[2013–14 Gib LR 1]

GUY v. ADMIRAL SECURITY (GIBRALTAR) LIMITED

SUPREME COURT (Prescott, J.): January 23rd, 2013

Employment—dismissal—unfair dismissal—basic award—no increase in basic award merely because reasons given for dismissal untrue rather than merely unfair

Employment—dismissal—unfair dismissal—compensatory award—compensatory award only payable if loss caused by unfair dismissal—not payable if attributable to claimant's ill-health and not to dismissal

The claimant brought an action against the defendant for breach of contract and unfair dismissal.

The claimant was employed by the defendant as a parking enforcement officer in 2005. In 2007, he suffered injuries at work which rendered him unfit for work. Sick pay was not advanced. A few days later, he was arrested on suspicion of theft of a car and the defendant suspended him without pay. He was later acquitted, but, in February 2010, his employment was terminated. In June 2011, the claimant took up alternative employment which he was able to maintain for about six months.

On June 22nd, 2012, the Supreme Court found that the defendant was in breach of contract in respect of failure to pay wages, and that the termination of the claimant's employment was unfair. The contractual claims were subsequently quantified, and only the assessment of the statutory claim remained.

The claimant submitted that (i) the court should use its discretion under the Industrial Tribunal (Calculation of Compensation) Regulations 1992, s.2 to increase the basic award of £2,200 to approximately £5,000 on the basis that the reason for the dismissal had been found to be untrue, not merely unfair; and (ii) compensation should be paid for loss of earnings from the date of the dismissal to the date of the judgment finding it to be unfair, a period of 122 weeks.

The defendant submitted in reply that (i) no compensation for loss of earnings was payable because the defendant was injured and unfit for work from before the dismissal to after the date of the judgment; or, in the alternative, (ii) compensation for loss of earnings should only be paid from the date of the unfair dismissal to the date the claimant took up alternative employment, a period of 69 weeks.

Held, awarding the claimant £2,200:

(1) The basic award of £2,200 would not be increased. The distinction between a dismissal which was unfair and a dismissal which was unfair because it was for an untrue reason did not justify such an increase. Both were unfair because they were not for reasons allowed by law and, without authority to the contrary, a particular manifestation of unfairness, in itself, did not engage the court's discretion to increase the basic award (para. 8).

(2) No compensatory award was payable. To obtain such an award, the loss sustained by the claimant had to be attributable to his dismissal by the defendant, and, since he had been unfit for work before his dismissal, his loss of earnings was due to his injuries, not to the termination of his employment. Any personal injury claim against the defendant in respect of those injuries was a separate matter, and did not relate to the present proceedings (para. 21).

Cases cited:
(1) *Digital Equipment Co. Ltd.* v. *Clements (No. 2)*, [1997] I.C.R. 237; [1997] I.R.L.R. 140, followed.
(2) *GAB Robins (UK) Ltd*. v. *Triggs*, [2008] I.C.R. 529; [2008] EWCA Civ 17, considered.

Legislation construed:
Employment Act 1932, as amended, s.71: The relevant terms of this section are set out at para. 5.
s.72: The relevant terms of this section are set out at para. 6.

Industrial Tribunal (Calculation of Compensation) Regulations 1992, s.2: The relevant terms of this section are set out at para 7.
s.3: The relevant terms of this section are set out at para 7.

C. Salter and *A. Cardona* for the claimant;
Ms. C.L. Pizzarello for the defendant.

1 **PRESCOTT, J.:** This is a claim by the claimant for damages following a hearing after which judgment was delivered by this court on June 22nd, 2012. The court found that there had been a breach of contract by the defendant in respect of a failure to pay wages, as well as an unfair dismissal of the claimant by the defendant.

2 This ruling has as its basis the facts and findings contained in the June 22nd judgment, to which reference will be made where appropriate, but it is perhaps useful at this stage to set out the essentials by way of very brief background.

