all signed the final, agreed terms of the order.

B 14. What the Respondent and the Tribunal understood to have been an agreed order, was for the remedy hearing to be relisted for 25 – 29 March 2019 and an order for a number of listed Third Parties to provide disclosure of all documents relating to or concerning applications by the Claimant for jobs, employment or work, made to, through and/or via each of them in the period C 22 January 2012 to 7 August 2017 ("the Lloyd Order").

15. It is the Lloyd Order that is the subject of the Claimant's appeal. His grounds of appeal D raised essentially 2 matters. Firstly, he considered that the Tribunal had impermissibly expanded the scope of the remedy hearing. Secondly, he considered the Lloyd Tribunal had erred in postponing the hearing and making the disclosure order as it should not have revisited or revoked E the Findlay Order.

16. On the sift HHJ Tucker considered that there were no arguable grounds for the appeal to proceed, but on a Rule 3(10) hearing on 6 March 2019 Mrs Justice Laing considered that it was F arguable that the Lloyd Order exceeded the scope of the remission by ordering third party disclosure of documents from 22 July 2012 to 13 November 2013. She decided that the forthcoming remedy hearing should not be adjourned, but the Tribunal could read her G observations and take them into account when it embarked on the hearing.

17. However, the Remedy hearing of 25 March 2019 was postponed again. I am told by Mr H Powell that the Tribunal was critical of the Respondent solicitors and their approach to the production of bundles for the Claimant who consequently considered he had insufficient time to

prepare for the hearing. After the Tribunal had started reading into the bundle and in light of the Claimant's concerns about lack of preparation time, the case was adjourned and relisted with a now increased time estimate of 9 days, to take place on 2 to 16 December 2019.

18. The Claimant has not attended today's hearing as he has serious health issues, but has provided written submissions which have helpfully set out the tortuous history of the litigation and his frustration is clear. Much of his submission focusses on the procedural challenge and his concern that the Lloyd Order had revisited or revoked the Findlay Order. However, permission to appeal was not granted on that ground and nor was permission given to challenge the decision postponing the hearing of 1 August 2018 and ordering third party disclosure per se.

19. The only ground of appeal permitted to be argued at this Full Hearing is that the ET exceeded the scope of the remission by making third party disclosure orders relating to job applications made by the Claimant between 22 July and 13 November 2013.

20. The issue therefore is whether that order had any relevance for the issues remitted back to the Tribunal or was out of scope.

21. The law in this area is agreed, uncontroversial and well settled. The Tribunal does not have jurisdiction to consider and decide matters other than those remitted to it by, in this case, the Court of Appeal (see **Aparau v Iceland Frozen Foods plc (No. 2)** [2000] ICR 341. The terms of the remittal back were clear and the Tribunal is not permitted to review or revisit its findings in respect of loss suffered by the Claimant between 22 July and 13 November 2013. The Respondent has helpfully reiterated today that in these Tribunal proceedings it will not seek to do so: those findings remain unchallenged and undisturbed.

22. However the Respondent is correct when it submits, as it does, that the third party disclosure ordered by the Tribunal is directly relevant to the issues that the Tribunal has to determine. In order to decide whether, as a result of the detriment which the Tribunal in its Judgment of 17 December 2013 found the Claimant to have suffered, he has or will suffer a compensable loss of earnings after 14 November 2013, will or may require an understanding of how his job seeking fared immediately after his dismissal and the period before 14 November 2013. It is apparent from the Court of Appeal's judgment that it envisaged the possibility of an exploration of these issues in the remitted hearing. At paragraph 17 of its judgment the Court of Appeal held thus:

> **"It was accepted by both counsel, that if that was our decision [which it was], neither party should be confined to the evidence or submissions that were advanced on the previous occasion, save that the Tribunal's finding that the Appellant would have continued to work for the Trust up to but not beyond 14 November 2013 should stand. Mr Powell made it clear that there were aspects of the Appellant's mitigation case that he had not explored on the previous occasion because of the basis on which he understood the claim to be being put and which the Trust might now wish to explore either in cross-examination or by adducing evidence which had not been adduced on the last occasion. It seems to me right in principle that he should be allowed to do so."**

