A1/2002/1795

Neutral Citation Number: [2003] EWCA Civ 380
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
AN EMPLOYMENT APPEAL TRIBUNAL
(HIS HONOUR JUDGE LEVY QC)

Royal Courts of Justice
Strand
London, WC2

Thursday, 27th February 2003

B E F O R E:

LORD JUSTICE PETER GIBSON

LORD JUSTICE CARNWATH

MR JUSTICE BLACKBURNE

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BENTWOOD BROS (MANCHESTER) LTD

Claimant/Appellant

-v-

MRS B E SHEPHERD

Defendant/Respondent

- - - - - - -

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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MR R WHITE (instructed by Wadesons) appeared on behalf of the Appellant.
MR C JEANS QC (instructed by Denton Wilde Sapte) appeared on behalf of the Respondent.

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J U D G M E N T
(As Approved by the Court)

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Right

Thursday, 27th February 2003

J U D G M E N T

1. LORD JUSTICE PETER GIBSON: The respondent, Mrs Barbara Shepherd, was dismissed by her employer, the appellant, Bentwood Brothers Manufacturers Ltd ("Bentwood"), on 8th December 1999 on the ground of redundancy. Bentwood is a member of a group of companies which design and manufacture clothing, including clothing for Marks & Spencer. She had been employed as a sales executive at one of its factories for nearly six years at a basic annual salary of £44,125 and was a member of Bentwood's pension scheme. As the Employment Tribunal was to find, she was in an important management position and was a high performer. When dismissed she was pregnant, her child being born on 17th December 1999. She presented an originating application to an Employment Tribunal on 6th March 2000. She complained of unfair dismissal and sex discrimination. After a hearing before the Tribunal at Liverpool to determine the issue of liability, the Tribunal by a decision sent to the parties on 7th November 2000 found that she was selected for redundancy because she was pregnant. Although Bentwood purported to undertake a process of applying selection criteria, the criteria were found to be intrinsically defective and unfairly applied; the exercise was not undertaken in good faith but was cobbled together in an attempt to provide an apparent justification for dismissing her. The Tribunal accordingly found that Bentwood had been guilty of unfair dismissal and sex discrimination. There has been no appeal from that decision.

2. There was a remedies hearing on 13th December 2000. She was then only 35 years old. The Tribunal awarded her £190,863.21 in compensation plus £7,157.38 interest. Among the items making up the compensation were a sum of a little over £100,000 for two and a half years' future loss of earnings and a sum of £62,969.10 for 10 years' future pension loss. For the accelerated payment the Tribunal deducted 5% from the total for future loss of £165,798.76, that is to say £8,289.95. The Tribunal also awarded interest on gross compensation, although they had said that tax and National Insurance Contributions were to be deducted from the gross sum.

3. Bentwood appealed against that award on a number of grounds including bias. At the preliminary hearing of the appeal one of the grounds was dismissed by the Employment Appeal Tribunal, His Honour Judge Altman presiding, but the appeal on the other grounds of appeal was allowed to go to a full hearing. At that hearing the Employment Appeal Tribunal, His Honour Judge Levy QC presiding, noted that it was agreed that there had been an arithmetical error in the figures. The award should have been of £190,663.21 compensation and £809.06 interest; but subject to that correction the appeal was dismissed.

4. Bentwood then sought permission to appeal to this court. On paper I granted permission on some of the intended grounds of appeal but refused permission on others. Bentwood reviewed its application before me in court, but I refused the application on 7th October 2002.

5. This appeal is therefore confined to three points:

   (1) Was the Tribunal perverse in awarding future pension loss for a period as long as 10 years?

   (2) Did the Tribunal err in law in deducting only five percent for accelerated payment of the future loss?

   (3) Did the Tribunal err in law in awarding interest on gross compensation?

   (1) Pension Loss

6. The Tribunal in their decision record that Bentwood conceded that Mrs Shepherd had done all she could to mitigate her loss. It was accepted that all the factual evidence that she provided was correct. She provided a schedule of loss in which she had stated that she had applied for 50 jobs since her dismissal but had only been offered one job for a fixed term of three months which had been extended for a further three months at a salary one-third below that which she received from Bentwood and which carried no pension. The Tribunal noted that she had made real efforts to obtain work and granted her 10 years future pension loss because the Tribunal believed it unlikely that she would find pensionable employment again.

