



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Lennon Knight

Respondent: Yakira Group Limited

HELD AT: Liverpool

ON: 6 June 2017
30 June 2017
(In Chambers)

BEFORE: Employment Judge Robinson
Mr J Edwards
Mr W K Partington

REPRESENTATION:

Claimant: Mr D Flood, Counsel
Respondents: Mr D Tatton-Brown, QC

JUDGMENT

The judgment of the Tribunal is that the claimant shall receive two more years losses in terms of net wages from October 2017 to 22nd October 2019 for the reasons set out below. That amount shall be grossed up as with previous sums ordered to be paid. The loss referred to is the future loss of salary only.

No further order or direction need be made. However if the parties wish to come before the Tribunal to deal with the exact calculation then application to list a one day hearing can be made by either party.

REASONS

1. This claim of Mrs Lennon Knight has had an unfortunate history because the remedy for Mrs Lennon Knight has taken some time to deal with to her satisfaction.

2. This will be the third judgment on remedy. At the liability hearing we found that Mrs Lennon Knight had been constructively unfairly dismissed and the reason for that dismissal was that she had made a protected disclosure.
3. We have had two judgments from the Employment Appeal Tribunal, first from His Honour Judge Hand QC on 12th December 2014 and secondly from His Honour Judge Peter Clark on 16th November 2016.
4. We understand that the claimant has already received a substantial sum of money from the respondents (over £300,000). She now seeks to increase that award on the basis of a lifetime loss relating to her reduced earning capacity.
5. The background to this case is well known to both parties and it is not our intention to set out all the details or facts as they are contained in previous judgments of this Tribunal and also in the EAT judgments.
6. We are unanimous however in concluding that the claimant should not receive a lifetime loss and we set out below why we believe that should be the case.
7. In order to assist the parties to understand our reasoning, it is worth including in our judgment a view of Mrs Lennon-Knight as a claimant in this litigation.
8. When we came to decide liability much of our sympathy was with Mrs Lennon Knight because of the way that she had been treated by certain directors of the Yakira Group. That treatment was connected to the making of a protected disclosure.
9. When we came to consider the claimant's evidence we were satisfied that she was an honest historian. It was noteworthy that Mr Carberry was the main witness for the respondent but neither Mr Conway nor Mr Thorne, who were the two people criticised most readily by the claimant during the liability hearing, did not attend to give their evidence. Accordingly the weight of evidence as to what and why certain events had occurred favoured the claimant.
10. Our feelings about the claimant and the quality of her evidence have, during the remedy hearings, changed in the respects set out below.
11. We have said on a number of occasions that the claimant is a hard working, professional woman with great skill, determination and intelligence. The events of those six months which she describes as the "worst six months of her life" have had a telling effect on her working life. We accept the medical evidence which records that the claimant has a moderately severe level of depression, that she is still on anti-depressant medication and that she will need more CBT therapy. We also accept that, on the balance of probabilities, she will not work as a Financial Director again. But it is recorded by both psychiatrists that the ending of this litigation itself will assist the claimant in her recovery. Indeed Professor Green was of the view that once the claimant was back in employment there would be a "significant improvement in mood within 3 months". That is what we have witnessed during the

course of this litigation. At the liability hearing the claimant was tense and nervous. At this hearing the claimant was confident.

12. Throughout these hearings, however, when giving evidence, the claimant has been more than capable of competently fielding questions from Ms Alistari at the original hearing and also from Silk at this hearing and at a previous hearing.

13. She talks quickly and accurately and is able to put her point of view across with great skill and has not been flustered by the Tribunal process.

14 His Honour Judge Hand made it clear that we had not given an adequate explanation as to why we limited the period of future loss for twelve months. We endeavoured to put that right in our second judgment on remedy but His Honour Judge Peter Clark considers we have still not perfected our reasoning in relation to remedy. However we have not changed our view as to why we have limited the period of compensation and resisted Mr. Flood's eloquent arguments that this is a lifetime loss case. Indeed, having heard the updated evidence of the claimant, we are even more convinced that future loss should be limited as we have ordered.

