Appeal No. UKEATS/0047/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Remote Tribunal
On 20th October 2020
Judgement Handed down on
19 th January 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MR ZAFFIR HAKIM — APPELLANT

THE SCOTTISH TRADE UNIONS CONGRESS — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR COLIN EDWARDS (Of Counsel) Instructed by Livingstone Brown Solicitors 84 Carlton Place Glasgow G5 9TD
For the Respondent	MR RICHARD STUBBS (Of Counsel) Instructed by Thompson's Solicitors 285 Bath Street Glasgow G2 4HQ

SUMMARY

TOPIC NUMBER(S):

UNFAIR DISMISSAL – 11

The Claimant was unfairly dismissed. He was found entitled to compensation. The Tribunal awarded compensation subject to a 30% reduction in respect of a variety of matters that the Tribunal considered necessitated a reduction to the award of compensation. The Tribunal accepted that the Claimant suffered an ongoing wage loss in that his new employment that was less remunerative than that which he had enjoyed with the Respondents. It terminated that loss when, at the end of his probationary period, the Claimant failed to secure a permanent contract with his new employer. Held that the authorities supported the proposition that wage loss should not be calculated on a broad-brush approach if possible and that there was a more objective method of calculating loss based on the periods of time the Claimant had been out of work or suffering differential wage loss. In this situation the Tribunal had erred in applying a percentage reduction. Held further that there was no rational basis for terminating the Claimant's ongoing wage loss when he failed to secure a permanent contract. The Employment Appeal Tribunal ordered the Tribunal to reassess wage loss and pension loss.

A **THE HONOURABLE LORD SUMMERS**

B **Introduction**

1. In this appeal the Claimant was found to have been unfairly dismissed. His claim of victimisation under section 27 of the Equality Act 2010 was also upheld. At the remedies hearing the tribunal awarded compensation in his favour. It reduced the level of compensation on the basis that he had failed to mitigate his loss and restricted the period of loss in circumstances that are set out below. The Claimant appealed the tribunal's decision to reduce his compensation.

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Relevant Statutory Provisions

E 2. Section 123 of the **Employment Rights Act 1996** provides (so far as relevant) –

> **(1)… 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.**
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> **(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.**
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> **(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.**

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Mitigation

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3. Section 123(1) of the **Employment Rights Act 1996** requires a compensatory award to be just and equitable. It enjoins the tribunal to have regard to the circumstances of the case. It indicates that the loss which is to be compensated must be "attributable" to the action taken by the employer. These are elementary rules. Section 123(4) also requires the tribunal to "apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law". The duty to mitigate is a feature of the law of damages generally and as one might expect applies in the case of wrongful dismissals at common law; see **Ross v Macfarlane** (1864) 21 R. 396. The common law rule that a person must mitigate their loss is thus brought over into the statutory scheme. In importing the rule that a person must mitigate their loss s. 123(4) refers to the common law of England and Wales and Scotland. The common law articulates how the rule should operate. The duty extends only to such steps as were reasonable **The Admiralty v Aberdeen Steam Trawling Co** 1910 SC 553). The onus of proof is on the party in breach **Gloag on Contract** p. 689; **Connal, Cotton & Co v Fisher Renwick & Co** 1883 10 R. 824. Although s. 123(4) refers to a single "rule" these ancillary rules are elaborations of how the general rule, that a person has a duty to mitigate loss, should operate. In **Leonard & Ors v Strathclyde Buses Ltd** 1999 S.C. 57 at p. 63A per Lord Coulsfield; 1999 S.L.T. 734; [1998] IRLR 693, the Inner House held that s. 123 did not involve a wholesale import of the common law of contract and that as a result the rules on foreseeability and remoteness were not imported by s. 123(4).