23. The Order from the Preliminary Hearing of 30 October 2017 alludes to the possibility and the 24 January 2018 Preliminary Hearing order makes even more direct reference to the relevance of the "entire history of the search for new employment" and the "job search as a whole". Mr Powell identifies in his written submission six ways in which the Claimant's work and job application record from 22 July -13 November 2013 will be relevant to considering the claim for **Chagger** damages, all of which are on point. As Mr Powell observes, it is the Claimant's express case that he was unable to obtain employment in the period after 22 July 2012 and continuing beyond November 2013 to the present day because of the stigma. He therefore relies on the period from 22 July in support of his claim for ongoing loss. The issue of why he was unable to obtain such further employment has not yet been addressed or determined by the Tribunal, all that has been decided is that in general terms the Respondent has not proved that he failed to mitigate his loss. They are different exercises. It is common ground that stigma damages were

not raised by the Claimant at the original remedy hearing which is why the further hearing is necessary, and the Court of Appeal expressly permitted further evidence – both by way of documentary evidence and cross-examination of the Claimant to explore the points – to be adduced to enable the Tribunal to decide the issue. It is not an insignificant issue since the Claimant has put his stigma damages in the region of £1million.

24. The Claimant relies on **Interbulk Ltd v Aiden Shipping Co Ltd (*the Vimeira (No. 1)*** [1985] 2 Lloyd's Rep 410 in support of his appeal. However the facts in that case were very different. In that case about how, why and whose fault it was a ship had been damaged, an entirely new and unanticipated argument was sought to be raised on the remission back: that the ship had been damaged by submerged concrete blocks, when the only matter the court had permitted to be potentially raised on remission back was whether the tightness of the turning circle in the dock had damaged the *Vimeira.* In this case, the issue has not changed since the remission back and the Respondent is not seeking to raise matters outside the scope of the Court of Appeal's order.

25. There is one aspect however that should be mentioned. The Respondent in its skeleton argument before the reconvened remedy hearing of 25 March 2019 and in its written submission before this Tribunal has raised the spectre of fraud. In a foot note it states that it reserves its position as to whether the original awards may be set aside for the fraud and non-disclosure of the Claimant which it says has come to light and that contrary to his evidence in the first remedy hearing he had, or may have had, further episodes of employment between 23 July 2013 and 14 November 2013, which it asserts he did not disclose to the Employment Tribunal at the first remedy hearing. It may well be that it is these apparently throwaway comments which have given rise to the Claimant's concern that the Respondent is seeking to go beyond the Order of the Court

of Appeal. Parties should be extremely careful in the language they use, and such sweeping statements and generalisations are unhelpful. The need for any allegations of fraud to be carefully pleaded and proved is well-known (see for example **Takhar v Gracefield Developments Ltd** [2019] UKSC 13). The Respondent knows it cannot pursue this argument in the remedy hearing as matters currently stand.

26. Mr Powell confirmed today that he had no instructions to pursue this avenue and understood that he cannot do so in the Employment Tribunal proceedings. He accepted that he would have a number of obstacles to overcome and he considered that it would require separate proceedings in the High Court would to be initiated. By seemingly conflating two entirely separate issues – the exercise of determining **Chagger** damages with an unparticularised and vague fraud allegation it is unsurprising that the Claimant balked at the third party discovery order. This will be a relevant consideration if the Respondent seeks to pursue its threatened costs application.

27. For the above reasons the appeal is dismissed. The Tribunal has not, and has not sought, to exceed the scope of the remission by the Court of Appeal in making the third party discovery orders that relate to job applications made by the Claimant between 22 July and 13 November 2013.