Neutral Citation Number: [2023] EAT 170

Case No: EA-2021-000223-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane London EC4A 1NL

Date: 30 November 2023

Before:

MR BRUCE CARR KC, Deputy Judge of the High Court

- -

Between:

ASTHA LIMITED (1) **MS S CHAKRABORTY (2)**	**Appellants**
- and –	
MR S GREWAL	**Respondent**

- -
- -

Ms S Chakraborty for the **Appellants**
The Respondent acted in person

Hearing date: 30 November 2023

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JUDGMENT

SUMMARY – Disability discrimination, Unfair dismissal

Appeal on various remedy/compensation issues after Claimant/Respondent had succeeded in both unfair dismissal and disability discrimination claims. Appeal on following grounds dismissed (1) deduction for contributory fault under **Law Reform (Contributory Negligence) Act 1945** - no error of law not to make such a deduction **Polkey/Chagger** deduction already made; (2) No break in the chain of causation where Claimant/Respondent found and then lost mitigating employment following his dismissal by the First Respondent/First Appellant. Appeal allowed in relation to Second Appellant/Second Respondent who had been made personally liable for awards under **Employment Rights Act 1996** and **Employment Act 2002** which could only be made against the employer and not against an individual Respondent named under **Equality Act 2010**.

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT:

1. In this Judgment the parties will be referred to by the titles that they held in the Employment Tribunal.

2. This is an appeal originally brought by both Respondents against the remedy decision sent to the parties on 24 November 2020 and following a hearing at the East London Employment Tribunal ("the ET") held on 24 and 25 September 2020.

3. There is a somewhat chequered history to these proceedings and related proceedings in other courts and tribunals but for present purposes matters can be summarised as follows. The Notice of Appeal to this Tribunal was originally filed on behalf of both Respondents on 8 January 2021. Four grounds were taken in the Notice of Appeal; first that the ET erred in determining the level of compensation by not making a deduction for contributory fault; secondly the ET had failed to address the issue of whether the Claimant obtaining new employment after his dismissal acted as a break in the chain of causation; thirdly that the ET had erred in its assessment of the award for injury to feelings and fourthly, whether the ET should have made a greater deduction for contributory fault in relation to the assessment of the basic award payable to the Claimant in respect of his unfair dismissal claim. The assessment of compensation and remedy came about as a consequence of the ET having found, by a Judgment sent to the parties on 22 November 2019, that the Claimant succeeded in his claims of ordinary unfair dismissal under section 94 of the **Employment Rights Act 1996 ("ERA**") and also under section 15 of the **Equality Act 2010** ("**EqA**") in that his dismissal was because of something arising in consequence of his disability.

4. As set out at paragraph 1 of the ET's reasons of November 2020, the section 15 Claim succeeded against both Respondents - the Second Respondent was liable as an individual Respondent by virtue of section 110 of the **EqA**. Consistent with that, the ET recoded at paragraph 25 of its reasons as follows:

> "The First and Second Respondents are jointly and severally liable for the compensation for discrimination awarded to the Claimant".

Notwithstanding that observation at paragraph 25, the form of the Judgment set out at the beginning of the Tribunal's reasons suggest that the Respondents collectively are ordered to pay the Claimant the full sum of £41,446.82p as compensation for both unfair dismissal and discrimination.

5. As far as unfair dismissal is concerned there is of course no provision in the **ERA** for individual liability; a claim can be brought against and an award enforced against only the employer, which in this case is the First Respondent.

6. On 22 December 2021 the appeal came before Her Honour Judge Tucker by way of an application under Rule 3.10 of the **EAT Rules** with the Respondents seeking permission to appeal, their appeal having been initially rejected at the Sift stage. At that hearing the Respondents submitted amended Grounds of Appeal with the original Ground 3, the assessment of injury to feelings, being removed. The appeal proceeded thereafter on the remaining three grounds, Ground 1 contributory fault, Ground 2 break in the chain of causation, and Ground 3 assessment of the basic award. On the basis of that decision and the amended Grounds of Appeal the matter was listed for a full hearing.

7. The next relevant event was that the Clamant submitted a cross appeal suggesting that, amongst other things, the Second Respondent had never honoured an agreement to pay shares in the First Respondent that had been transferred to her and that as a consequence all of the disciplinary action that had been taken against him was "an illegal process". The cross appeal was considered by His Honour Judge Auerbach and rejected at the Sift stage on 16 February 2022 on the basis that it disclosed no reasonable ground of appeal. In his reasons for that conclusion Judge Auerbach said as follows:

> "The burden of his proposed ground of cross-appeal appears to be that Ms Chakraborty did not lawfully gain control of Astha Limited. He contends that the actions taken against the claimant by the company were therefore illegal from the start, and that this aspect was wrongly overlooked by the ET.
>
> However, the issues that he raises properly fell to be considered (and it appears, on his account, had been considered) by other courts in the other litigation to which he refers. They did not fall to be considered by the ET as legal issues, as such, though evidently there was overlapping factual background. The Tribunal did not therefore arguably err by failing to take into account the legal contentions and arguments about these legal issues. They simply did not arise for determination by the Tribunal."

