Harlequin Hire Cars Limited t/a Europcar Guernsey & Dent
Royal Court
13th June, 2014

JUDGMENT 26/2014

Appeal against a decision of the Employment and Discrimination Tribunal.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Appeal from the Employment and Discrimination Tribunal

Case No: ED036/13

Between: **HARLEQUIN HIRE CARS LIMITED T/A EUROPCAR GUERNSEY** **Appellant**

-and-

CLAIRE DENT **Respondent**

Date of hearing: 5th June 2014

Reasons handed down: 13th June 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Appellant: Advocate N.J. Barnes
The Respondent was not represented

Legislation referred to:

The Employment Protection (Guernsey) Law, 1998
The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005
The Employment Protection (Appeals and References) Order, 2006
The Sex Discrimination (Appeals and References) Order, 2006

Introduction

1. At the conclusion of the appeal hearing on 5 June 2014, I announced that I was allowing in part the appeal brought by Harlequin Hire Cars Limited, trading as Europcar Guernsey, against the decision of the Employment and Discrimination Tribunal given in favour of Claire Dent on 5 March 2014 (hereafter referred to as "the Decision"). I outlined the reasons for that conclusion and indicated that full reasons would be provided in writing in due course. This judgment contains those reasons.

Background

2. Following a hearing which took place on 6 February 2014, the Tribunal found that the Respondent, Ms Dent, had been dismissed by reason of her pregnancy. It also upheld her complaint of sex discrimination. It made awards aggregating to £12,093.92, although the arithmetic looks slightly suspect as the two individual awards added together total 23p less than stated.

3. In its Notice of Appeal dated 4 April 2014, the Appellant raised three grounds of appeal. At the hearing, Advocate Barnes elected not to pursue the second ground relating to the reason for the Respondent's dismissal. In any event, the Appellant has not challenged the Tribunal's findings that the Respondent was dismissed and also the subject of unlawful sex discrimination. Accordingly, he confined the Appellant's appeal to two distinct grounds. The first challenged the conclusion reached by the Tribunal as to the effective date of termination of the Respondent's employment. The Appellant contended that it was 9 April 2013 and not, as found, 17 July 2013, with the consequence that the Respondent's complaint, which was made on 19 July 2013, was out of time. The second ground asserted an error of law about the operation of section 23 of the Employment Protection (Guernsey) Law, 1998, as amended (hereafter referred to as "the 1998 Law").

Factual Findings of Tribunal

4. The facts found by the Tribunal are succinctly stated in section 2 of its reasoned Decision. For the purposes of this appeal, the paragraphs from 2.11 are the most relevant:

> "*2.11* *Ms Claire Dent worked at Harlequin Cars at Guernsey Airport from 12 June 2012.*
>
> *2.12* *She did not sign her contract of employment until September 2012 when she was judged to have passed her three month trial period.*
>
> *2.13* *She told her immediate supervisor Mr Poole that she was pregnant in September of 2012 a few days after signing her contract, and asked him not to tell the other staff, but that he could inform his manager Mr West.*
>
> *2.14* *She formally advised the Company of her pregnancy in January 2013.*
>
> *2.15* *Ms Dent was verbally informed by her supervisor, that under the terms of her contract, there was no maternity provision and that her job could not be kept open for her.*
>
> *2.16* *The Applicant asked for confirmation of this in writing as she was concerned that Social Security would think she had voluntarily left her job, which may have made her ineligible for claiming benefit if she needed to.*
>
> *2.17* *She received a letter dated 1 February 2013 from Mr West addressed 'To whom it may concern' in response to her request. This letter states "I cannot keep a position available for Claire" and that she would be leaving the Respondent's employment at the end of April 2013.*
>
> *2.18* *After the Applicant sought advice on her situation, she wrote to Mr West on 19 February stating that she wanted to return to work after her confinement and asking for confirmation, in writing, that she could do so.*
>
> *2.19* *She did not receive any further written correspondence, but was again verbally reminded that the Company had no maternity provision, and that she had signed the contract which laid out that condition of employment.*
>
> *2.20* *She was also informed that they would need to replace her for the upcoming busy season. Ms Dent believed that this replacement would be temporary,*

and asked for confirmation of this in her letter. She did not receive confirmation, nor did she pursue this question further.