15 At paragraph 12 of the judgment HHJ Clark says "this is ...plainly a lifetime loss case" and then at paragraph 13 points makes it clear that we must set out how the continuing loss is likely to be calculated taking into account the claimant's future career progression. It is that last point which is the nub of this remedy hearing. There are cogent reasons, which we set out below, as to why this is not a lifetime loss case. That evidence expands the issue of future loss beyond the narrow issue of whether or not the claimant will work again as a Financial Director. The claimant says she will not and the medical evidence suggests she will not. However that is not the end of the story. We have tried to balance both side's arguments in order to come to a conclusion which reflects the situation as presented to us. We note that there is no reference to compensation being made on a just and equitable basis in S.124 of the Equality Act 2010 but there must be a sense of proportion when calculating this compensatory award.

12. The two most recent psychiatrist's reports both suggest that the claimant may never work as a Financial Director again. We accept that medical evidence.

13. What we do not accept is that the claimant is not going to earn substantial sums of money in the 13 to 15 or so years left of her career. Quite the contrary, with her abilities, ambition, drive and commitment she is more likely than not to match her earnings of 4 years ago within the next two years if she so wishes. However much more importantly, the claimant has made some lifestyle choices over the last 4 years. Choices which she was considering before she became unhappy at Yakira The reasons for so concluding are set out below and include some of the findings that we have made already in our previous judgments.

14. Initially, when she left Yakira, the claimant applied for many jobs, enrolled with six recruitment agencies and was looking to earn the same sort of money as she had earned with Yakira group and she was also looking for a similar job.

15. She decided, and this was a decision she made herself, to work for the Chester Tourist Board as a Financial Manager only. When we made our first decision we took that into account when dealing with her actual losses to the date of the first remedy hearing. Within a very short period of time she was asked by her employer at the Tourist Board to take on further and more demanding duties. This is indicative of the way the claimant shows, very quickly once in employment, that she can do the job well and is valued.

16. She showed similar acumen when putting the respondent's finances in order between August 2009 to January 2013.

17. She was so good at her job with Yakira that when she proffered her resignation in 2012 the respondents held out the carrot of offering her the role of Managing Director of another company in the Yakira group, called Kyle Lewis London Limited, in order that she could increase that franchise's profitability for her own benefit. She was quick to withdraw her resignation. She was more than content to stay with the respondent.

18. At the first remedy hearing the only concern that the claimant had was that she was not able to obtain employment at the level that she had had. She had been looking for seven months for the type of job that paid her in the region of a gross annual income to £85,000 to £90,000. This did not smack of someone who was fearful of the responsibility that comes with such a well remunerated job.

19. We accept that she wished to keep her options open at that point in 2014 to enable her to think through whether she wanted such a demanding job as the one she had had with the respondent.

20. The reason that she said she did not want to take on the more demanding job with Chester Tourism Board was that "at that moment in time" she did not want to have that high level of intensity in her daily life. That comment in quotation marks is telling. She told us that "all thoughts of my future career are parked until such time as I am well again". There was no evidence from her that she would not pick up an exacting role with an employer at some time in the future. The claimant, in her own words, said that, prior to taking the job with Chester Tourism Board she had struggled to find work at the same level as her position in Yakira. That was her complaint. Not that she would not want to work as a Financial Director.

21 The claimant was upset to find that having had 30 years of consecutive work (with a short break for the birth of her son) she was having difficulty finding work. This is a woman, who over the course of her working life, has, with each role, advanced her career one job at a time. We noted at the first remedy that she was having some difficulties finding a job because Yakira had not given her a reference. That impediment was put right by the respondent. She felt there was a question

mark over her reputation, she lacked trust and confidence in potential employers because of the events over six months at the Yakira Group and she also worried about potential imprisonment for fraud with regard to the pension issue she had raised at the Yakira Group.

22 However the claimant has always wanted to run her own business. She has now set up a consultancy company called Aspire with a view to using it to obtain new employment, She has found it difficult to obtain capital to support her business ventures. She has successfully been accredited as a Business Growth Coach and Mentor and she was accredited by the European Regional Development Fund for an accelerator scheme. All done since her employment at Yakira. She considers that if she applied for a job as a Financial Controller, with less responsibility than a Financial Director, it would be inevitable that if she did the job well, and she knows she would, she would be asked to step up to become a Financial Director within a short period and it is that she now says she does not want to do. She told us that companies, when considering the employment of a financial controller saw placing an employee into that role as a way of checking whether he or she will fit into the business and ultimately become a financial director. By recruiting in that way it protected companies against making an expensive mistake by employing someone straight into the role of financial director and getting it wrong. Her worry was that if she took up a role as a financial controller the pressures of a financial director would eventually be foisted upon her. There is no logic to that argument as there would be nothing to stop the claimant refusing any advancement and simply staying as a financial controller if that was what she wished. That is a failure to mitigate her loss as she could potentially earn more as a financial controller than she is earning now.