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4. I was referred by the Claimant to **Cooper Contracting Ltd v Lindsay** [2016] ICR D3; UKEAT/0184/15/JOJ. It provides a valuable overview of the duty to mitigate loss in employment law. Langstaff, J summarises the law under nine (overlapping) principles (paragraph 16). These principles demonstrate that employment law has adopted the common law as envisaged by s. 123(4). Principle 8 is that "it is for the wrongdoer to show that the Claimant acted unreasonably by failing to mitigate". He warns tribunals that they should not

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adopt a censorious approach to the rule. "(The Claimant) is not to be put on trial as if the losses were his fault".

5. He also notes that in determining whether the claimant has acted unreasonably account should be taken of the Claimant's views and wishes. Langstaff, J in **Cooper Contracting** acknowledges that ultimately it is for the tribunal to assess what is unreasonable.

6. The Tribunal's reasoning and decision is found at paragraph 39 (p. 82 of Core Bundle). The tribunal decided to reduce the Claimant's compensation because of the following factors. First, it was not satisfied that he had exerted himself sufficiently in search of new employment. It considered 35 job applications over 4 years did not indicate that he had sought to take reasonable steps to mitigate his loss. Second, it thought that he had acted unreasonably in confining his search to the equalities/TU/third sector market. Third, it noted that he had not attempted to retrain or seek volunteering opportunities. In these circumstances the Tribunal decided it was just and equitable to apply a reduction of 30% to the Claimant's loss of earnings.

7. The Claimant submitted that the use of a percentage reduction was unlawful. The Claimant submitted that the correct approach to assessing mitigation of loss was to be found in and in **Glasgow City Council v Rayton** UKEATS/0005/07/MT at paragraph 14 where the EAT quotes from **Savage v Saxena** [1998] ICR 357; [1998] IRLR 182 at paragraph 23. There it is said that a tribunal is required to –

> **(1) identify what steps should have been taken by the applicant to mitigate his loss; (2) find the date upon which such steps would have produced an alternative income; (3) thereafter reduce the amount of compensation by the amount of income which would have been earned.**

8. These words are in fact a repetition of Browne-Wilkinson, J in **Gardiner-Hill v Roland Berger Technics Ltd** [1982] IRLR 498 at p. 500 where he said –

> **"….it is well established that it is inappropriate in dealing with failure to mitigate damages to reduce the amount of the compensation by a percentage. In order to show a failure to mitigate, it has to be shown that if a particular step had been taken, Mr. Gardiner-Hill would, after a particular time, on balance of probabilities have gained employment; from then onwards the loss flowing from the unfair dismissal would have been extinguished or reduced by his income from that other source. In fixing the amount to be deducted for failure to mitigate, it is necessary for the tribunal to *identify what steps should have been taken; the date on which that step would have produced an alternative income and, thereafter, to reduce the amount of compensation by the amount of the alternative income which had been earned*. Since that is the principle of mitigation, a reduction of a percentage of the total sum representing compensation for the whole period is inappropriate." (my italics)**

9. **Gardiner-Hill** is therefore authority for the proposition that "it is inappropriate when dealing with a failure to mitigate damages to reduce the amount by a percentage". Browne-Wilkinson, J (as he then was) does not cite authority for his proposition. It may be that he had in mind **Peara v Enderlin Ltd** [1979] ICR 804 at p 807HI. **Smith, Kline & French Laboratories Ltd v Coates** [1977] IRLR 220 at p. 222 contains an indication that it was not the "practice" of tribunals to use percentages in assessing mitigation. It would appear therefore that if, as the Claimants submit, it is unlawful to apply a percentage reduction, the unlawfulness is not to be found in the common law of Scotland but in the EAT's endorsement of the practise adverted to above.

