

Appeal No. UKEAT/0147/09/MAA

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS



At the Tribunal
On 9 October 2009

Before

HIS HONOUR JUDGE PETER CLARK

MR D CHADWICK

PROFESSOR S R CORBY

NCP SERVICES LTD

APPELLANT

MR G TOPLISS

RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING - ALL PARTIES

APPEARANCES

For the Appellant

**MR O SEGAL
(of Counsel)
Instructed by:
Messrs Collinson Grant Ltd
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Manchester
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For the Respondent

**MR A BERTIN
(Solicitor)
Messrs Employment Relations Solicitors
Yewgate Barn
Old Road Elham
Canterbury
Kent CT4 6UH**

SUMMARY

VICTIMISATION DISCRIMINATION: Whistleblowing
UNFAIR DISMISSAL: Compensation
PRACTICE AND PROCEDURE: Costs

Employment Tribunal entitled to find dismissal was for a s103A reason. The Respondent's Appeal on liability dismissed.

Costs order, in sum of £3,000 in favour of Claimant arguably unreasoned. Appeal against costs order by the Respondent and against quantum of award by Claimant allowed to proceed to full hearing.

Award of compensation for unfair dismissal covered claim for past and future full loss of earnings. However, additional claim for partial continuing future loss arguably not dealt with by Employment Tribunal. That issue to proceed to full hearing on Claimant's cross-appeal.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. The parties to these proceedings before the London (Central) Employment Tribunal were Mr Topliss, Claimant, and NCP Services Ltd, Respondent; we shall so describe them. We have before us, for All Parties Preliminary Hearing, an appeal by the Respondent and a cross-appeal by the Claimant against the judgment of a Tribunal chaired by Employment Judge John Warren promulgated on 27 January 2009. The issues raised in those appeals may be conveniently headed liability, costs and remedy.

Liability

2. The Claimant was employed by the Respondent as National Operations Manager DVLA between January 2006 and his dismissal effective on 31 March 2008. The principal liability issue between the parties concerned the Respondent's reason for that dismissal. It was the Respondent's case that Mr Morgan, a Manager at DVLA, with whom the Respondent had a contract for the removal and scrapping of unlicensed vehicles parked on the public highway, had requested the removal of the Claimant as was provided for in that contract. That was some other substantial reason for dismissal, a potentially fair reason.

3. The Claimant, on the other hand, contended that the reason or principal reason for dismissal was that he was a whistle blower. Specifically, as was conceded by the Respondent, he had made protected disclosures to his then Manager, Mr Cooper, in about March 2007 and to Mr Cooper's successor, Mr Coltman, at an appraisal meeting held on 21 January 2008. The nature of those disclosures was that the Claimant believed that the Respondent was short-changing the DVLA on the scrap metal value of the vehicles seized.

A 4. The Respondent contested that suggestion. Messrs Cooper and Coltman gave evidence
of an unminuted meeting attended by them and Mr Morgan but not the Claimant on
B 14 February 2008 at which Mr Morgan said, in no uncertain terms, that the Claimant had been
very difficult to deal with and if he was not removed from his post, that would have an impact
on the Respondent's ability to secure a two-year extension to the DVLA contract. Thus, said
Mr Cooper, the Respondent was left with no option; the Claimant had to go.

C 5. The Respondent was advised by their solicitors to obtain confirmation of the DVLA's
wishes. What they received was a letter from Mr Morgan which read as follows:

D "In relation to our meeting last week with yourself [Mr Coltman] and Alastair Cooper, I can
confirm that to further improve the efficiency and effectiveness and delivery of NCP
Wheelclamping activity across the piece, we are of the view that a change in NCP Operations
Management would provide a much needed boost.

There are some key decisions to be made in the near future regarding the way this contract
progresses. To that end, a Delivery Focused Manager with the ability to destroy the targets as
opposed to nudging them is needed. Empowered delivery from NCP would therefore be of
huge benefit to the Agency in the next year."

E 6. The Tribunal considered that letter and concluded (reasons paragraph 50) that it did not in
terms say that the DVLA wished the Claimant to be taken off the contract. In these
circumstances, as Mummery LJ made clear in Kuzel V Roche [2008] IRLR 530, paragraphs
F 58-159, it was for the Employment Tribunal to make findings of primary fact on the basis of
direct evidence or by reasonable inferences from the primary facts what was the reason or
principal reason for dismissal. They expressed their reasoned conclusion on that critical issue
at paragraphs 54 to 58 of their reasons. We need not recite them in this judgment.

G 7. In the Respondent's appeal Mr Segal challenges that conclusion. His argument is based
principally on the perversity ground with a subsidiary complaint that the Tribunal's reasons for
their finding as to the reason for dismissal were not Meek-compliant. The question for us at
H this Preliminary Hearing stage is whether those grounds of appeal, or either of them, are

A reasonably arguable at a full hearing. Having carefully considered the way in which the argument has been put by Mr Segal, our answer is no.