2.21 Ms Dent attended work on 9 April 2013 for the final time.

2.22 On this day she returned her Company car, and received her outstanding holiday pay. She did not view this as evidence she would not be returning to work.

2.23 Mr West believed that these things should have been taken as confirmation that the Company believed she was leaving and would not be returning to work.

2.24 Two months after the birth of her child, on 11 July 2013, Ms Dent wrote to the Company saying she would like to return to work, and suggesting that early August would be an appropriate time.

2.25 In response, Ms Dent received a letter from Mr West dated 17 July 2013, saying that the Company had no vacancies, and that they had been unable to keep her job open for her.

2.26 Ms Dent considered this to be a confirmation of termination of employment and proceeded to make a claim under the provisions of 'The Employment Protection Law'.

2.27 In a letter dated 12 August 2013 Ms Dent was offered re-employment by Harlequin Hire Cars on a full time basis, and was asked to confirm that she would accept this offer by the end of that week.

2.28 Ms Dent declined to respond as she had already started proceedings against the Company."

In addition to these findings, I have had the benefit of seeing the full texts of the letters to which reference is made and the Respondent's contract of employment with the Appellant.

Effective date of termination

5. At paragraph 3.4 of the Decision, the Tribunal concluded that:

> "*The Applicant's letter [of 19 February 2013] received no response; neither was the Applicant told verbally or in writing that she was dismissed and she began her presumed maternity leave on 9 April 2013, handing in her car and uniform at that time. On 11 July 2013 Ms Dent then wrote to her employer referencing her letter of 19 February 2013 stating her readiness to return to work. The Employer responded in writing on 17 July 2013 stating that the Applicant no longer had a job and her position had been replaced. Only on this date did the Applicant know with certainty she had been dismissed and thus the 17 July 2013 should be taken as the Effective Date of Termination.*"

It is this conclusion that the Appellant submits cannot be maintained in the light of the Tribunal's factual findings.

6. In his Skeleton Argument in support of the appeal, Advocate Barnes submitted that "*the Tribunal were bound to find that the Appellant [sic] had terminated her employment on 9th April 2013 or at the latest at the end of that month*". At the hearing, he concentrated on the earliest date of 9 April 2013 as being the only possible effective date of termination. He highlighted that this was the last day on which the Respondent attended work and the events on that day show that it was accepted by both parties that her employment formally ended on that day.

7. The Respondent maintained the stance she had before the Tribunal, namely that the first time she became aware of her dismissal was when she was told by letter dated 17 July 2013. She

also referred to the provisions of her contract of employment, which required any notice given to her to terminate her employment needing to be in writing and that the minimum notice period in respect of her length of employment was, therefore, two weeks.

8. The effective date of termination of the Respondent's employment is significant because of how section 17 of the 1998 Law operates. Subsection (1) provides:

> "*The Tribunal shall not hear and determine a complaint under section 16(1) unless it is presented to the Secretary –*
>
> *(a) within a period of three months beginning on –*
>
> *(i) the effective date of termination, or …*
>
> *(b) within such further time as the Tribunal (constituted by a single member of the Panel) may, on application of the complainant presented to the Secretary, allow in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the said period of three months.*"

The Respondent's complaint was dated 19 July 2013. Accordingly, in Advocate Barnes' submission, if the effective date of termination were found to be prior to 19 April 2013, that complaint should not have been heard and determined and the appeal should be allowed. As an alternative submission, he suggested the question of whether subsection (1)(b) applied should be remitted to the Tribunal for its determination because further factual findings would be required.

