SECOND DIVISION, INNER HOUSE, COURT OF SESSION

XA166/02

Lord Justice Clerk

Lord MacLean

Lord Hardie

OPINION OF THE COURT

delivered by THE LORD JUSTICE CLERK

in

APPEAL

from a decision of the Employment Appeal Tribunal dated 3 December 2002

by

DIGNITY FUNERALS LIMITED

Appellant;

against

WILLIAM DOUGLAS BRUCE

Respondent:

_____

Act: Truscott QC; DLA

Alt: Napier QC; Russell Jones and Walker

14 October 2004

Introduction

[1] This is an appeal from a decision of the Employment Appeal Tribunal dated 3 December 2002. The case arises from the respondent's summary dismissal by the appellant on the ground of gross misconduct. By Decision dated 18 March 2002 the Employment Tribunal determined that the dismissal had been unfair. It awarded compensation of £9,370, being (i) a basic award of £720, (ii) a compensatory award of £8,400 and (iii) an award for loss of employment rights of £250. The appeal relates to the amount of the compensatory award.

The decision of the Employment Tribunal

[2] Before the Tribunal, the amount, if any, of the compensatory award turned on a question as to the cause of the respondent's unfitness to work in the period after the dismissal. The Tribunal found that on 5 December 2000 the appellant began its investigation into certain complaints that had been made against the respondent. On 8 December 2000 the respondent was signed off work with reactive depression. On 21 December 2000 the appellant sent him a letter of suspension. On 5 January 2001 the appellant held a disciplinary interview. On 8 January 2001 the diagnosis of reactive depression was confirmed. On 10 January 2001 the appellant reconvened its disciplinary hearing. On 18 January 2001 the appellant summarily dismissed the respondent.

[3] The Tribunal hearing ended on 12 December 2001. It was not disputed that the respondent had not worked from the date of dismissal to that date; that he had been unfit for work throughout that period, and that at that date he remained unfit.

[4] The appellant led no evidence relating to the cause of the respondent's unfitness for work. On that question there was only the respondent's own evidence and a report from his doctor dated 24 August 2001. The respondent spoke to his condition of depression. He said that he believed that once the Tribunal proceedings were over he would start to improve and that he hoped to be able to start work once the decision of the Tribunal was issued. The medical report disclosed that the appellant had had a history of depression five years earlier. The respondent's doctor described the treatment that the respondent had received for depression from 8 December 2000 up to 20 August 2001 and said that at 20 August 2001 he was "feeling much brighter as he felt he could see a resolution to his work problems."

[5] In deciding on the compensatory award, the Tribunal had to apply section 123(1) of the Employment Rights Act 1996 which, so far as material to this appeal, provides as follows:

> " ... 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."

The Tribunal therefore had to consider two main questions; namely, whether the respondent's dismissal was one of the causes of his wage loss in the period after January 2001; and, if it was, what compensatory award would be just and equitable in all the circumstances. The former question was one of fact. The latter was one of discretion. This is what the Tribunal decided:

> "*Compensatory Award*: the applicant has not worked since the time of his dismissal and stated in evidence that this was due partly to his medical condition - reactive depression - and partly due to the reason for his dismissal. A Tribunal, in calculating the compensatory award, usually firstly considers the loss of the applicant in the period from the date of dismissal to the date of the hearing. In this case, it was submitted by the respondent's representative that the applicant had suffered no loss as he had not been fit for work. It was submitted by the applicant's representative however that the cause of the applicant's ill-health was a matter that could be considered by this Tribunal. We were referred to the case of *The Governors of Hanson School v Mr C S Edwards*, an Employment Appeal Tribunal decision delivered on the 11th January 2001. That case concerned the dismissal of an employee on grounds of capability, where it was alleged the employers had caused the illness leading to the dismissal on those grounds.
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> We distinguished the present case from the one to which we were referred on the

grounds that this was not a case where the applicant alleged the employer's conduct led to his depression, which in turn led to his dismissal. This is a case where the employee claims he suffered ill heath as a result of the unfair dismissal. We referred to the case of *Devine v Designer Flowers Wholesale Florist Sundries Ltd*, [1993] IRLR 517. In that case an employee's dismissal caused her to suffer anxiety and depression which rendered her unfit for work. The EAT stated that the fact that the employee's incapacity was caused by the unfair dismissal did not necessarily mean that she was entitled to compensation for the whole period of the incapacity. It is for the Tribunal to decide how far an employee's losses were attributable to action taken by the employer and to arrive at a sum that is just and equitable. The Tribunal may want to consider, for example, whether the illness would have manifested itself in any event. It is also important to ascertain the extent to which the illness was actually caused by the dismissal, as opposed to the manner in which the dismissal was carried out, it being well established that the manner of a dismissal is not a proper subject of compensation.

