Appeal No. UKEAT/0534/08/CEA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 21 July 2009

Before

THE HONOURABLE MR JUSTICE BEAN

MR B R GIBBS

MR T MOTTURE

HIBISCUS HOUSING ASSOCIATION LIMITED — APPELLANT

MS J MCINTOSH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR B COVE (Consultant) Wolverhampton Voluntary Sector Council 16 Temple Street Wolverhampton WV2 4AN
For the Respondent	MR J DAVIES (of Counsel) Instructed by: Messrs Thompsons Solicitors City Gate East Tollhouse Hill Nottingham NG1 5FS

SUMMARY

UNFAIR DISMISSAL: Compensation

Unfair dismissal compensatory award: whether Claimant mitigated her loss.

THE HONOURABLE MR JUSTICE BEAN

1. Jennifer McIntosh was employed as a support worker at a sheltered housing complex operated by Hibiscus Housing Association when on 12 July 2007 she was dismissed. An Employment Tribunal chaired by Employment Judge Beard determined in April 2008 that that dismissal had been unfair, but that Ms McIntosh's conduct had contributed to it to the extent of 25 per cent. They therefore directed that a remedy hearing should take place.

2. By this time Ms McIntosh had obtained new employment with Wolverhampton City Council which began on 9 April 2008. At the remedy hearing the Employment Tribunal, composed as before, made a basic award of £1,708.70, an award for loss of statutory rights of £250 and a compensatory award of £7,392.90; that being 30 weeks loss of earnings representing the period from her dismissal to her obtaining the job with Wolverhampton City Council at a rate of £246.43 per week. They then made the 25 per cent deduction foreshadowed in their liability decision, giving a total of £7,013.70. No issue arises before us as to the basic award, or the loss of statutory rights award. The employers appeal against the compensatory award of 30 weeks loss of earnings. The employee cross-appeals, arguing that that period of time should have been longer.

3. The principles of law applicable to compensatory awards for unfair dismissal, and in particular the issue of mitigation of loss, were not in dispute before us. The leading case is the decision of the Court of Appeal in **Wilding v British Telecommunications plc** [2002] 1 ICR 1079. Potter LJ, as he then was, giving the leading judgment, said at paragraph 37 that:

> **"(i) It was the duty of Mr Wilding [the former employee] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party"**

4. On the issue of the period for which a compensatory award should be allowed this Appeal Tribunal had given guidance in the earlier case of **Savage v Saxena** [1998] ICR 357. The tribunal should identify what steps should have been taken by the employee to mitigate his loss, decide on a date by which such steps would have produced an alternative income, and reduce the amount of compensation by the amount of income which the tribunal considers would and should have been earned thereafter.

5. In their remedy decision the Employment Tribunal, having noted that Ms McIntosh had no prospect of a favourable reference from Hibiscus in the light of the circumstances of her dismissal, went on to set out the relevant history of the matter as follows:

> **"4. The claimant was dismissed on 12 July 2007 within 5 days of that date she had made an application to enrol at university. The claimant told us that the application was made on the basis that she was aware that the university course was in effect only 2 days long and not a full time course. The claimant explained that she had made a conscious decision about wanting to take on the university course but at the same time take on a full time job, knowing that the two could fit around one another.**
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> **4.1 The claimant told us that at that stage she was aware that she would not be able to get a good reference from her former employer. The claimant said that she approached Hays Recruiting agency and Capita. We accept her evidence that she was advised by Hays that she could not expect to get employment in the same type of work (care) without such a reference. However the claimant told us that she engaged in a consistent job search from time to time.**
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> **4.2 We found the claimant's evidence that she engaged in a long and consistent job search from 12 July onwards unconvincing. In particular the claimant gave internally inconsistent evidence as to the way in which that job search was conducted. Further the claimant has provided no documentary evidence of any sort to support her assertion that she was making 3 or 4 job applications a week.**
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> **4.2.1 An example of the inconsistency shown by the claimant in her evidence was where she, in answer to cross-examination said words to this effect 'I was affected mentally and I said to myself what's the point in applying for similar work'. This answer was given when the claimant was being asked about job advertisements that were appearing at the time of her search. In answer to questions from the tribunal however the claimant said that she had started looking for work about a week after her dismissal and she was putting in application for 2 or 3 jobs a week. The claimant further explained that a majority of those applications were for jobs that involved being engaged in care support work.**
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> **4.2.2 In our judgment a further inconsistency then emerged: the claimant also said that after 3 weeks of searching she was consistently getting responses from support/care jobs indicating that she was not going to get such employment. The claimant told us that she needed to seek other jobs because of this and she spoke of applying for telesales and marketing. She had told us that the reason for seeking support/care work was because of the flexibility they allowed. The jobs in telesales and marketing would not necessarily have fitted in terms of flexibility so that the claimant could follow the university course.**
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> **4.3 Those internal inconsistencies in the claimant's evidence were enough to convince us that not to accept the claimant's account that she had been engaged in a detailed and long job search immediately after her dismissal. We were further bolstered in this view by the fact that**

the claimant had applied for a university course within 5 days of end of her employment and was offered a place at university on 31 July.