B 8. It seems to us that either of the reasons advanced by the parties was open for the Tribunal to accept. The scales were not weighed wholly in favour of the Respondent as Mr Segal has sought to persuade us. On the question as to whether Mr Morgan required the removal of the
C Claimant from the DVLA contract, there was a gap between the account given by Messrs Cooper and Coltman of their unminuted February meeting with Mr Morgan and his subsequent email obtained on the advice of the Respondent's solicitors. Mr Morgan did not give evidence before the Tribunal. The Tribunal, as we read their reasons as a whole, identified that gap and
D were not persuaded that the oral evidence of the meeting in February accurately reflected Mr Morgan's position.

E 9. On the other hand, they noted that the Claimant made his final disclosure to Mr Coltman at their 21 January 2008 appraisal meeting. It must follow that Mr Cooper had not taken action previously on the earlier disclosures. In these circumstances, given the less favourable appraisal on the Claimant in January 2008, compared with appraisals in earlier years, the
F Tribunal were entitled, although not, of course, bound to conclude, that it was the disclosures which formed the principal reason for dismissal. Therefore, it follows that the Respondent's liability appeal is dismissed at this Preliminary Hearing stage.

G **Costs**

H 10. At paragraph 66, the Tribunal considered the Claimant's application for costs. They found that the Respondent had acted unreasonably in some ways in resisting the claim and ordered them to pay a contribution to the Claimant's costs assessed at £3,000. No reasons for that ruling are there given.

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11. Following a **Burns/Barke** question posed by Silber J at paragraph 1 of his Sift order dated 2 April 2009, Judge Warren provided reasons for that determination on the 7 July. We need not set out the reasons set out in the letter of that date.

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12. Mr Segal submits, we think with some force, that the real issue in this case was the reason for dismissal. It mattered because, as we have observed, compensation for a dismissal under Section 103(A) of the **Employment Rights Act** is uncapped whereas the compensation award for what is commonly called "ordinary unfair dismissal" is statutorily limited. In these circumstances, we see considerable force in the submission that it is difficult to tell from the reasons eventually given by Judge Warren precisely what it was about the Respondent's conduct of the case in advancing their own reason for dismissal which was itself unreasonable such as to trigger the jurisdiction to grant costs, which remains a limited order in the Employment Tribunal.

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13. Conversely, Mr Bertin argues, by way of cross-appeal, that if a costs' order was appropriate, no explanation is given as to why the costs should be limited to the arbitrary figure of £3,000; itself unexplained. It is the Claimant's contention that a full costs' award, subject to agreement or assessment, was required. We detect from this a common view between the parties that either the Claimant was entitled to his full costs or none. In these circumstances, we consider that the costs issue, both in the appeal and the cross-appeal, must proceed to a full hearing.

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Remedy

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14. For the purpose of assessing the Claimant's loss in the event of success on liability, the Claimant's solicitors commissioned a report from Mr Andrew Nicoll, an employment
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A consultant. We have read that report. Based on that report, the Claimant's solicitors prepared a Schedule of Loss which was put before the Employment Tribunal. The report, we are told by Mr Bertin, was agreed. It falls into three sections so far as loss of earnings is concerned.

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- (1) Loss to date of the hearing.
 - (2) Future loss at the Claimant's full pre-dismissal net level of earnings with the Respondent.
 - (3) Continuing partial future loss after the Complainant could be expected to secure alternative employment albeit at a lower salary than that enjoyed with the Respondent.
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15. In dealing with those heads of loss, the Tribunal assess loss under stage 1 at paragraph 62 of their reasons. 23 weeks loss at a net weekly rate of £892.51 from dismissal to the date of hearing in December 2008 totalled £20,527.73. As to future loss, the Tribunal deal with it in one sentence at paragraph 65:

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"Doing the best we can we make an award for future loss which includes the healthcare element [valued at £1,000 per annum in the Schedule of Loss] we make an award of £35,700."

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16. Looking at Mr Nicoll's agreed report, he opined that the Claimant, who was unemployed at the date of the Tribunal hearing in December 2008, would remain out of work for a total period of 15 months i.e. 65 weeks. 23 weeks loss was awarded for past loss, stage 1, and we calculate that the remaining 42 weeks of that 65-week period would, at the rate of £892.51 a week, produce a figure of £37,485.42 which has been rounded up by the Tribunal to £37,700 to take into account the healthcare premiums. That covers stage 2 of the claim.

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17. However, nothing has been awarded at stage 3, the future partial loss claim which was quantified, based on the report of Mr Nicoll, at £56,182.08 for a further three-year period and thereafter until retirement age in the sum of a further £174,448.32, a total of £230,630.08.

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A 18. The difficulty we have is that Tribunal provides no reasons for effectively rejecting the
whole of the stage 3 claim for future partial loss. That lacuna necessarily requires that this part
of the cross-appeal also proceeds to a full hearing. We do not think it appropriate given the
B guidance of Dyson LJ in the case of Barke to return the question of the third stage loss to this
Tribunal for further reasons under the Burns/Barke Procedure. Such a course may be
perceived on the part of the Claimant as giving the Tribunal an opportunity to fill a gap with
C ex-post facto reasoning rather than simply articulating those reasons which were inchoate at the
time their judgment was delivered.

D 19. In these circumstances, the appeals on costs and remedy only will proceed to a full
hearing and we will now hear from the advocates on directions for that full hearing.