Appeal No. UKEAT/0397/09/SM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 17 June 2010
Judgment handed down on 16 July 2010

Before

HIS HONOUR JUDGE PETER CLARK

MR M CLANCY

MR M WORTHINGTON

YORKSHIRE HOUSING LTD — APPELLANT

MRS B J CUERDEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DAVID CUNNINGTON (of Counsel) Instructed by: Qdos Consulting Ltd Qdos Court Rossendale Road Earl Shilton LE9 7LY
For the Respondent	MR DAVID JONES (of Counsel) Instructed by: Messrs Spencer Davies Solicitors 6 Station Road Grassington Skipton BD23 5NQ

SUMMARY

DISABILITY DISCRIMINATION

Reasonable adjustments

Compensation

Failure to make reasonable adjustments. Utility of making relevant adjustment properly considered by Employment Tribunal.

Compensation under DDA. Treatment of incidence of taxation; applying the **Gourley** principle. Application of personal tax rates in calculating grossed up award.

HIS HONOUR JUDGE PETER CLARK

1. The parties in this matter before the Leeds Employment Tribunal were Mrs Cuerden, Claimant and Yorkshire Housing Ltd, Respondent. This is an appeal by the Respondent against parts of the reserved judgment, promulgated with reasons on 22 June 2009, of an Employment Tribunal chaired by Employment Judge Keevash, upholding the Claimant's complaint of breach of contract, unfair dismissal and disability discrimination and awarding the Claimant compensation totalling £173,972.08, of which £168,547.53 related to the finding of disability discrimination (the DDA claim). The appeal raises 3 points. First, liability under the DDA claim and, in relation to DDA remedy, questions of pension loss and the incidence of taxation. We shall deal with each head of appeal in turn.

DDA liability

2. The relevant factual background is as follows. The Claimant commenced employment with the Respondent's predecessor as a Customer Services Officer on 15 December 2003. She resigned from her employment by letter dated 5 December 2007 in circumstances which, the Employment Tribunal found, amounted to constructive dismissal (para. 34). She was then disabled within the meaning of s1 DDA; she suffered from a major depressive disorder of moderate to severe variety and panic disorder with agoraphobia in the opinion of Dr Britto, Consultant Psychiatrist who reported in this case. That mental impairment had a substantial adverse effect on her normal day-to-day activities (paras. 40 & 43).

3. The relevant claim was one of failure by the Respondent to make reasonable adjustments. That claim focused on a letter dated 10 October 2007 written to the Claimant by Ms West of the Respondent. The material content of that letter is set out at para. 4.42. The letter was written in response to a suggestion by the Claimant's solicitors dated 2 October (para. 4.39) that a meeting

be arranged (the Claimant then being off sick) with the Respondent's management attended by the Claimant, her counsellor Ms Neligan and the Claimant's solicitor with a view to agreeing a timetable and series of steps to be followed to manage her return to work. Ms West's response was that the Respondent would not agree to attend any meeting at which the Claimant was accompanied by her solicitor; the Respondent's procedures (not unusually, in our experience) provided only for employees to be accompanied by a work colleague or trade union representative. Further, again in accordance with the Respondent's procedures, Ms West indicated that it was for the Claimant to advise the Respondent when she was mentally and physically fit and well to return to work. Only then would the Respondent consider any advice which she had received from her doctor and seek assurances from her counsellor that the Claimant would be able to modify her behaviour towards her co-workers. We interpose that the background to her going off sick with depression related to complaints by employees whom she supervised concerning her management style.

4. The Employment Tribunal found, by reference to the helpful guidance to be found in the Judgment of HHJ Serota QC in **Environment Agency v Rowan** [2008] IRLR 20, para. 27, that the requirements stated by Ms West in her letter of 10 October 2007 amounted to a provision, criterion or practice (PCP); that a comparison should be made with an employee who, like the Claimant, had been absent from work for 7 months, but who did not have a mental impairment, and who was seeking to have a meeting with the employer in order to discuss return to work arrangements; that in making that comparison the Claimant was at a substantial disadvantage, bearing in mind the stress reaction experienced by the Claimant, of which the Respondent was aware, by reason of the content and tone of Ms West's letter; and that in these circumstances a reasonable adjustment by the Respondent, which was very likely to have prevented the adverse effect, would have been to hold a meeting as suggested by the Claimant's solicitor. Instead, the Respondent failed to seek medical advice nor consult with Ms Neligan (whose intervention the

Respondent had funded) with a view to assisting the Claimant in overcoming her condition and returning to work (paras. 50-55).