4.4 The claimant applied to and attended university. We have little doubt she did so in the expectation that it would be a full time course. We do not accept the claimant's evidence that at the time when she made her application she had had sufficient time to research the details of the course. Nor, at the time of her application, would there necessarily be sufficient information available to her from a prospectus for her to have a clear understanding that in practical terms that what was advertised as a full time course would only take up two days of her time. We do accept that that is a state of affairs that would become very apparent to her when she first attended university.

4.4.1 It is at that stage we are convinced that the claimant did begin a significant job search. We conclude that the claimant saw that she would be able to combine the course with a job in order to boost her income. The claimant having made this discovery then looked for work over the ensuing months.

4.5 The claimant was successful in obtaining employment on 10 April 2008. That was with Wolverhampton City Council working as a residential night social care worker. We are convinced that at that stage the claimant came to the conclusion that she would not seek further work. That was a position where she could occasionally earn overtime and it was suitable fit in with her university course. We are convinced that the claimant in fact settled to work in that job for the remainder of her university course.

5. Has the respondent demonstrated to us that the claimant has failed to reasonably mitigate her loss? The test that we must apply is this: are the efforts that the claimant has made reasonable, if the claimant was not likely to receive compensation would she have made similar efforts of a similar sort, if so then she has acted reasonably. That does not mean that the tribunal is entitled to impose its view of what is reasonable but it instead must look at the circumstances that existed at the time as they were known to the claimant. We must ask: were the decisions that the claimant made reasonable or unreasonable in light of all the circumstances?

5.1 We have come to the conclusion that the claimant's decision to seek university place, in circumstances where: she knew she could only expect a poor reference (if any at all); she had been told by those upon whose advice she could be expected to act that where such a reference (or no reference) would prevent her getting work in the field in which she had previously been employed; it was not unreasonable for the claimant to apply to university in order to improve her prospect of employment.

5.2 We also have to recognise that the duty to mitigate loss is a continuing obligation. That continuing obligation we believe was met when the claimant realised that she need only work 2 days at university and she began seeking work in order to fill the additional time.

5.3 Having come to that conclusion we then deal with the claimant accepting employment with Wolverhampton Council. We have come to the conclusion that a settled decision on the part of the claimant to remain in that employment cannot be laid at the respondent's door. That decision is entirely the claimant's; therefore it breaks the chain of causation for loss."

6. We deal first with the employer's appeal. Before turning to the substance of that appeal we observe that Mr Cove, for the employers, put in a note taken by a clerk in the employee of Wolverhampton Voluntary Sector Council providing advice to the employers of the cross-examination of Ms McIntosh at the remedy hearing. It is said, and we have no reason to doubt it, that its contents have been agreed by the Claimant's solicitors. Be that as it may, it is clearly not verbatim and the procedure of this Appeal Tribunal lays down that even where parties are in agreement as to what was said by a witness below, the proper practice is for the matter to be

referred to the Employment Judge. There is no need to ask the Employment Judge to provide his or her notes from scratch where the parties are able to produce a draft note, but nevertheless Employment Judge Beard should have been asked whether he approved the draft note of the cross-examination or had anything to add to, subtract from, or amend in that note.

7. Moreover, there is no point in obtaining what used to be called chairman's notes, whether by this procedure or from scratch, unless the notes are going to demonstrate that there is no evidence to support a particular finding of fact by the Tribunal. In the present case, in our view, the notes do not contradict the decision of the Employment Tribunal; nor do they demonstrate that there was *no* evidence to support any finding of fact.

8. We turn now to the substance of the appeal. Mr Cove's principal point is what he alleges is inconsistency between the findings of the Tribunal in paragraphs 4.2 to 4.3 (which were undoubtedly critical of the Claimant) and their conclusion. He submits that in paragraphs 4.2 to 4.3 the Tribunal made clear findings rejecting the Claimant's evidence that she was making three or four job applications per week. The Tribunal did not, he submits, make findings that the Claimant was making regular job applications at any point prior to her successful application to Wolverhampton City Council in April 2008.