7. No evidence was given by Bentwood at the remedies hearing.

8. Mr Robin White for Bentwood contrasted the period for the future loss of earnings, two and a half years, with the period for the future loss of pension, 10 years, and submitted that this part of the award had no basis in the evidence before the Tribunal, was not explained by the Tribunal, offended good sense and was perverse. He

asked how it could be said that if the lost job could be replaced in two and a half years that would be without pension provision ever again; alternatively how could seven and a half years further pension loss be an appropriate award? He submitted that the Tribunal had failed to explain its reasoning. It is, of course, trite law that the Tribunal, whilst not having to produce some elaborate product of refined draftsmanship, must nevertheless explain to the parties why they have won or lost.

9. Mr Christopher Jeans QC for Mrs Shepherd supported the Tribunal's conclusion. He pointed out that the Tribunal had to do the best they could with the uncontradicted material produced by Mrs Shepherd. The Tribunal would use their industrial experience and take account of their findings and their impression of Mrs Shepherd. He also reminded us that awards for future loss are necessarily broad assessments and incapable of precision.

10. In considering whether or not the Tribunal has been perverse in their award of 10 years pension payments, I bear in mind that there are many statements in the authorities on the narrow circumstances in which it would be proper for an appellate body to interfere with the assessment of damages by a tribunal. We were referred in particular to Gbaja-Biamila v DHL Ltd [2000] ICR 730 at page 742 paragraph 36 where Lindsay J, the then President of the Employment Appeal Tribunal, said this:

> "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] I.C.R 864, 872. That is not to say that the employment tribunal's sovereignty as to facts is here in question. Only if, firstly, 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) 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 *Steward v Cleveland Guest (Engineering) Ltd*. [1996] ICR 535, 541."

11. This court, like the Appeal Tribunal, will interfere with such assessments with reluctance, given that the Tribunal as the industrial jury can be expected to make broad brush assessments which reflect the Tribunal's local knowledge and experience.

12. I own to a feeling of some surprise that the Tribunal have found that Mrs Shepherd, who from a fairly youthful age has held down a responsible and well-remunerated position for a number of years, should receive two and a half years loss of earnings but 10 years loss of pension, and in particular I am surprised by the Tribunal's finding that she would never obtain pensionable employment again. Mrs Shepherd was, of course, working in the textile industry, and it is notorious that that industry has been in decline for a number of years. However, the Tribunal had to do what it could with the evidence put before it. It is significant that Bentwood chose not to put in any evidence or challenge the facts presented by Mrs Shepherd. The Tribunal had the evidence which she gave of the difficulties which she had encountered when trying to find a job, that is to say she had applied for 50 jobs but had only obtained a short fixed term contract. She had in her schedule drawn attention to the fact that the textile industry is a tight-knit industry, and that as soon as the circumstances of her dismissal and subsequent tribunal claim had become known to prospective employers, they did not wish to continue their interest in her. The Tribunal Chairman, when invited to provide notes of evidence, had said that no evidence on oath was taken and had referred to the parties' schedules of loss on which the representatives of the parties had made submissions. The Tribunal Chairman had added:

> "The findings as to pension loss were made in the light of the evidence that the applicant had only been able to find one job in a year and that a temporary job without a pension."

13. Mr White suggested that it was significant that the Chairman had not referred to the Tribunal's knowledge of local conditions or to any special factors which the Tribunal may properly have taken into account in arriving at their conclusion. But, in my judgment, it goes without saying that a tribunal will make use of their knowledge of local conditions and will reach their assessment in the light of what they know. There was some evidence before the Tribunal from which they were able properly in my judgment to reach the conclusion which they did on this point. It is only a rare case when perversity can be established. In the particular circumstances, given Mrs Shepherd's evidence in the form of the schedule of loss, which was not criticised, and the absence of

evidence from Bentwood, I cannot go so far as to say that this Tribunal's decision on pension law was perverse. Accordingly I would dismiss the appeal on that point.

(2) Accelerated Receipt

14. The Tribunal have recognised that the factor of accelerated payment should be taken into account, but they did not explain why they chose to deduct the figure of 5% of the total compensation as a single deduction for future loss, notwithstanding that such loss covered two and a half years future earnings and 10 years pension payments. Mr White submits that the Tribunal has misunderstood and misapplied the conventional 5% rate for deduction for future loss. That, he says, is plainly an annual rate. Using actuarial tables, he argues that for a payment for a period of two and a half years the appropriate deduction at 5% per annum would be about 9%, and for a payment for a period of ten years the deduction would be 20.9%. This, he tells us, produces a total discount for accelerated receipt which differs from that which was awarded by the Tribunal by about £14,000.