9. The phrase "*effective date of termination*" is defined in section 5(4) of the 1998 Law. Paragraph (c) relates to fixed term contracts and so is inapplicable in the present case, but the other paragraphs provide that the phrase:

> "*(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which that notice expires;*
>
> *(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.*"

Advocate Barnes suggested that the Respondent's contract of employment had been terminated without notice, meaning that the termination took effect from the last day of working, namely 9 April 2013.

10. I was unable to accept that submission. Based on the findings of the Tribunal and my own review of the correspondence, I reached the conclusion that the dismissal of the Respondent had been on notice and that the notice given was due to expire at the end of April 2013. Accordingly, the complaint made on 19 July 2013 was not out of time and the Appellant's first ground of appeal failed.

11. In reaching the conclusion, I bore in mind that the parties had agreed in accordance with the terms of the Respondent's written contract that notice of termination needed to be in writing. The only piece of writing from the Appellant in respect of the Respondent's employment coming to an end was the letter dated 1 February 2013. Whilst it was addressed generally "*To whom it may concern*", the Tribunal found (at para. 2.17) that it was received by the Respondent. Further, when she wrote her letters of 19 February 2013 and 11 July 2013 referring to a period of "*maternity leave*", the Respondent was ignoring the fact that her

contract of employment explicitly stated that such maternity leave was "*Not applicable*", which had been confirmed on behalf of her employer by what she had been told by her supervisor (see para. 2.15). In my judgment, the content of the letter from the Appellant to the Respondent dated 1 February 2013 stating that "*she would be leaving her employment with Europcar at the end of April*", the Appellant having refused the Respondent's request to keep her job open, is evidence of the Appellant giving notice of the date at which the Respondent's employment would cease. The parties may have reached some agreement for 9 April 2013 to be her last working day, at which point her pay entitlements were calculated, but no one has suggested that there were any steps taken to vary the notice period provided in writing, with the consequence that the notice given previously continued to apply for the purpose of calculating when it expired.

12. Having reached the conclusion that the effective date of termination of the Respondent's employment with the Appellant was not before 19 April 2013, the Appellant's argument that the complaints of unfair dismissal and sex discrimination (section 39 of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 (hereafter referred to as "the 2005 Ordinance") similarly providing that complaints must be made within three months beginning on the day when the act complained of was done) were out of time could not be maintained.

13. Even if I were wrong in law to conclude on the basis of the Tribunal's findings and the evidence adduced before it that the effective date of termination was late April 2013 and had accepted Advocate Barnes' submission that the correct date was 9 April 2013, I would not have been minded to allow the appeal on this basis of this ground alone. The Respondent's complaint would have been just 10 days out of time. During that three-month period she gave birth to her child. She then enquired of her former employer as to her position in her letter dated 11 July 2013 and made her complaint just two days after receiving confirmation that she did not have a job. In those circumstances, I am satisfied that, had the Tribunal needed to do so, the single member of the Panel would have had no hesitation in granting an extension of time to accommodate this short delay in presenting the complaint under section 1(1)(b) of the 1998 Law (and section 39(1)(b) of the 2005 Ordinance).

14. Had it been the only issue to resolve, I would not have remitted that issue to the Tribunal for its determination. The appeal provisions in the 1998 Law and the 2005 Ordinance are silent as to the powers of this Court when determining an appeal. Section 25 of the Law and section 48 of the Ordinance simply confer a right of appeal on a question of law. The Employment Protection (Appeals and References) Order, 2006 and the Sex Discrimination (Appeals and References) Order, 2006 do not explain what powers the Court is permitted to exercise. In those circumstances, in accordance with Advocate Barnes' submission that the powers of the Court must be those generally available to an appellate body, whilst remitting a matter is an option available to this Court, I take the view that there is also power to confirm the Tribunal's decision, albeit for different reasons, if that outcome achieves justice between the parties. The question of whether the Respondent's complaint was out of time was not raised by the Appellant before the Tribunal. It is clear from the Tribunal's decision that it did not, of its own motion, consider whether the complaint had been presented too late and whether it was necessary to consider inviting the Respondent to seek an extension of time. Accordingly, were it necessary to have done so, I would have preferred to resolve the question myself in the manner I have indicated rather than remitting the question for a member of the Panel to consider. That said, in the context of the present case, because of the outcome of the other ground of appeal, had I upheld Advocate Barnes' submission on the effective date of termination I would have remitted the case to consider this aspect as well.