3 The court found that—

(i) the claimant had commenced employment with the defendant on June 4th, 2005 as a parking enforcement officer;

(ii) on June 21st, 2005, a job application form was filled in from information supplied by the claimant and was signed by him;

(iii) the claimant misrepresented the truth in his job application form by concealing the fact that he had previous convictions;

(iv) on October 31st, 2007, the claimant suffered an injury at work. From November 2nd, 2007 to March 27th, 2008, the claimant was unfit for work by reason of injury;

(v) sick pay was not advanced;

(vi) on November 9th, 2007, the claimant was arrested on suspicion of theft of a car which had been in his care/control as part of his employment. He was subsequently acquitted at trial;

(vii) on the same date, November 9th, 2007, the claimant was suspended without pay;

(viii) the date of termination of employment was on February 17th, 2010; and

(ix) the termination was unfair according to law.

4 The claim for damages comprises two tiers: the contractual and the statutory. Pursuant to submissions and partly by consent, the totality of the contractual claim was quantified by this court on September 4th, 2012. The outstanding issue before the court today is the assessment and quantification of the statutory claim.

5 Statutory provisions governing the compensatory element of a claim for unfair dismissal stem from s.71(1) of the Employment Act 1932, which provides:

> "Where in any proceedings on a complaint brought under section 70, the tribunal makes an award of compensation to be paid by a party to the proceedings (in this section referred to as 'the party in default') to another party (in this section referred to as the 'aggrieved party') the amount of the compensation shall be calculated in accordance with the provisions of section 72 and in relation to payments provided for in subsection (2) of that section shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates in so far as that loss was attributable to action taken by or on behalf of the party in default."

6 In relation to the calculation of compensation, s.72 provides:

"(1) Where a tribunal has determined that compensation shall be awarded to a person who has presented a complaint under section 70, the tribunal shall award a basic payment of the prescribed amount.

(2) Where in accordance with subsection (1) a tribunal has determined that compensation shall be awarded, that tribunal may award an amount in compensation of any loss suffered by the person and in determining that loss in accordance with the relevant provisions of section 71, no account shall be taken of any payment made by virtue of subsection (1) of this section.

(3) The maximum amount of compensation that may be awarded by virtue of subsection (2) shall not exceed the prescribed amount."

7 The prescribed amounts referred to in s.72 are defined by the Industrial Tribunal (Calculation of Compensation) Regulations 1992 ("the Regulations") as:

"**Basic award.**

2. The amount of the basic award provided in section 72(1) of the Act shall be £2,200 or such higher amount as the Tribunal, at its discretion, shall determine.

Compensatory awards.

3. The prescribed amount for the purposes of section 72(3) of the Act, shall be the lesser of—

(a) the amount which, in the case of a person who has presented a complaint under section 72 of the Act, represents 104 weeks' pay; or

(b) the amount calculated as follows—

104 x (2 x the weekly minimum wage),

whichever is the less."

Basic award

8 The claimant submitted that the basic award of £2,200 should be increased to the region of £5,000, to take account of the fact that the reason for dismissal "has been found to be untrue rather than merely unfair." In the absence of any authority that would persuade me otherwise, I fail to see how that distinction could justify an increase of the award. At the risk of over-simplifying the matter, the dismissal was unfair, and it was unfair because it was not a dismissal on any of the grounds allowed by law. I am not persuaded that a particular manifestation of unfairness, by itself, engages the court's discretion to increase the basic award, particularly when in this case although the court found that the reason given for

termination of employment in the notice of termination form was untrue, when considering issues related to the notice of termination it also found that—

> ". . . this could be nothing more sinister than the right hand not knowing what the left is doing, not least because there is an apparent lack of record keeping on the part of the defendant, nonetheless it casts a shadow on the reliability of the evidence of the defendant as a whole and in particular in relation to accuracy" (June 22nd judgment, at para. 55)

Compensatory award

9 Counsel are agreed that the guidelines for the approach to calculation of the compensatory award are to be found in *Digital Equipment Co. Ltd.* v. *Clements (No. 2)* (1), as qualified by the Court of Appeal.

10 The first step in the process is calculation of the loss which the claimant suffered in consequence of the dismissal, and which is attributable to action taken by the employer.