15. Mr Jeans takes two points in response. First, he submits that there is no obligation on the Tribunal to make any discount for accelerated receipt, and he referred to the decision of the Appeal Tribunal in Les Ambassadeurs Club v Bainda [1982] IRLR 5 at paragraph 13. In that case the applicant had succeeded in a claim for unfair dismissal -- the compensatory award was assessed on the basis of two years loss of earnings -- but the applicant was held to have been 70% to blame and the compensation was reduced accordingly to about £3,000. The Appeal Tribunal held that they should not interfere with the Tribunal's award, which made no discount for accelerated payment. Neill J giving the judgment of the Appeal Tribunal said that in a case such as that before the Appeal Tribunal it was important that the calculation of compensation should be kept simple, that the figures should be looked at in a broad way and an unnecessary complication should not be introduced. But in so holding the Appeal Tribunal chose not to follow the decision of the National Industrial Relations Court in York Trailer Company Ltd v Sparkes [1973] ICR 518 in which Sir Hugh Griffiths, giving the judgment of that court, said at page 523E:

> "As the employee is having the immediate advantage of the receipt of a sum to make up the deficiency between the first year's trading and his salary as an employee, some allowance has to be made for the accelerated receipt of the capital."

In the York case the period for which the award was made was again two years, and the amount awarded after the allowance was £1,760. I find it difficult to see what in the Les Ambassadeurs case would distinguish it from the York case in any relevant respect.

16. I hesitate to differ from a view expressed by Sir Brian Neill particularly in this field, but for my part, I have no doubt that as a matter of principle the view expressed in the York case is to be preferred. In arriving at the computation which it is proper to require the employer to pay to the employee, it cannot be right to ignore the fact that the employee receiving compensation has the benefit of receiving immediately what he would otherwise have to wait to receive in instalments over the period of loss. The accelerated payment can be invested to produce an additional benefit to the employee during that period of loss. The conventional discount of 5% which one finds referred to in the text books, such as Harvey on Industrial Relations and Employment Law, is designed to reflect, as I understand it, the annual yield that would be obtainable on investment of the sum paid, though it is rather higher than the 4.5% figure which, until fairly recently, was applied in personal injuries cases. Now, by statute, that figure has been reduced to 2.5% for such cases. Of course, if the amounts are very small, tribunals may be excused from introducing this complication; but in principle tribunals ought not to ignore the fact of accelerated receipt. They may take it into account in more than one way. The conventional way in which accelerated receipt is recognised in ordinary civil cases in the courts is through the multiplier to be applied to the multiplicand.

17. Second, Mr Jeans drew attention to the fact that the Tribunal had only awarded 10 years loss of pension to Mrs Shepherd, even though they thought she would not obtain pensionable employment again. She might be expected to have 25 or 30 more years of employment until she reached retirement age. He submitted that, therefore, the Tribunal had already built into the award a substantial discount. If there was some indication that the Tribunal had taken that into account, I would find very considerable force in Mr Jeans' submission that this court should not interfere with the assessment by the Tribunal. However, I can see no indication at all that the Tribunal considered that in awarding 10 years loss of pension payments they were taking account of the accelerated payment. On the contrary, it seems plain to me that what the Tribunal did was to accept the figure put forward on behalf of Mrs Shepherd that she should receive compensation for the loss of 10 years pension payments, and all that the Tribunal did was to multiply one year's pension payments by ten. The only way in which the accelerated payment was taken into account was by the 5% figure.

18. For the reasons I have given, that seems to me to be a wholly incorrect way of applying a conventional investment rate which is reflected in the discount because it fails to recognise that that rate was intended to be an annual rate. In the circumstances, we are left with the choice of making an assessment ourselves on the basis of the 5% rate which was adopted by the Tribunal, albeit erroneously, or selecting some other rate, or referring the matter back to the Tribunal. I think it is arguable that the 5% rate was on the high side. It is out of line with rates in other areas of the law, and this is a matter which in my judgment ought to be considered again by the same Tribunal.

19. For my part, I would not allow on that remission the Tribunal to reopen the question of the number of years for the assessment of compensation for loss of pension payments. That was not the means by which an accelerated payment was taken into account by the Tribunal. I would therefore remit the question of how to assess the discount for accelerated receipt of two and a half years earnings and 10 years pension payments to the Tribunal to reconsider in the light of our judgments. Having said that, I would hope that the parties would adopt a realistic attitude and consider whether this is not a matter on which they might arrive at some compromise solution rather than add to the costs of what has already been an expensive exercise.