8. The next step in the chronology occurred on 2 November 2023 under the terms of an order made by Judge Stout following a hearing attended by both the Second Respondent and the Claimant. As is apparent from the order of Judge Stout, by this time the Claimant was also acting on behalf of the First Respondent. The recital to the order confirms that both the Claimant and the Second Respondent accepted that the Claimant was now "the sole director and proper representative" of the First Respondent. In that capacity it was indicated that he would be withdrawing the First Respondent's appeal and he was ordered to confirm that point in writing. This he did by an e-mail dated 2 November 2023. However, he continued to assert that the Second Respondent and her representatives had undertaken actions which were illegal and an abuse of process. Judge Stout was criticised for what the Claimant asserts was a denial of an abuse of process. He was as a consequence sent a letter by the ET, the key part of it which reads as follows, quoting from Judge Stout:

> "I note that he also seeks to argue that Ms Chakraborty should not be permitted to continue with this appeal in her own name and that her doing so is an abuse of process. However, as I endeavoured to explain at the hearing and will now explain at somewhat greater length, the position is that he brought an ET claim against her naming her as an individual Respondent to the disability discrimination claim under sections 15 and 39 of the **EqA 2010**. He succeeded on that Claim so an order was made against her personally (as well as against Astha Limited) for her to pay the circa £41,000 in damages to him by way of compensation for his employment having been unlawfully terminated by her when she was acting in a capacity for which Astha Limited was vicariously liable under sections 109 and 110 of the **EqA 2010**. As a result, she has been personally ordered by the Tribunal to pay him compensation. She personally has a right of appeal to the EAT against that decision and she is fully entitled to exercise that right notwithstanding that the company has decided not to continue to exercise its right of appeal. I note that Mr Grewal continues to assert that Ms Chakraborty did not have the authority of Astha Limited to act for discipline and dismiss him. If he were right about that he could not have named Ms Chakraborty as an individual Respondent to the ET claim and/or the Tribunal should not have found her to be personally liable to him because her personal liability depends upon her being at the time an employee or agent of Astha Limited for whom the company was vicariously liable under sections 109 and 110. As matters stand, however, the Tribunal in its liability Judgment necessarily determined that Ms Chakraborty was an employee or agent of Astha at the time of the dismissal and

> thus a person who is personally liable to Mr Grewal under the remedy award. There has been no appeal against the liability Judgment which now stands as reflecting the legal position between the parties for the purposes of this appeal."

In the same letter it was also pointed out by Judge Stout that there was a potential error in the ET's reasoning in making the Second Respondent liable for the basic award and that she should consider making an application to amend her Grounds of Appeal in order to take that point.

9. The application was duly made on paper on 21 November 2023 and was considered by me at the start of this hearing. The Claimant objected to the amendment on a similar basis to his previous concern about these proceedings, namely that there had been an abuse of process in that the Second Respondent had never had any authority to act as she did. He did not make any point specifically referable to the particular ground which she was wishing to advance. I allowed her amendment on the basis that there was no material objection to it.

10. After initial adjournment of the argument in this case I retired to consider my judgment. On doing so I noticed that, insofar as the ET were making the Second Respondent liable for the basic award under the **ERA,** they were also doing so in relation to compensation for failure to provide written particulars of employment for which a remedy is provided under section 38 of the **Employment Act 2002** ("**EA**").

11. Section 38(2) **EA** gives the ET power to make an award of up to four weeks' pay where there has been a failure to provide a statement of employment particulars, but that award is one that on the face of it can be made only against an employer, not an individual employed by that employer. It therefore potentially faced the same problem as had been identified by Judge Stout in relation to the basic award under the **ERA**. I, therefore, invited the Second Respondent to amend her Grounds of Appeal to take this additional ground. The Claimant objected on the same basis as he had before, namely that the whole of these proceedings were an abuse of process, but I took the view that the

interests of justice were such that the Second Respondent should be allowed to make that additional amendment.