10. The Claimant referred me to **Glasgow City Council v Rayton**. In **Rayton** the tribunal held the employee had been unfairly dismissed. In examining his loss at the remedies hearing the tribunal noted that he had been unemployed for a time and then secured employment at a lesser level of remuneration. The tribunal came to the view that had he fulfilled his duty to mitigate he would have been able to secure employment similar to that of the employment from which he had been dismissed and at a similar rate of remuneration. The EAT was persuaded that the tribunal's approach to calculating his loss was so crude and unsophisticated that it

should be overturned. The Tribunal had not attempted to establish when he would have regained employment at his old rate of remuneration. It had not sought to establish his loss of pension rights between the termination of employment and the putative date of re-employment in a job with the same salary and pension rights. The Claimant submitted that **Rayton** was authority for the proposition that the tribunal was bound to follow the methodology adverted to in **Savage** and which as I have indicated has its source in **Gardiner-Hill** and earlier case law. As I have indicated Browne-Wilkinson, J deprecates the use of percentage reductions in cases involving the computation of wage loss and the application of the duty to mitigate. His approach was to require the tribunal to follow a methodology –

> **(2) identify what steps should have been taken by the applicant to mitigate his loss; (2) find the date upon which such steps would have produced an alternative income; (3) thereafter reduce the amount of compensation by the amount of income which would have been earned.**

11. **Rayton** does not address the use of percentage reductions directly. The difficulty in **Rayton** was that the tribunal had not addressed the question of when, had the employee fulfilled his duty to mitigate loss, he would have regained employment at the level of remuneration he had enjoyed before. The EAT took the view that this was a basic requirement and that if it had followed this approach the tribunal would have been bound to apply a differential wage loss. This would have also had knock on consequences for the assessment of pension loss. **Rayton** is supportive of the following propositions. First in assessing compensation tribunals should not if possible, follow a "broad brush" approach (see **Savage** and **Gardiner-Hill**). Second, the approach taken should have a logical and reasoned basis. It noted (paragraph 24) -

> **"Whilst there is no specific statutory guidance as to how the deduction for failure to mitigate should be calculated, the deduction does require to have a logical and reasoned basis. We do not see that the deduction in this case has such a basis and the reason for that appears to be that the Tribunal has failed to carry out the complete exercise required."**

12. If the Claimant is to succeed, he must persuade me that the Tribunal has made an error of law. While I am wary of reducing the computation of compensation to a series of rules and while I acknowledge that I should endeavour to give tribunals a large degree of flexibility, particularly where the evidence is uncertain, the English cases I have referred to deprecate the use of percentage reductions. I consider that their antagonism arises from the statutory obligation to award compensation that is just and equitable. If compensation is to be "just and equitable" it must be logical. The use of a percentage reduction clarifies rather than obscures the considerations that justify a diminution to the award of compensation. Although the Claimant relied primarily on **Royston** it might have been better if he had footed his appeal on **Gardiner-Hill**. I accept that the Tribunal's approach may be said to amount to an error of law in light of the case law.

13. That said I acknowledge that the law permits percentage reductions in other connections. Outside the realm of employment law, contributory negligence is usually assessed in percentage terms. Within the realm of employment law, percentage reductions are used n **Polkey** deductions and in assessments of contributary fault. I also appreciate that the rules in s. 123 are simple. No doubt the aim was to avoid complex rules. The use of a percentage reduction is a simple approach to assessing an appropriate award.

14. If a percentage reduction is to be applied in cases involving compensation under s. 123 of the 1996 Act the tribunal should be in a position to justify the adoption of a crude approach. It may lack evidence of the prospects of alternative employment or of the wages that employment would attract. It may not be satisfied that the employee would on the balance of probabilities regain employment but nevertheless consider that some reduction should be made for that prospect. But in this case the Claimant regained employment and the tribunal had

A evidence of the relative rates of remuneration. The Tribunal was satisfied that he would have gained employment at an earlier stage had he fulfilled his duty to mitigate loss. In such a situation I consider that following **Gardiner-Hill** and **Royston** the tribunal should have fixed the date when in its judgement he should have regained employment and calculated the differential wage loss. As it appears to me broad reductions based on percentages are appropriate where it is not possible to engage in a more precise assessment. The defect does not lie in the use of percentages. Percentages based on appropriate data may be an extremely precise means of assessing compensation. The difficulty is that the Tribunal could have been more exact. A more logical approach was available to it. The approach of the tribunal does not adequately explain why 30% was an appropriate figure.