23 She now works in a small private hospital on the Wirral as Financial Manager and her own business, Aspire, she tells us, is making a loss.

24 The claimant suggests that she is delighted to have been given the role at Spire Murreyfield and is doing it well (again as one would expect with the claimant's employment record) but she is cautious because she believes that leaves her vulnerable to having the "rug pulled from under her".

25 We have not had an updated psychiatric report presented to us since Dr Faith's report of 24th September 2015 but we reconsidered, for this judgment, all the reports. In Professor Green's report of 26th November 2013, we note that the prognosis was that he believed that if the claimant found other remunerative employment and have the treatment suggested there would be a significant improvement in her mood within three months of starting.

26 We accept that he also went on to say that the claimant would be more vulnerable to relapses of a depressive mood should she be subject to undue work stress, unpleasant life events and/or psychiatric traumas. We have heard nothing from the claimant about suffering unpleasant life events since we last heard evidence from her. We have assumed, and it is a fair assumption to make, that the claimant is no more vulnerable to instance of suffering such events as any other person.

27 We then turned to the claimant's CV and note that she is proud that she commenced her career as an Office Junior and progressed to Group Finance Director and that she also held positions of Managing Director in a business in which she invested cash for equity in addition to funds from Venture capitalists and banks.

28 The claimant's CV and her employment history is set out in the next paragraph. The claimant sort to deny that the CV was correct indeed she said that her CV was just full of lies. We did not believe her.

29 In her CV she says this:-

"My husband has taken a promotion working away from home so I need to work closer to home and family. After many years with long journeys to and from work in very senior positions I am keen to be closer to home and family. I am expecting to earn less and take a less senior role in order to meet this important personal requirement. Again this is a willingly accepted work/life balance, it is far more important to me right now. However I am still very hungry for an exciting challenge and hard work is part of my make up".

30 That was the CV she put together when she resigned from the Yakira Group. However the claimant wanted to change the way she was working before the events that led her to resign.

31 In the original documentation and again in the bundle for this hearing there is an email from Daniel Thorne of the Yakira Group which the claimant acknowledges is a response to her proposed resignation in 2012. In it he says:

"I do understand and have always known that you have always felt a hunger to manage and own, or part own, a business".

32 When the claimant was offered by Mr Conway a "proper chair which sat outside the Yakira Group" - i.e. the Kyle Lewis Jewellery business - she jumped at the chance and stayed with the Yakira Group from March 2012.

33 One of the reasons for the claimant wanting to get away from the pressures of a Financial Director are set out at page 315 of the bundle for this hearing. Dr Faith, the Consultant Psychiatrist engaged by the respondent, noted that "previously the claimant had been recorded as suffering from tiredness and difficulty concentrating at work in January 2011".

34 When cross examined the claimant suggested, unconvincingly, that that was a misprint and that Dr Faith had not accurately recorded her GP notes.

35 Dr Faith goes on to say that those symptoms did not appear to be problematic to an extent that it affected her ability to work.

36 Dr Faith continues in this way. She does not believe that the symptoms described by the claimant's GP in 2011 represent the start of a continuum of psychological order but rather the symptoms in 2012 "arose denovo" in relation to the problems at work that we described in our original decision on liability.

37 Dr Faith goes on to say that the claimant's mental disorders do impair her ability to work "to some extent" and that in a situation of higher demand the adverse affect would be substantially greater.

38 The claimant denied that that was the situation in 2011 when cross examined by Mr Hatton Brown. She also described the Tribunal's findings made during the second remedy hearing after His Honour Judge Hand's EAT decision as wrong although she has never challenged that finding of fact.

39 The content of paragraph 49 of that judgment was put to her in cross examination where we said:-

"We also noted that the claimant prior to these troubles at the respondent was thinking of setting up her own business and that she also wanted a better work life balance".

40 She denied that the judgment was correct and did not accept that finding of fact by this Tribunal as accurate. When paragraph 53 of that judgment was put to her in cross examination by Mr Hatton Brown she also denied that was accurate.

41 We repeat the words of that paragraph:-

"We also believe that the claimant has taken the opportunity to reconsider her work/life balance as suggested in her CV and employment and retraining herself has been a goal for her for some time".