5. In challenging that liability finding Mr Cunnington who, like Mr Jones, appeared below, submits that the Employment Tribunal failed to consider the utility of the adjustment identified. How, he asks rhetorically, would such a meeting eliminate the comparative disadvantage and allow the Claimant to return to work? Although the Employment Tribunal found that such an outcome was very likely, that conclusion is inadequately reasoned.

6. In support of that submission he relies on my Judgments in **Romec Ltd v Rudham** (UKEAT/0069/07/DA, 13 July 2007); and **Secretary of State for Work & Pensions v Heggie** (UKEAT/0482/07/JOJ, 6 June 2008) and that of HHJ McMullen QC in **NCH Scotland v McHugh** (UKEATS/0010/06/MT, 15 December 2006), none of which were cited to the Employment Tribunal below. Those cases do no more than apply the principles formulated by Judge Serota prior to **Rowan** in **Smiths Detection – Watford Ltd v Berriman** (UKEAT/0712/04/CK, 9 August 2005), to the facts of the individual cases. Thus, in **Romec**, we held (paras. 38-39) that the Employment Tribunal had failed to ask themselves the utility question; would the adjustment found have enabled the Claimant to return to full-time duties? We took a similar view in **Heggie** (para. 38) – see also **McHugh**, paras. 40-45.

7. However, in the present case Mr Jones has taken us carefully through the factual history leading up to the exchange of correspondence in October 2007. We need not repeat it here. Suffice it to say that we accept his submission that not only did this Employment Tribunal ask itself the utility question; they answered it, we think permissibly, on the facts as found. Taken in the context of the overall factual context set out in the Employment Tribunal's reasons their

finding at para. 54 is, in our judgment, '**Meek**-compliant'. Accordingly, the liability appeal fails.

Pension loss

8. The Employment Tribunal deal with this head of compensation for disability discrimination at paras. 72-79. Mr Cunnington takes no objection to the methodology used by the Employment Tribunal in arriving at a pension loss figure of £59,263.82; rather, he takes what may be described as a fairness point.

9. True it is, as Mr Cunnington submits, that the agreed list of issues before the Employment Tribunal at the start of the hearing deals with questions of liability only. The case was originally listed for 3 days and the Employment Tribunal Notice of Hearing dated 20 October 2008 states:

> **"3 days have been allocated for the hearing, including remedy if appropriate."**

10. In the event, the 3 days allocated to the case, 17-19 December 2008 proved insufficient to dispose of the matter. The case was adjourned to a further 3 days on 24-26 March 2009. During the intervening period the Claimant served on the Respondent a detailed Schedule of Loss. Material to this part of the appeal is the calculation of pension loss.

11. Mr Cunnington complains that on the last day of hearing before the Employment Tribunal he contended that since no directions had been given that the issue of remedy was to be considered at the hearing (overlooking, it seems to us, the Notice of Hearing) and no evidence taken by the Employment Tribunal as to pension loss, that this head of loss should not then be determined by the Employment Tribunal. Further, Mr Cunnington submits that the

eventual finding as to the quantum of pension loss greatly exceeded that contended for in the Claimant's Schedule, put at £19,794.78.

12. Mr Jones counters that, following the original Notice of Hearing, the Respondent was on notice of the way in which the compensation claim, including pension loss, was put on the Claimant's behalf. Both counsel were given the opportunity to address the issue in closing submissions. On the face of the Schedule the calculation leading to a figure of £19,794.78 was expressly described as,

> **"…the very least sum to reflect any pension loss and is included for illustrative purposes. The actual loss is significantly greater and is dependant upon the Tribunal's evaluation of the Claimant's future pension earning capacity."**

13. That final observation goes to the heart of Mr Cunnington's complaint, directed to para. 77, where the Employment Tribunal say this:

> **"The Claimant's Schedule of Loss was based on an assumption that she would obtain alternative employment with membership of a final salary pension scheme. However the Tribunal accepted Mr Jones' submission that this was highly unlikely because many such schemes were closed to new entrants and many employers were even looking to change arrangements for existing members. The Tribunal found on the balance of probabilities the Claimant would find alternative employment in which there was no pension scheme and no prospect of one….."**

14. The Claimant was aged 47 at the date of dismissal. Pension loss was therefore calculated on a full loss basis to retirement at age 60.