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Offer of re-employment

15. The second ground of appeal developed by Advocate Barnes was a technical one relating to section 23 of the 198 Law, which provides:

> "*(1) Where in relation to a complaint of unfair dismissal under section 16(1)(a) the Tribunal finds that the complainant has unreasonably refused an offer by the employer which, if accepted, would have had the effect of reinstating him in his employment in all respects as if he had not been dismissed, the Tribunal shall reduce the amount of the award of compensation to such extent as it considers just and equitable having regard to that finding.*
>
> *(2) Where in relation to such a complain the Tribunal considers that, by reason of any circumstances other than those mentioned in subsection (1), it would be just and equitable to reduce the amount of the award of compensation for unfair dismissal to any extent, the Tribunal shall, subject to subsection (3) and subsection (4), reduce that amount accordingly.*"

Subsections (3) and (4) disapply subsection (2) if it is shown that the reason, or the principal reason for the dismissal is *inter alia* section 9 (dismissal on ground of pregnancy) or section 9A (dismissal on ground of sex or marital status). Section 47 of the 2005 Ordinance makes similar provision to section 23(1) of the 1998 Law in relation to an offer which, if accepted, would put the complainant in the position in which he would have been had the act which founded the complaint not occurred.

16. Advocate Barnes' submission was a simple one, pointing out that "*Although the Tribunal found that the Respondent had been offered re-employment it made no finding as to whether her refusal was reasonable or unreasonable*" and that its conclusion that "*no consideration could be given to any reduction of this award*" was, therefore, wrong in law.

17. In response, the Respondent acknowledged that the Appellant had offered re-employment on a full-time basis and that her concern, which had been relayed to the Tribunal, was about what her position would be if she were to fall pregnant again. She was clear that she had no desire to put herself through the same treatment she had previously experienced once again.

18. Building on its findings at para. 2.27 and para. 2.28, at para. 4.2 of its Decision the Tribunal stated:

> "*Given the nature of the reason for this dismissal, and in accordance with Section 23 of the [1998] Law, no consideration could be given to any reduction of this award.*"

The award in question pursuant to the 1998 Law was the full amount fixed by section 22 of that Law, although because the Respondent appears to have been paid weekly the reference to "*six months' pay*" should have been to 26 weeks' pay. When dealing with the award of three months' pay (or, as it should have been, 13 weeks' pay) under the 2005 Ordinance in para. 4.3 of its Decision, the Tribunal did not even mention the possibility of reduction pursuant to section 47.

19. In my judgment, the Tribunal erred in law in failing to deal properly with section 23(1) of the 1998 Law and section 47 of the 2005 Ordinance. Section 23(2) of the 1998 Law does not override the obligation set out in section 23(1) to approach an employer's offer of re-engagement in a structured manner. The conclusion that "*no consideration could be given to any reduction*" of the award that would otherwise follow the finding of unfair dismissal implies that the Tribunal had in mind the disapplication of section 23(2) by subsection (3). However, such disapplication does not apply to section 23(1), which involves the Tribunal in a distinct exercise.