The applicant had produced a medical report from his Doctor dated 24th August 2001: that report recorded - in summary - that it was felt the applicant was suffering from reactive depression on the 8th January 2001 and he was prescribed antidepressants. He had suffered similar symptoms of depression five years previously. He was reviewed on the 26th March as his asthma had been exacerbated. He was admitted to hospital on the 3rd August with chest pains. He was finally reviewed in August 2001 feeling much brighter. We noted however that the applicant's evidence had been that he did not consider he would be fit to return to work until the decision of this Tribunal was issued. We noted we were not provided with a medical report for the period August to December.

We took all of the above points into account and decided that it would not be just and equitable to award the applicant compensation for the period from the date of dismissal to the date of this hearing. We did however decide that the applicant should receive an award of six months future loss: we were of the opinion that the applicant will be fit to return to work and we expect that he will be able to find alternative work within this period taking into account his skills and experience. The applicant earned £1400 net per month and is accordingly awarded £8400 ... " (pp. 19-20).

The decision of the EAT

[6] The respondent appealed to the EAT on the grounds that the Tribunal had erred in law in failing to award him a sum equivalent to four weeks' wages by way of notice entitlement, and in failing to make a compensatory award for the period from the expiry of the notice period to the date of the Tribunal hearing.

[7] Before the EAT, the solicitor for the respondent submitted that, whatever the decision on the compensatory award, the respondent was entitled to four weeks' wages in lieu of notice. He submitted that the reasoning of the Tribunal on the question of the compensatory award was defective because the Tribunal had not paid proper attention to the medical evidence and had in any event given no reasons for its determination that it was just and equitable not to base the compensatory award on the respondent's wage loss for the whole period between the date of dismissal and the date of the hearing. He further submitted that its determination was inconsistent with the fact that it had made an award for future loss, which had to be attributable to the continuing presence of the illness on which the claim was founded.

[8] The solicitor for the present appellant contested the appeal on the notice pay point "only on the basis that it had not been pleaded." He submitted that the Tribunal had properly assessed the question of the compensatory award. It had taken into account the relevant authorities and had decided on the whole evidence that the present respondent was not entitled to the whole period against the background of his having had a depressive illness in the past. The solicitor for the appellant accepted, however, that the reasoning of the Tribunal on this point "was lacking any precise terms" (para 5). At the hearing before us, counsel for the appellant withdrew that concession.

[9] The EAT accepted the submissions for the respondent "in their entirety" (para 7). It said no more on the subject of notice pay. On the question of the compensatory award, its reasoning was as follows:

> "We are satisfied that there is inconsistency in the reasoning of the Tribunal as between the award of future loss and the award of only part of the period between the date of dismissal and the date of the hearing. Even if that were not so, the Tribunal has not given any reasons for its declaration that it is just and equitable to limit the award in the way they did. Both parties are entitled to know the basis upon which the Tribunal reaches a decision whether on the merits or on compensation. Here, it is impossible to determine what limited the period in the mind of the Tribunal against a background of a finding in fact that the appellant (*sc* the present respondent) suffers from a reactive depressive illness and probably has done so from the date of his initial suspension and, certainly, from the date of dismissal. There is therefore a causal connection between the dismissal and the illness which bases a claim for compensation" (para 8).

On the amount of the award, the EAT said

> "Parties were agreed the relevant sum, if we were in favour of the appellant, was £15,050. We will accordingly allow the appeal and increase the award made by that sum" (para 10).

Conclusions

[10] For reasons that we shall give, we are of the opinion that the decision of the EAT should be set aside; but we have also to consider whether the decision of the Tribunal was correct (*Scottish Midland Co-operative Soc Ltd v Cullion*, [1997] IRLR 261, at para 10; *Scottish Daily Record and Sunday Mail (1986) Ltd v Laird*, 1996 SC 401, at p 408). In this case it is convenient first to examine the decision of the Tribunal.

The decision of the Tribunal

[11] A compensatory award depends on proof of loss (*Leonard v Strathclyde Buses Ltd*, 1999 SC 57). Therefore any application of the just and equitable test (*supra*) in a case such as this must be underpinned by findings in fact establishing that the loss was caused to a material extent by the dismissal.