12. I then turn to the particular Grounds of Appeal which were advanced by the Second Respondent. Under Ground 1 of the Grounds of Appeal the ET was criticised for refusing to make a deduction under section 123(6) **ERA** and/or under the **Law Reform (Contributory Negligence) Act 1945** ("the **1945 Act"**). Insofar as this appeal is advanced by reference to the **ERA**, I regard it as no longer being before this Tribunal. The award made under section 123 can be made against the employer only as a result of a successful unfair dismissal claim against that employer. There is no scope for additional or joint liability for an individual, even the one who is responsible for effecting the dismissal. Now that the First Respondent's appeal has been withdrawn their arguments in respect of Ground 1 and section 123(6) ERA fall away. Nevertheless, the appeal does continue so far as it applies to the award for discrimination made under the **EqA**, as was recognised by the Tribunal in its reasons at paragraph 56 of its judgment. Compensation may be reduced for compensation, and they referred to the **1945 Act**.

13. At paragraph 59 of their reasons the Tribunal said this:

> "Where there is a significant overlap between the factors taken into account when making a **Chagger/Polkey** deduction, and when making a deduction for contributory conduct, the ET should consider expressly, whether, in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and if so, what its amount should be. This is to avoid the risk of a Claimant being penalised twice for the same conduct."

14. In paragraph 55 of its reasons the ET had set out their conclusion as to why there should be a 75 percent reduction in compensation otherwise payable to the Claimant on the application of the principles in **Chagger/Polkey**. That deduction was made on the basis that the Claimant was highly likely in any event to have been dismissed from his employment with the First Respondent, in particular due to his conduct which the ET had set out at paragraph 51. The authority on which the ET relied for not making any further deduction in paragraph 60 of their judgment was the decision

of the EAT in **Lenlyn UK v Kular** [UKEAT/0108/16/DM). The first point taken in the Grounds of Appeal is that that decision is wrong in law. I disagree. If an ET makes a **Chagger** deduction based on the risk of a claimant being dismissed fairly in any event because of his conduct, there is clearly a risk of a claimant facing a double penalty if that same conduct is then used as the basis for a further deduction under the **1945 Act**. The second point taken on this ground is grounded on an assertion that the **Chagger** deduction made by the Tribunal was based not simply on the Claimant's conduct but also on the fact that the relationship between him and the Second Respondent in particular had come to an end, or was likely to come to an end, regardless of any misconduct by the Claimant. I disagree.

15. At paragraph 51 the Tribunal had set out the conduct of the Claimant which was relevant to its consideration of the **Chagger** point and found that his conduct "probably amounted to gross misconduct". That might suggest that a hundred percent **Chagger** deduction would have been appropriate. However, at paragraphs 52 and 53 of their reasons the Tribunal discussed other aspects of the relationship and set out reasons why dismissal might not have occurred or might have been unfair if it had occurred. Hence its conclusion that, rather than a deduction of one hundred percent based on **Chagger**, the deduction should be only 75 percent. In any event, even if other factors were present in the **Chagger** assessment beyond the Claimant's conduct, that conduct clearly formed at least part of the reason for the 75 percent deduction being made and there would still be a significant risk of double counting against the Claimant if it was revisited for the purposes of a potential further deduction made under the **1945 Act**.

16. For those reasons I dismiss Ground 1 of the appeal.

17. Turning to Ground 2, it is said that the ET failed to address the question of whether the chain of causation as far as the Claimant's loss of earnings was concerned, was broken by the fact that he had gained new employment from which he was subsequently dismissed. The finding of fact by the

ET (paragraph 41 of its judgment) was that on 13 August 2018 the Claimant had succeeded in getting employment as a minibus driver and he had held that employment for just short of two years to 7 August 2020. During that period, he had earned £29,695.57p. At paragraph 43 the ET found that he had been dismissed from that employment because of the consequences of the Covid-19 pandemic, the dismissal having taken place, as I said, in August 2020. The Respondents were therefore given full credit for the earnings that the Claimant had made during that period. The earnings were in total less than he would have earned during his employment with the First Respondent. With the First Respondent, looking at his pay and benefits, his overall weekly loss was assessed by the ET as being £311.22p. From his role as a minibus driver, he earned the sum of £288.30p, thereby giving rise to a modest partial weekly loss substantially mitigated by the new employment that he had managed to obtain.

18. It follows from that that the new employment at a lower wage did not eliminate the loss entirely or break the chain of causation, on any view at least in respect of the partial loss.

19. The Claimant then lost his employment, as I have already indicated, in August 2020. The ET found that he would have worked only to State retirement age in any event which he would have reached on 15 January 2020, some 68 weeks after he had lost his employment as a minibus driver. That gave rise to a loss before the **Chagger** deduction of some £21,000 but after the **Chagger** deduction this was reduced by 75 percent to the sum of £5,301.