11 The claimant submitted that the period of loss of earnings should be 122 weeks, from February 17th, 2010, to the date of judgment on June 22nd, 2012.

12 The defendant's submission is twofold:

(i) the compensatory award should be nil because since dismissal the claimant has been unable to secure employment by reason of ill-health; or, in the event that this argument enjoys no success,

(ii) the period of loss of earnings should be 69 weeks from February 17th, 2010 to the date when the claimant commenced alternative employment with Calypso Tours on June 17th, 2011.

13 It is a trite proposition that any award of compensation must be attributable to the employer's actions and must not be too remote. The first hurdle to clear in order to determine whether any award of compensation is in fact payable is to establish whether the loss sustained by the employee was attributable to the action of dismissal taken by the employer.

14 By way of chronological reminder, the claimant suffered an injury at work on October 31st, 2007. He was certified unfit for work on November 2nd, 2007, and seven days later, on November 9th, he was suspended from his post. The court found that it was more likely than not that he was unfit for work until March 27th, 2008 (June 22nd judgment, at para. 71). The reason that March 27th was identified as the date marking the end of the period of unfitness was because on the evidence, March 27th, 2008 was the date upon which the final medical certificate expired, and up until that

period the claimant had been certified by a qualified medical practitioner as being unfit for work. It was appropriate, therefore, that the court take notice of that unchallenged medical opinion and place reliance on it as being true. The strong inference which presents itself as a result is that immediately thereafter, on March 28th, 2008, the claimant was fit for work. That said, in reality, given that the claimant did not work for the defendant during the period of suspension—which spanned November 9th, 2007 to February 17th, 2010—it is difficult to ascertain whether in actual fact the claimant was fit to work as from March 27th, 2008, or whether upon returning to work he would have discovered that he was still labouring under an injury which prevented him from working.

15 So far as I understand, the claimant did not work again until August 17th, 2009, when—

> ". . . in order to make ends meet, he obtained employment with a company called Seekers Ltd., commencing on August 17th, 2009, although he only worked some four hours a week and only for a period of 2–3 weeks, his injury impeding further work." (June 22nd judgment, at para. 18)

16 It is evident from the above that, at least in 2009, the claimant was alleging that his injury was still interfering with his ability to work. I do not ignore the fact that at this time the claimant was still employed by the defendant, and although his ability to work during the period of employment is not directly relevant to the issue of compensation, it does establish a helpful and relevant background.

17 The position after termination of his employment with the defendant in February 2010 is addressed by the claimant in his witness statement of June 15th, 2011, which was adopted by him as evidence-in-chief at the hearing. At para. 26, the claimant states:

> "I have been unable to obtain employment since I was formally dismissed in 2010, despite my efforts to obtain suitable alternative employment. I have only managed to do the odd job for friends and family for which I have received negligible remuneration. I have attended the ETB [the Employment and Training Board] on a regular basis, but the jobs that were available all related to labour-intensive work of the kind that I am unable to perform due to my injuries. I have since been told not to attend the ETB because I am unable to accept the work which they have offered me."

18 It is evident from the above that from date of his dismissal, the claimant is attributing his inability to obtain work to his state of health. This appears consistent with the claimant's inability to sustain the job previously obtained with Seekers Ltd. All this places a question mark over whether the loss sustained by the claimant was in fact attributable to the

dismissal and, if it was not, whether it can form the basis of the compensatory award claimed.

19 The case of *GAB Robins (UK) Ltd*. v. *Triggs* (2) is instructive. That case involved an employee who had been treated so badly by her employer during the course of her employment that she had become ill and her earning capacity had been reduced. The Employment Tribunal (in a decision upheld by the Employment Appeal Tribunal, "the EAT") awarded a compensatory award ([2008] I.C.R. 529, at para. 19), on the basis that the loss suffered by the employee in consequence of the dismissal—

> ". . . included loss consequential upon the antecedent breaches by the employer of the implied term of trust and confidence that had amounted to the repudiatory breach of the employment contract which Mrs Triggs accepted on 15 February 2005 so as to effect the dismissal on 15 March 2005."