15. The Respondents sought to argue that the Tribunal was not bound to follow the approach in **Royston**. They pointed out that percentage reductions are used (though not invariably) by tribunals when making **Polkey** deductions. As I have noted however the fact that percentage reductions are recognised as appropriate in some circumstances and are used in other connections in employment law does not mean that they are appropriate in this case. I acknowledge that there may be cases where the facts are so uncertain that a percentage reduction may be applied. I do not consider this is such a case.

16. In remitting this aspect of the case back to the Tribunal I acknowledge that I have proceeded on the basis that there is sufficient evidence before the Tribunal and sufficient expertise in the Tribunal membership to follow the approach in **Gardiner-Hill** and **Royston**. Ostensibly it would appear that the Tribunal has the wherewithal to make a suitable judgement. It is a matter for the tribunal how it approaches matters but the Tribunal may consider that the following issues arise. The Tribunal appears to accept that the Claimant was entitled to seek employment in his specialist field to begin with. But for how long was it reasonable for him to

do so? Would he have gained employment outside his specialist field? If so when would that have been likely to occur? Would it have occurred before he gained employment with SAMH? Would the rate of remuneration be equivalent to that gained at SAMH? What relevance does his failure to retain employment at SAMH have for the assessment of compensation? Does his failure to seek training or perform voluntary work have any relevance if he would have gained employment without retraining? I note that the Respondents in their submissions refer to evidence that the Claimant was unwilling to travel or relocate. What if anything does the Tribunal make of that?

17. Were I confident that the approach urged on me by the Claimant would make no difference to the outcome, different considerations would arise. But I am not sure that approaching matters in the way desiderated by **Gardiner-Hill** would necessarily yield a figure equivalent to the application of a reduction of 30%.

18. I accept therefore that the Tribunal erred in law in failing to follow the principle enunciated in Royston and exemplified in **Savage** and **Gardiner-Hill.** In finding that he should have looked for work outside his specialist area the Tribunal covered the first step identified in **Gardner-Hill**. But it should then have sought to work out the consequences of that conclusion. Although the cases above ask the tribunal to identify the "date" upon which he would have found employment, the tribunal should not strive for a false appearance of precision. The tribunal is entitled to use its judgement and fix a suitable point in time for the purpose of the calculation. In performing this exercise, it should be recalled that the burden of proof is on the Respondents. It was for the Respondents to satisfy the tribunal that the Claimant's steps were unreasonable. In the absence of satisfactory evidence, the claimant should no doubt get the benefit of the doubt. After making suitable findings the tribunal should then assess the differential loss.

Ground 2 – Period of Loss

19. After his unfair dismissal the Claimant was unemployed for a period of time. He was then employed with Webhelp. The Claimant did not find it congenial employment. This employment only lasted for a short period and the Tribunal as it was entitled to do, do not appear to have regarded this employment as significant to the assessment of compensation. He was then unemployed for over a year. He then gained employment with SAMH. He earned less with SAMH than he did with the Respondents. The tribunal determined that he was entitled to be paid the difference between his previous earnings and his earnings at SAMH. But he did not remain with SAMH. He was released after his probationary period. SAMH were not satisfied with his performance. The tribunal decided that the termination of his employment with SAMH also terminated the Respondents' liability to the Claimant.

20. The Claimant submitted that the tribunal erred in terminating his loss of earnings at this point. Even if the Claimant was culpable in some way for SAMH's decision not to offer him permanent employment, that did not elide the Respondents' liability for the difference in wages between his earnings with the Respondents and his earnings with SAMH. It was illogical to sever the respondent's whole liability at this stage. The matter could be tested by asking what the position would have been had his probationary period been successful and had he entered permanent employment. In that situation the Claimant would still have been earning less than he earned with the Respondents. The Claimant submitted that the tribunal's finding was perverse. The Claimant also submitted that the tribunal gave no reasons for its finding that the termination of the new employment ended the causal link between the dismissal and the shortfall.