[12] If the dismissal was not a cause of the respondent's wage loss, no award was due. If it was the sole cause, the full award would normally be appropriate. But in this case the respondent's depressive state had manifested itself before the dismissal and it appears that there may have been other unrelated causes of his unfitness for work thereafter. It was therefore possible that after 18 January 2001 the dismissal was merely one of two or more concurrent causes of his wage loss. It was also possible that the dismissal had been a cause of the unfitness for work for

only part of that period. In such circumstances, a just and equitable award, in our opinion, would in all likelihood be of less than the full amount of the wage loss.

[13] The Tribunal therefore had to decide whether the depression in the period after the dismissal was caused to any material extent by the dismissal itself; whether, if so, it had continued to be so caused for all or part of the period up to the hearing; and, if it was still so caused at the date of the hearing, for how long it would continue to be so caused. It was essential that the Tribunal should make clear-cut findings on these questions before any question of a compensatory award could arise (cf *Devine v Designer Flowers etc Ltd*, [1993] IRLR 517 (EAT), Lord Coulsfield at paras 2-3).

[14] The Tribunal made no compensatory award for the period from the dismissal to the hearing, but made a compensatory award for a period of six months beyond that. At first sight, this is a strange result; but the appellant did not challenge that part of the award before the EAT and in this court counsel for the appellant expressly declined to do so. In our view, therefore, that part of the award must stand.

[15] We therefore turn to the question whether the Tribunal's decision to make no compensatory award for the period to the date of the hearing was well founded. In our view, it was not. That decision was made without a proper basis of findings in fact and without proper and adequate reasons. The Tribunal made no finding as to whether the dismissal was a cause of the respondent's unfitness at all. Although its decision appears to us to imply that it was, it gave no satisfactory reason for the conclusion that there should be no compensatory award for the period from the dismissal to the hearing. We agree with the EAT on this point.

The decision of the EAT

The compensatory award

[16] Counsel for the appellant submitted that the respondent had no foundation in his notice of appeal to the EAT for challenging the decision on the compensatory award on the ground of perversity as explained in *Meek* v *Birmingham City Council*, ([1987] IRLR 250). We do not agree. The question is essentially one of fair notice. In our view, the notice of appeal gave reasonable notice that the respondent was attacking the Tribunal's decision on the point on the ground of intelligibility. The factual basis for the decision, and the intelligibility of the reasons for it, were points for which the respondent's solicitor could reasonably have been expected to prepare.

[17] Counsel for the appellant further submitted that the EAT erred in saying that the appellant's solicitor agreed that if the appeal succeeded the award should be increased by £15,050. He told us on instructions that the appellant's solicitor had conceded only that if the EAT were to hold the respondent entitled to a compensatory award for wage loss during the period in question, the total amount of the respondent's loss for that period was correctly calculated at £15,050.

[18] The EAT, on the other hand, concluded that if the appeal succeeded on the question of the compensatory award, that was the sum by which the award should be increased. That conclusion seems to us to have proceeded on a misunderstanding, since the appellant's case before the Tribunal, reflected in its answer to the notice of appeal, raised the question of there being a pre-existing cause of the respondent's depression and sought to minimise the amount of the award on a just and equitable basis. In the result the EAT, having rightly held that the Tribunal's decision on compensatory award was unsound, proceeded to increase the award by £15,050. We consider that the EAT ought not to have interpreted the position of the appellant's solicitor as it did. On that view, we consider that it ought to have remitted the case to the same Tribunal to reconsider its decision on the compensatory award for the period 18 January to 12

December 2001 and, in so doing, to make clear and adequate findings in fact and to explain its application of section 123(1) with proper and intelligible reasons. We shall now remit the case for that purpose.

Pay in lieu of notice

[19] Before the EAT, the solicitor for the present appellant submitted that the respondent could not argue the notice pay point because it had no foundation in his notice of appeal. Counsel for the appellant renewed that submission. In our view, it is unsound. Since the respondent's entitlement to pay in lieu was obviously relevant to the calculation of the compensatory award, and since the appellant can scarcely claim to have been at any significant disadvantage in having had to respond to the point, we think that the EAT was right in allowing the respondent to raise it. We infer that the EAT made no further reference to the point because the compensatory award exceeded the amount of the entitlement to pay in lieu.

[20] When the case is remitted to the Tribunal, the amount of the respondent's entitlement to pay in lieu will be relevant to the question of the compensatory award (cf *Hardy v Polk (Leeds) Ltd* [2004] IRLR 420 (EAT)); but of course if the Tribunal makes an award equal to or greater than that amount, the point will again be of no significance.

Interlocutor

[21] We shall allow the appeal, recall the decision of the EAT and remit the case to the same Tribunal for reconsideration, in the light of this Opinion, of its decision on the question of the compensatory award for the period 18 January to 12 December 2001.