9. We are unable to construe the passages which we have set out from the Tribunal's decision in that way. We consider that in paragraph 4.4.1 and paragraph 5.2 the Employment Tribunal made findings that, beginning with the time when the Claimant started her university course (which is not spelt out in the decision but is agreed on all sides to be at the usual time of late September), the Claimant did make a significant job search and looked for work over the ensuing months, and did so to an extent which met her continuing obligation to mitigate her loss. Whether that consisted of three job applications a week, or more or less, they do not say,

but they evidently thought that the applications were sufficiently regular and sufficiently energetic to meet the Claimant's obligations.

10. As to the first two months, the university summer vacation period, the Tribunal have found in paragraph 4.1 that the Claimant, who had just been dismissed on the grounds of misconduct, approached two well-known recruiting agencies and put herself on their books. We do not think that the Tribunal were obliged to spell out to a greater extent than they did that the Claimant could not have been expected immediately to obtain work. Firstly, she had just been unfairly dismissed on the grounds of misconduct. Secondly, she had, as the Tribunal found, been advised by one of the recruiting agencies that she could not expect to get employment in the same type of work, which is support to the caring professions, without a favourable reference.

11. Thirdly, as this Tribunal has emphasised, for example, in **Orthet Ltd v Vince-Cain** [2005] ICR 374, paragraph 49, it is not reasonable to expect a dismissed employee to lower her sights immediately in the kind of job for which she applies. A dismissed manager, for example, may be able to work as a cleaner, but it is not reasonable to expect him or her to do so immediately. It may become reasonable to expect the dismissed employee to accept a lesser paid job with lesser status after a period of time, but that is a matter of fact and degree for the Tribunal.

12. As to whether the application to go on a university course was itself something which disqualified the Claimant from a compensatory award, this again was a question of fact for the Employment Tribunal. It is neither the law that, where an employee seeks higher or further education following a dismissal, this of itself constitutes a failure to mitigate, nor that such a

course once applied for may necessarily be followed to a conclusion however many years distant at the employer's expense.

13. Here in paragraph 5.1 the tribunal found as a fact that it was not unreasonable for the Claimant to apply to university in order to improve her prospect of employment, especially given the circumstances of her dismissal and her inability to obtain a favourable reference from her immediately previous employer. That is a conclusion with which we cannot interfere on appeal.

14. In short, we do not consider that there is any inconsistency in the findings of fact which we have set out, made by the tribunal, nor any *lacuna* in their reasoning and the employer's appeal therefore fails.

15. In his cross-appeal, Mr Davies, for Ms McIntosh, focuses on paragraph 5.3 of the decision, where the Tribunal says that the Claimant's acceptance of employment with Wolverhampton Council:

> **"... cannot be laid at the respondent's door. That decision is entirely the claimant's; therefore it breaks the chain of causation for loss."**

Mr Davies is right, in our view, to submit that the question is not whether it broke the chain of causation of loss; it clearly did not. The circumstances in which Ms McIntosh found herself were caused by her dismissal. The question which the Tribunal should have asked is whether once the Claimant accepted employment with Wolverhampton she was failing to take reasonable steps to mitigate her loss.

16. Mr Davies submits that the Tribunal might have found, for example, that there were longer hours of work available to the Claimant, had she been willing to work them. But they did

not; and there is no evidence that longer hours were available at that stage. It might in theory have been open to the Tribunal to find that a better paid or more senior job was available as from 10 April 2008 but there is certainly no evidence of that; and it would perhaps have been surprising given the position of weakness from which the Claimant was applying.

17. The schedule of loss before the Tribunal in its final version claimed partial loss of earnings to the end of that university year, that is the summer vacation of 2008, and then for a further 35 weeks representing the 2008-2009 university year. Mr Davies has told us that he accepted before the Tribunal, and accepts before us, that the Claimant had enhanced earning capacity in the university vacations.

18. We have come to the conclusion, which indeed Mr Cove did not oppose in the concluding phases of oral argument, that the finding at the end of paragraph 5.3 is unsound and the case should be remitted to the Employment Tribunal, composed so far as practicable as before, to consider whether the Claimant was failing to mitigate her loss as from April 2008; or if not, from what later date the Claimant was failing to mitigate her loss so that compensation should cease. The Tribunal might, for example, come to the conclusion that by the time of the beginning of the university year in late September 2008 the Claimant had the advantage of an employment record of five months which she could have used as a platform for obtaining better paid work or longer hours. We do not have the factual information on which to make that assessment and it is in any event a matter of fact for the Tribunal and not for us.

19. We only add this: the amounts at stake on the cross-appeal are not colossal, and it may be that the parties will be able to come to terms on this issue. But if not, as we have said, the case is remitted for what should be a short further hearing before the Employment Tribunal to determine the mitigation issue.

20. The appeal is dismissed and the cross-appeal is allowed to the extent which we have indicated. We are very grateful to both Mr Davies and Mr Cove for their helpful submissions.