21. The Tribunal examined section **123(6) of the Employment Rights Act 1996** (para 26 at p76 of the Core Bundle) in relation to the cessation of his employment with SAMH. Section 123(6) states -

> **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.**

22. The Claimant submitted that section 123(6) had no application to the circumstances of his departure from SAMH. It was intended to apply to cases where the conduct of a claimant caused or contributed to his dismissal. It was not intended to deal with conduct after dismissal. The Claimant submitted that the termination was unrelated to the claimant's dismissal by the respondent.

23. The failure to secure a permanent contract after the Claimant's probationary period was treated as a significant matter by the Tribunal. In paragraph 26 it described the Claimant's failure to secure a contract as "breaking the chain of causation". The Tribunal then describes the failure to secure permanent employment as a *novus actus interveniens*. The Tribunal thought that because the Claimant had caused or contributed to his dismissal by SAMH this should break the "chain" of losses that stretched back to his unfair dismissal. The Tribunal does not say why. There is a hint that the Tribunal took the view that he was to blame for the failure to secure permanent employment and that this entitled it to break off the Respondents' liability. This emerges from the Tribunal's reference s. 123(6) of the 1996 Act. This subsection allows a tribunal to reduce an employee's compensation to the extent that he or she has caused or contributed to his dismissal. It may be that the Tribunal felt that the Claimant was at fault or bore responsibility for the failure to secure permanent employment with SAMH and applied the terms of s. 123(6).

24. The Respondent recognised that s. 123(6) has no application to the circumstances in which his employment at SAMH came to an end and suggested that the Tribunal had made a typographical error and had meant s. 123(1). But I consider I must take the judgement as it stands. The Tribunal was not entitled to apply the terms of s. 123(6) to the termination of his employment with SAMH. S. 123(6) is intended to recognise that an employee may be partially to blame for the dismissal that gives rise to the claim. It has no application to the circumstances in which subsequent employments come to an end and may not be used to restrict the quantum of loss.

25. I accept that the Respondent was not responsible for the failure of the Claimant to secure permanent employment with SAMH. I accept that the Tribunal was entitled to deduct the earnings he would have otherwise made with SAMH had he continued in their employment from the quantum of loss. But what of the differential between his earnings with SAMH and his employment with the Respondent? The Tribunal decided it too should come to an end at this point. It does not seem to me self-evident that his failure to secure permanent employment could sever the causal link with the continuing loss arising from his original dismissal. There is no explanation from the Tribunal of what it considered the failure to secure permanent employment was a novus actus interveniens for the purpose of the differential loss.

26. The Tribunal's approach can be tested by asking what the position would have been if he had successfully completed his probationary period and continued to work for SAMH? In that situation the Respondents would remain liable for the difference in remuneration. That being so, it can be seen that there is no connection between his failure to secure employment and the differential loss. It does not appear to me that his failure to successfully complete the probationary period can of itself justify the Tribunal's decision. I should not be taken however to say that nothing could terminate that loss and that it should therefore accrue to retirement.

Plainly other factors might entitle the Tribunal to terminate or reduce the Respondent's liability. In my opinion this matter requires to be returned to the Tribunal for their consideration.