42 The claimant's response at this latest hearing was that it was a "goal" for her only since termination of her employment with these respondents and not before. The claimant would not accept that finding of fact by this Tribunal yet the sentiment matches the one contained in her CV. Again she has never, previously, challenged that finding.

43 She now says that her CV was a lie.

44 The claimant will be 52 years of age in August of this year and has potentially at least another 12 years of employment ahead of her.

45 It was suggested to her by Mr Hatton Brown that her reason for wanting a better life balance is that her husband had been promoted and was now earning money which in itself could support her and her family together with her own lower earnings.

46 The claimant denied this yet she is on record as saying exactly that on previous occasions. She attempted to deny that by suggesting her husband had not been promoted, that she was always the main breadwinner in the family and that her husband whilst now earning £40,000 had not been promoted. We did not believe her.

47 In summary, when one considers the totality of her evidence over all the hearings the claimant has always wanted to have her own business, wanted to have a better life balance and understood now that, as her husband was earning a substantial wage himself, those two wishes could be fulfilled.

48 This has meant that the claimant has been happy, “for the moment” (see paragraph 20) to accept that she was going to earn less money in the future.

49 Returning now to the medical reports we find that, if the claimant keeps to her CBT, keeps taking her medication and allows this litigation to be finalised, her concerns and nervousness in the employment field will largely disappear and we place that moment, still, as a date two years from the ending of these proceedings..

50 Professor Green’s and Dr Faith’s reports repeat that once the litigation has finished’ and after a couple of years, matters will be much more on an even keel for the claimant than they have been over the last three or four years.

51 We are therefore not prepared to award this claimant lifetime loss compensation or extend compensation for future loss past the two year cut off point. Consequently we do not need to use the Ogden tables.

52 We accept that in analysing what the appropriate remedy should be we should compare her old job with her new job. When doing that there are clear differences between the earning capacity of the claimant with the Yakira group and the earning capacity now at Spire or at the Chester Tourist Board. But that is not the issue in this claimant’s case.

53 The claimant still has a company (Aspire) which she can develop in a way which eventually may afford her an income. The claimant has always been ambitious to run her own company and we find the claimant would not have set up her own company if she was not going to develop it. Furthermore, she is in a role at the Spire hospital which is full time and where she is happy. We believe that that is a springboard for the future once this litigation is over and she can put behind her the upset caused during her time at Yakira.

54 We also want to put into context that upset. She was perfectly content working there from 2009 to 2012 and even withdrew her resignation once she was given a carrot to stay. Mrs Lennon Knight is not only motivated by career advancement, she is motivated by earning good money. Ultimately with her intelligence and business acumen she will be able to earn substantial amounts, either with progression or promotion in the job she is in now or by seeking other work once this litigation is over and by her own business getting off the ground.

55 Having heard this claimant give evidence on a number of occasions we find that she will, by her mid 50's, be earning the substantial amounts of money she wishes to earn and which motivates her, or the work/life balance she has suits her and her family and she will stay, contentedly, in the sort of job she is doing now.

56 The role of Financial Director may scare the claimant but there are many other jobs for the claimant in the business world which she will be able to do. Her work history, both before and after leaving Yakira, proves that. There is also the opportunity of building up her own business which has been a driving force for this claimant over her working life. We accept that finding capital to fund such a business can be hard but she has many contacts in Merseyside. Her fears over prosecution for any perceived wrongdoing over the Yakira pension issue should now have dissipated. Similarly her fears she would not get a job because she would be seen as a whistleblower and consequently as a troublemaker must have disappeared as she has been working consistently since her resignation from the respondents. Furthermore there is no evidence that her reputation has been damaged. Indeed all good prospective employers would be glad to have such a hardworking and diligent employee who is not afraid to stick to her accountancy principles despite pressure from directors.

57 Finally she said to us at this hearing that what she needs to do is to find the capital to develop her own business. We recognised that she has had a substantial sum in compensation in these proceedings which could have been used to finance any projects on which the claimant wanted to embark. When asked about this the claimant suggested that much of that money had gone on lawyer's fees and payment of tax. We were not told how much remained but the claimant could use that money in her own business if she was finding it hard to find a financial backer.

67. For all the above reasons we are not prepared to make the respondents pay more than we are now ordering after reconsideration of the facts.

11-09-17

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 September 2017

FOR THE TRIBUNAL OFFICE