The Court of Appeal overturned the EAT decision on the basis that the loss did not flow from the dismissal. It held that notwithstanding that the illness and diminished earning capacity were caused by the employer, they were already apparent at the time of the dismissal and it was the illness, not the dismissal, which would impede future employment. Essentially, whilst the employee might have a separate common law remedy in respect of the damage caused to her by the employer, it was not recoverable as compensation in an unfair dismissal claim. Having recognized that the employer by its treatment of its employee had caused her illness which had the result of reducing her earning capacity, Rimer, L.J. continued (*ibid*., at para. 37):

> "It had thereby inflicted upon her a loss (and a potential for future loss) that she had already suffered by the time she elected to treat that conduct as entitling her to terminate the employment. It was that election that amounted to the dismissal, but her right to sue in respect of that loss had accrued before the dismissal. The loss that she would thereafter suffer by reason of her reduced earning capacity was therefore not caused by, or a consequence of the dismissal at all. It was caused by the employer's antecedent breaches."

20 In much the same way as in *GAB Robins*, in the present case, the injury complained of was sustained before dismissal, specifically on October 31st, 2007. Following from that, upon the evidence, the claimant was unfit for work until March 28th, 2008. Thereafter, when he returns to work (albeit with a different employer, whilst still employed by the defendant) in August 2009, he finds he is still unfit for work. By the claimant's own evidence, thereafter, from the date of dismissal, the situation is that at least up until June 15th, 2010 the claimant has been unable to obtain work due to his injuries, so much so that the Employment and Training Board advised him to stop visiting their offices.

21 I am satisfied that the loss sustained by the claimant from the date of dismissal arises from his inability to work due to injury, as opposed to from the dismissal itself. Any compensatory award under s.71 of the Employment Act must be confined to compensating the employee for the loss sustained from the dismissal itself. In the circumstances, there can be no compensation payable under that section. That is not to say that the claimant would not have recourse to any common law remedies available to him in respect of the injuries sustained. Indeed, it is fair to say that I have been made aware by the defendant that the claimant is pursuing a personal injury claim against him. Suffice to say that the court has not given leave for any such claim—or pleadings in support—to be admitted as evidence in this action, and consequently they do not inform the decision of this court.

22 Before I conclude, I will address one last issue. It is not in dispute that two days after he made his witness statement, the claimant commenced work with Calypso Tours. Whilst there is no mention of employment with Calypso Tours in the pleadings, nor is there an additional witness statement introducing this, nor was there reference to it in evidence-in-chief or in cross-examination at the hearing, I make reference to it now because counsel have touched upon it in the course of their submissions on statutory compensation. From documents contained in the trial bundle, I glean the following information. On June 17th, 2011, the claimant took up employment with Calypso Tours as a driver, on an "as and when required" basis. On July 1st, 2011, his contract was varied and he was employed for 20 hours per week. On December 22nd, 2011, his contract was once again varied to an "as and when required" basis. It is not clear to me when the employment ended, nor indeed exactly why, but no records of receipt of salary have been provided past December 23rd, 2011, so it would appear that the irresistible inference to be drawn is that after December 23rd, 2011, the claimant was not called upon to work.

23 As counsel for the claimant rightly points out, there is no evidence before the court which would allow it to conclude that the claimant stopped working for Calypso Tours because of ill-health. The evidence is that up until June 15th, 2011, ill-health had been the reason for not securing employment. However, it would appear that two days thereafter, the claimant started work for Calypso Tours and evidently was able to maintain that employment—albeit with a variation in hours of work—at least until December 23rd, 2011. In my view, the reason for the cessation of employment with Calypso Tours is of no consequence. If the claimant left Calypso Tours because his injury prevented him from working, then that goes to the issue already established that his injury, as opposed to the dismissal, is the root of his loss. If, on the other hand, the claimant left for any other reason and was capable of working, then from the date of his

employment with Calypso Tours he cannot look to the defendant for compensation.

24 In light of my findings, the necessity to consider the remaining steps in the assessment of compensation process becomes redundant.

25 I award the claimant a total of £2,200, and will hear the parties on the question of interest and costs.

Order accordingly.