Ground 4 – Pension

27. At paragraph 27 the Tribunal explains that it was not disposed to award pension loss to retirement. It decided that the period of pension loss should mirror the period of wage loss. The Claimant submitted that if I was disposed to reject the Tribunal's reasons for ending wage loss at the end of his employment with SAMH, then by extension I could not be satisfied that pension loss should end at the same point. The Claimant pointed out that the Tribunal had held that there was a

> **"relatively small likelihood of the claimant enjoying a similar [final salary] scheme in any employment he secures in the future".**

28. In other words, any pension loss was likely to be a continuing loss. The Tribunal held that

> **"it was considered to be just and equitable to calculate pension loss with regard to the same period in respect of which wage loss was calculated" (paragraph 37).**

29. I consider that in light of my finding in connection with wage loss it would be appropriate for the Tribunal to reappraise what was just and equitable in connection with pension loss. It may be that it will wish to reconsider whether the end of the Claimant's probation with SAMH is an appropriate point at which to terminate the Respondent's liability for pension loss. The Respondent placed before me a variety of considerations that supported the Tribunal's choice of the end of his probation with SAMH. I accept that there are weighty arguments in support of the Respondent's position. I cannot be confident however that the Tribunal's decision to terminate pension loss at the same point as it terminated wage loss does

not infer a connection between these two heads of loss. If the Tribunal were to take a different position on the appropriate date for ending wage loss it may be that this would have ramifications for its view of pension loss. In this situation I consider that it would be appropriate for the Tribunal to have an opportunity to review its decision on pension loss.

Cross Appeal

30. The Respondent cross appealed. He submitted that the Tribunal had erred as follows. First, the correct accrual rate for the period 1 October 2017 – 30 October 2017 was 1/115th, not 1/80th. Second, the correct gross annual salary for the period 1 April 2015 – 31 March 2016 was £25,091.29 and from 1 April 2016 – 30 October 2017 was £30,479. As a result, the Respondent submitted the pension loss award was therefore incorrectly calculated since an accrual rate of 1/80th and a salary of £35,479 was used for the whole period. The Claimant did not seek to dispute the Respondent's submissions save to submit that the Tribunal calculated pension loss on a basis agreed between the parties and on figures agreed between the parties (para 37, p81-82 of the bundle).

31. Mr Stubbs, counsel for the Respondent, vigorously contested the contention that the figures and methodology employed by the Tribunal were a matter of agreement. Mr Edwards, counsel for the Claimant did not appear at the Tribunal. In that situation his submission that the figures had been agreed was not based on personal knowledge of proceedings at the Tribunal. There is no record of an agreement. The terms of the Judgement do not enable me to determine whether the Tribunal was working from agreed figures. Mr Stubbs accepted that the parties agreed to use the figures in the actuarial report but that was the extent of matters.

32. This is an unfortunate disagreement. I consider it unlikely that the figures used by the Tribunal were agreed. It would appear that varying submissions were made on quantum. Mr

Edwards does not suggest that the corrections proffered by Mr Stubbs are erroneous merely that they had been agreed and were not liable to challenge. I have come to the view that I should in this circumstance uphold the cross appeal and remit the matter to the Tribunal to consider the position of new.

Interest

33. It was agreed between parties that the Tribunal had erred in its treatment of interest. The Tribunal failed to apply interest to the award to injury to feelings. In this connection I am satisfied that the Tribunal erred as follows. Interest ought to have been awarded for four years at eight percent per year (31 March 2015 to 28 March 2019). Interest on the award of £3800 amounts to £1216. In addition, no award was made for loss of statutory right. The schedule of loss claimed £350 for that loss (p121 of the bundle). Interest on that amounts to £56 (two years at eight percent per year). In total, an additional £1622 ought to be awarded (£1216 + £350 + £56).

Conclusion

34. I shall quash the finding that compensation be reduced by 30% for failure to mitigate loss, and remit to the to the Tribunal to make a finding as to the period of loss of earnings and to recalculate the compensatory award. I shall further remit to the Tribunal to make a finding as to the period of loss of pension and if so advised to recalculate the compensatory award accordingly. I shall find that the claimant is entitled to £1216 in respect of interest on compensation for injury to feelings and £406 in respect of compensation for loss of statutory

rights and interest thereon. I shall grant the Respondent's cross-appeal and remit to the Tribunal to recalculate compensation as it sees fit.