15. We do not accept that there was any unfairness to the Respondent in this aspect of the case. They were aware of the way in which the pension loss claim was put from the Claimant's Schedule. The case was listed for 3 days to include remedy if appropriate. In fact it ran to 6 days and, applying the principle of proportionality, the Employment Tribunal was entitled to

hear the parties on remedy at the end of the hearing when reserving their judgment. The Employment Tribunal received submissions, as para. 77 shows. The Claimant could give no useful evidence on her prospects of pensionable employment and it appears that the Respondent called no evidence on the point. In any event, it seems to us that, on the submissions before them, it was for the Employment Tribunal to use their collective experience of the current industrial landscape in order to reach a judgment on the prospects of the Claimant securing pensionable employment in the future. We are quite unable to say that their conclusion, albeit generous to the Claimant, was an impermissible finding.

16. In these circumstances we also reject this second head of appeal.

Taxation

17. The point here concerns the Employment Tribunal's approach to grossing up the award to take account of the incidence of taxation, the 'reverse-**Gourley** principle' (see **British Transport Commission v Gourley** [1956] AC 185).

18. At para. 80 the Employment Tribunal decide that the whole of the award of compensation with the exception of the breach of contract (unrelated to the termination of employment) was taxable above £30,000 and that the balance, £84,394.52 had to be grossed up by a factor of 40 per cent (the higher rate of tax). The 'grossed up' element in the overall award is £56,263.01.

19. Mr Cunnington submits that the Employment Tribunal's approach to taxation contains two errors of law. First, certain elements of the award are not subject to taxation and in those respects grossing up is inappropriate; secondly, no allowance is made for the Claimant's taxable income below the higher rate.

20. Before turning to the substantive argument we should first deal with Mr Jones' complaint that these are points not argued below and therefore not matters which we should consider for the first time on appeal, relying on the **Kumchyk** principle; see **Kumchyk v Derby City Council** [1978] ICR 1116. He also points out that the Respondent has paid the full award of compensation ordered by the Employment Tribunal prior to launching this appeal and further did not seek a review.

21. These are powerful objections; however Mr Cunnington has persuaded us that we should entertain this ground of appeal (which was, technically, ordered to proceed to this full hearing by a division presided over by HHJ Reid sitting on a preliminary hearing held on 8 January 2010; there has been no appeal against that order). First, we note that no grossing up element is contended for in the Claimant's Schedule of Loss; secondly, the point was plainly raised by Mr Jones in submissions below; Mr Cunnington took the position that grossing up was correct in principle on heads of loss taxable in the Claimant's hands. True it is that no detailed submissions were apparently advanced on the heads of loss which were and were not taxable, but a party is entitled to rely on the Employment Tribunal to apply the law correctly (whilst sympathising with an Employment Tribunal which does not receive full assistance from counsel appearing before them). We think that some assistance may be derived from the decision of the EAT (Hooper J presiding) in **Williams v Ferrosan** [2004] IRLR 607, where an Employment Judge's approach to the taxation of future loss of earnings, based on a mistaken view of the law by the Judge and both parties' representatives, was corrected on appeal following an unsuccessful review application before the Employment Tribunal. As to the absence of a review application in the present case, we accept Mr Cunnington's submission that the points here raised are essentially questions of law more properly to be dealt with on appeal, particularly where there are other grounds of appeal raised. Finally, there is no evidence before

us that the Claimant has materially altered her position following receipt of the compensation payment and before she had notice of this appeal.

22. As to the substantive issues before us on taxation, in summary Mr Cunnington submits that the following heads of award by the Employment Tribunal are not taxable in the Claimant's hands and are therefore not subject to 'grossing up'; injury to feelings; general damages for personal injury, pension loss and interest ordered.

23. We have been referred to the provisions of the **Income Tax (Earnings and Pensions) Act 2003** (ITEPA).

24. The general rule that termination payments are taxable, subject to the £30,000 threshold (s403), is subject to this exception under s406:

> **"This chapter does not apply to a payment or other benefit provided –**
>
> **(a)….**
>
> **(b) on account of injury to or disability of, an employee."**

25. Thus the question is whether the awards made by the Employment Tribunal in respect of injury to feelings and personal injury (respectively £9,000 and £7,500, together with interest calculated at £498.16) were received on account of injury or disability and were payments received by the Claimant directly or indirectly in consequence of or otherwise in connection with the termination of the Claimant's employment.