20. There are a number of authorities which deal within the extent to which post-dismissal employment with a new employer will break the chain of causation flowing from a discriminatory act. The most relevant for my purposes is the decision of the Court of Appeal in **Dench v Flynn & Partners** [1998] IRLR 653. At paragraph 19 of that Judgment. Beldam LJ, said as follows:

> "No doubt in many cases a loss consequent upon unfair dismissal will cease when an applicant gets employment of a permanent nature at an equivalent or higher salary or wage than the employee enjoyed when dismissed; but to regard such an event as always and in all cases putting an end to the

> attribution of the loss to the termination of employment cannot lead in some cases to an award which is just and equitable."

21. The principles of justice and equity sit as overarching features of any assessment of a compensatory award, and I also note that the Judgment in **Dench** involved a case in which there had been employment at a higher salary than the then applicant had been earning with the employer that had unfairly dismissed him.

22. On the facts of this case, when the Claimant secured alternative employment at a lower rate of pay and then lost that employment through no fault of his own, it seems to me that there is no scope for excluding loss of earnings after he had lost that employment due to unrelated factors over which he had no control. Therefore, that subsequent dismissal did not, in my view, provide a basis on which the Tribunal might have reached a conclusion that the chain of causation had been broken.

23. I also have some reservations about this Ground of Appeal in any event because it seems to me there is some doubt about the way in which the matter was put before the ET; but insofar as Ground 2 is advanced on the basis that the matter should have resulted in a finding that there was a break in causation, I dismiss that Ground of Appeal.

24. I turn to Ground 3 under which it is said that there should have been a further deduction in the basic award based on contributory fault by the Claimant. That appeal has been withdrawn as far as the First Respondent is concerned. It is academic as far as the Second Respondent is concerned for reasons which will become clear when I deal with Ground 4, the first of the two additional grounds now advanced by the Second Respondent.

25. I turn to deal with Ground 4. In paragraph 3 of its Judgment the ET records that the Respondents are ordered to pay the Claimant the sum of £41,046.82p. The use of the plural in that paragraph suggests that the Tribunal had approached the matter on the basis that both Respondents are responsible for the entire amount. The sum of £41,046.82p is the figure taken from the

Appendix to the Tribunal's award which sets out its calculation in respect of both discrimination and unfair dismissal. Therefore, on the face of it the Tribunal has, indeed, ordered that both Respondents including the Second Respondent are jointly and severally liable for the full amount of the award.

26. An element of that award is the basic award made under section 122 of the **ERA**. That is an award that is made in respect of a claim of unfair dismissal brought under section 94 **ERA** and is a claim which can be brought only against the employer and, indeed, compensation can be recovered only against the employer. I, therefore, allow this appeal in relation to Ground 4 in that the Second Respondent, insofar as she was ordered by the Tribunal to pay the basic award of £5,411.25p, should not be required to do so and the amount of the award made against her will be reduced to reflect the fact that she is not liable to pay the basic award.

27. I turn to what is now Ground 5, which is the figure of £1,244.88p awarded in respect of the failure to provide written particulars of employment in breach of the obligations in section 38 of the **EA**. As is clear from the wording of that section, this is an award that is made against the employer and it suffers from the same defect that appears to be the case with regard to the basic award in that on the face of the ET's Judgment, the Second Respondent has been found liable to pay that additional sum of £1,244.88p in circumstances in which she was not the Claimant's employer. I, therefore, allow the appeal under what is new Ground 5 which will have the effect of reducing the award which the Second Respondent is liable to discharge by a further sum of £1,244.88p. That sum when added to the basic award comes to a total o £6,656.13p and I, therefore, order that the Second Respondent be ordered to pay, insofar as it is not recovered from the First Respondent, the sum of £34,390.69p.

28. The only additional point I should make is this. I entirely accept that, the Claimant has had to act for himself in these proceedings and, therefore, will not have brought to the EAT the same

experience as that of a professional lawyer. That said, he continued in his skeleton argument which he presented for the purposes of this Tribunal, to argue the point based on the alleged abuse of process consequent upon his assertion that the Second Respondent had never paid for the shares that had originally been transferred to him. I remind him for what I suspect is at least a third time that those matters do not fall for consideration within the scope of this appeal. Other than that, the Claimant has not put forward any substantive reasons why the appeal should not be allowed. Notwithstanding that position, I have nonetheless considered what legal arguments might have been presented on his behalf and, indeed, have dismissed a number of the grounds which the Second Respondent has sought to advance as part of this appeal.

29. I would like finally to thank both parties for their attendance both this morning and this afternoon and for the courteous way in which they presented their arguments.