(3) Interest

20. The Tribunal ordered Bentwood to pay compensation in a gross sum, less tax and National Insurance Contributions which were to be deducted from the gross sum. But in calculating the interest due, the interest was stated to be 7% of the gross sum.

21. Mr White submits that that is wrong in principle as it is an award of interest on sums which the employee would not actually receive because of the deduction of tax and National Insurance contributions by the employer.

22. Mr Jeans submits that the award of interest is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, section 2(1) providing that "where an Employment Tribunal makes an award under the relevant legislation, it may include interest on the sums awarded". He submits that the sum awarded was the gross sum; and that, he suggests, is a proper reflection of the fact that tax will be deducted from the amounts awarded and, indeed, from the interest which is payable. He suggests that there are other possible approaches for the award of interest. One such approach, he said, would be to deduct tax and National Insurance Contributions, apply interest and then gross up to reflect the liability of the employee for tax and National Insurance. He argued that because there are such alternative approaches, it could not be said that the Tribunal's approach was not erroneous in law.

23. I agree with Mr White. The function of an award of interest is to compensate the party to whom it is awarded for being kept out of the money which he should have had in his pocket at an earlier date. PAYE Income Tax and National Insurance Contributions would have been deducted from the periodic payments of remuneration paid to Mrs Shepherd. She would not have received the gross sums, and for my part I can see no logical basis why interest should be awarded on what Mrs Shepherd would never have received. To my mind the Tribunal were wrong on this point.

24. Mr Jeans further submits that the approach of the Appeal Tribunal on this should be adopted. They said that, given the correction on interest which had been made by that Tribunal, it would be disproportionate for there to be a further inquiry into a further reduction. So the Appeal Tribunal did not in fact grapple with whether or not interest should have been paid on a gross or net sum. If this ground of appeal had been the only ground of appeal, I doubt if I would have allowed it to go ahead to this court so small is the amount involved. However, as it is one of several matters which have been properly raised before this court, I see no reason why this court should not deal with it.

25. For the reasons which I have given, I think that the Tribunal were wrong in awarding interest on the gross sum and I would allow the appeal on this point.

26. LORD JUSTICE CARNWATH: I agree that the appeal should be allowed on the first and second points. On the second point I would add that it is particularly unfortunate that the employers did not give more help to the Tribunal, since it was clearly on the cards that there would be an award relating to a claim for loss of over 10 years. It is not satisfactory, in my view, to expect the appeal court at either level to deal with the matter on the basis of extracts from actuarial tables, such as the Ogden Tables or their successors, which were not produced at the first hearing. However, I agree this point raises an issue of principle, on which the Tribunal were in error.

27. On the third point, for my part I am not convinced that the Tribunal were wrong to treat the grossed-up award as the "award" for the purposes of the regulations on interest. Although, of course, the claimant only receives the net sum, that is because, as I understand it, she is liable for tax on the whole of the award so far as it represents compensation for loss of taxable emoluments, and, as a matter of machinery, the tax is deducted by the employer and paid to the Revenue. Indeed, as I understand it, the interest itself is in theory subject to tax, although in practice it may be that the Revenue does not seek to recover it. However, the amount involved is not more than about £200, and, not surprisingly, the parties have not addressed detailed argument upon what is at the most a very incidental part of the case. We also had conflicting accounts of the established practice in relation to interest.

28. In the circumstances and given the overall imprecision of the assessment of compensation in cases of this kind, I would have been inclined to agree with the Tribunal that this is not a matter which would be appropriate for the court to intervene. However, I understand that I am in a minority on this point, and therefore I do not find it necessary to express a concluded view.

29. MR JUSTICE BLACKBURNE: I also agree with Peter Gibson LJ. I say a brief word on the third point, since that is a point on which my Lords, I think, differ.

30. The award on which the interest is calculated is in my judgment the net sum which the applicant employee is to be paid by the respondent employer. The purpose of the interest award, which under the regulations is discretionary, is to compensate the employer for having been kept out of pocket. The employee is not kept out of pocket to the extent of amounts which the employer is obliged by the award to deduct before payment.

31. In this case the award was net of tax and National Insurance. It follows that interest was not payable on that part of the overall sum at which the Tribunal arrived.

Order: Appeal allowed. The employer should pay 50% of the costs of the appeal. We refuse permission to appeal to the House of Lords.