26. Mr Cunnington confidently asserted in his written argument (para. 42) that it is well established law that awards granted for personal injury and injury to feelings do not fall within the scope of Part 6 Chapter 3 or within s62 ITEPA. With equal confidence Mr Jones submitted

that such awards were taxable on the basis that those payments were not made on account of the Claimant's disability. The motive for payment by the Respondent was not the Claimant's disability but the order of the Employment Tribunal (**Hamer v Hasted** [1995] STC 766).

27. Further, he has taken us to the HMRC website where it is stated, by reference to the Special Commissioners' decision in **Walker v Adams** [2003] STC 269, that awards for injury to feelings in respect of pre-termination discrimination are not to be treated as taxable employment income, whereas awards arising on termination of employment are taxable under s401.

28. In our judgment the question as to whether the s406 exemption applies is rendered moot by the fact that the awards for both personal (psychiatric) injury and injury to feelings relate back to the tortious act found by the Employment Tribunal, namely the Respondent's failure to make reasonable adjustments in October 2007 which pre-dated termination of the employment on 5 December 2007.

29. Accordingly, on the basis of Mr Jones' concession that pre-termination awards under these 2 heads are not taxable it follows that those awards with interest totalling £16,998.16 are not subject to 'grossing up'. In arriving at that conclusion we note that counsel did not find it necessary to refer us to the controversial observations by HHJ McMullen QC in **Orthet Ltd v Vince Cain** [2004] IRLR 857 (see the commentary in *Harvey on Industrial Relations and Employment Law*, vol 1, section B11, para. 241) that awards for injury to feelings are non-taxable. On the facts and argument in this case it is unnecessary to embark on an analysis of that reasoning. We accept the submission of Mr Cunnington that the Employment Tribunal was wrong in law in subjecting that part of the award for unlawful discrimination, totalling £16,998.16, to grossing up.

30. Mr Cunnington further argues that the award for pension loss, £59,263.82, is also not subject to grossing up. He submits that the Respondent's pension scheme is a tax exempt scheme as defined by s407(2)(a) ITEPA and that s407(1)(a) renders a payment or other benefit provided under a tax-exempt pension scheme non-taxable. That, he submits, covers this head of compensation awarded by the Employment Tribunal.

31. We disagree. We consider that Mr Jones is correct in submitting that s407(1)(a) is concerned with payments to a beneficiary out of a pension scheme (for example, the tax free lump sum paid to pensioners on retirement): it is not directed to a tribunal award of compensation in respect of loss of pension rights on termination of employment, as in the present case. Accordingly, we reject this part of the Respondent's appeal.

32. That leaves finally the Employment Tribunal's assessment of the appropriate marginal rate of tax for the purposes of grossing up. They took a flat rate of 40 per cent (higher rate tax). However, as Mr Jones accepts, that fails to take into account the Claimant's personal allowance and standard rate of tax for the year in which she received the award of compensation (2009-10). Thus, on the Employment Tribunal's calculation the relevant part of the award of £84,394.52 (which must now be reduced by £16,998.16 to reflect our earlier ruling; £67,396.36) must be subject to the Claimant's correct taxation position, based on the material before the Employment Tribunal. We note from para. 69 of the reasons that the Claimant was in receipt of incapacity benefit of £50, which benefit we are told is taxable. 52 weeks x £50 = £2,600. We are also told that the personal allowance was then £6,475. Thus the correct calculation, in our judgment is as follows. The first £3,875 of the total taxable sum of £67,396.36 is free of tax; the next band (£37,400) is taxable at 20 per cent; the balance at 40 per cent.

33. Thus, by our calculation, the sum of £67,396.36 would be subject to nil tax on the first £3,875; £7,480 on the next £37,400 and £10,448.54 (at 40 per cent) on the balance of £26,121.36, making a total of £17,928.54.

34. It follows that we shall substitute that figure for the Employment Tribunal's straight 40 per cent uplift (£56,263.01), thereby reducing the Employment Tribunal's total award by £38,334.46. The appeal is allowed to that extent only. The parties have liberty to apply so far as our calculations are concerned within 21 days of the promulgation of this Judgment.