20. The Tribunal concluded, as it was obliged to do, that there was no scope to reduce the award for unfair dismissal because of some reason other than an offer of reinstatement but it should, so as to comply with section 23(1) of the 1998 Law (and section 47 of the 2005 Ordinance), have approached the Appellant's letter of 12 August 2013 by asking itself a series of questions and setting out for the benefit of the parties its conclusions on them. The first question is whether or not the offer made by the employer "*would have the effect of reinstating [the employee] in his employment in all respects as if he had not been dismissed*" (or, under the 2005 Ordinance, "*in which he would have been had the act which founded the complaint [of sex discrimination] not occurred*"). If the offer does not satisfy that condition, the Tribunal does not need to consider the further questions raised. However, if it does, there must be a finding as to whether the employee's refusal of that offer was unreasonable. If it was not unreasonable, there is no scope on this basis to reduce the award from the level of six months' or 26 weeks' pay (or half that amount under the 2005 Ordinance). However, if the refusal of the employer's offer was found to be unreasonable, the Tribunal is obliged to consider whether it is just and reasonable to make some reduction in the award. There will inevitably be many matters for the Tribunal to consider in such a case, including having regard to whether any compensatory element of the award otherwise fixed would be unduly generous if no reductions were to be made.

21. In the present case, there is no indication on the face of the Decision that the Tribunal engaged in this exercise, or in the separate exercise required pursuant to the 2005 Ordinance. Accordingly, I concluded that the appeal must be allowed on this ground. Because of the need for the Tribunal to make further findings of fact and, if appropriate, exercise its discretion, this issue has to be remitted to the Tribunal for it to consider further. Advocate Barnes accepted that his submission in the Skeleton Argument that this be to a differently constituted Tribunal was not strictly necessary. Indeed, I take the view that it would be more cost-effective and so appropriate for the Tribunal to re-convene for this purpose unless the Convenor of the Panel is unable for any reason to arrange that. The Tribunal members have already had the benefit of hearing the parties' evidence and submissions and there would be less duplication of effort for them simply to continue hearing the matter to its conclusion.

22. I did consider briefly whether I could properly resolve the questions arising under section 23(1) of the 1998 Law and section 47 of the 2005 Ordinance without needing to remit the case. There appears to be an argument that the Appellant's letter of 12 August 2013 constituted an offer of <u>re-employment</u>, as it was put within it, rather than of <u>reinstatement</u> on such terms as if the dismissal had not occurred, and where the consequences would potentially mean that the Respondent would be treated as having been employed continuously throughout and may have had other entitlements not provided had the offer been for a fresh period of employment commencing on a date after 12 August 2013. If that were the case, the offer itself would not fall within section 23(1) of the Law (and probably not within section 47 of the Ordinance). However, the Tribunal made no findings in relation to how it construed the letter or other matters that potentially need to be considered before the exercise required by the legislation can be completed and, in the absence of such findings, it was not appropriate for me to attempt to resolve these questions at the appeal hearing. Quite what was being proposed and how that falls to be viewed are clearly matters to be developed further before the Tribunal.

Conclusions

23. For the reasons given, because the Tribunal misunderstood how to perform its functions under section 23 of the 1998 Law and section 47 of the 2005 Ordinance, the Appellant's appeal was

allowed to the extent of remitting those questions to the Tribunal to determine in the light of the approach I have set out. The remainder of the appeal was dismissed.

24. Advocate Barnes applied for the costs of the appeal to follow the event, seeking an order for costs to be made against the Respondent. In my discretion, I decided to make no order as to costs. In my judgment, the Respondent had not, in the way she presented her complaint to the Tribunal, caused the Tribunal to make the error which formed the basis of allowing in part the Appellant's appeal. In any event, although the Appellant had also been successful in arguing that the Tribunal had found the wrong effective date of termination, the Respondent had actually succeeded in respect of the consequences flowing from that issue because I had not decided that her complaint had been made out of time, which was the outcome for which the Appellant had argued. To that extent, I regarded the result of the appeal as being that honours were broadly equal and that it would be unjust to penalise the Respondent further by awarding costs against her.

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