

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 17 November 2003

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**MR P DAWSON OBE**

**MR R N STRAKER**

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MISS Y A MEARS

APPELLANT

LLOYD GREEN & CO

RESPONDENT

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Transcript of Proceedings

JUDGMENT

Revised

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## APPEARANCES

For the Appellant

MR M REED  
(Representative)  
Free Representation Unit  
Peer House  
4th Floor  
8-14 Verulam Street  
London WC1X 8LZ

For the Respondent

MR DAVID McHUGH  
(of Counsel)  
Instructed by:  
Lloyd Green & Co Solicitors  
Kensal House  
77 Springfield Road  
Chelmsford  
Essex VM2 6JG

**HIS HONOUR JUDGE PETER CLARK**

1 The Applicant, Miss Mears, was employed by the Respondent firm of solicitors from 1 September 1998 until her dismissal effective on 9 February 2000. On 3 April 2000 she presented a complaint of unfair dismissal and breach of contract (wrongful dismissal) to the Stratford Employment Tribunal. The claim was resisted, but by the time it came on for hearing before a Tribunal chaired by Mr S M Duncan, sitting on 18 and 19 March 2002, the Respondent had conceded that her dismissal was both unfair and wrongful. That hearing was thus concerned only with the assessment of compensation, that being the Applicant's preferred remedy.

2 By a decision with Extended Reasons promulgated on 13 May 2002 the Tribunal awarded the Applicant £5,325 damages for wrongful dismissal, a basic award of £230 and a compensatory award for unfair dismissal of £9,501. However, the wrongful dismissal damages were set off against that part of the compensatory award which covered her three month notice period, in respect of which wrongful dismissal damages were awarded.

3 Against that remedies decision the Applicant appealed. Her appeal came on for Preliminary Hearing before a division presided over by Mr Recorder John Hand QC sitting on 3 March 2003. On that occasion she was represented by Counsel, not Mr Reed, under the ELAAS pro bono scheme.

4 In a very full judgment given by the learned Recorder that day the appeal was permitted to proceed to this full hearing on a number of grounds. However today Mr Reed limits his attack on the Tribunal's decision to two areas. We shall deal with each in turn.

## Mitigation of Loss

5 Mr McHugh, appearing for the Respondent below as he does today, took the point that the Applicant had failed to mitigate her loss (see Extended Reasons, paragraph 10). The Tribunal dealt with that submission at paragraph 14 in this way:

14 “We now turn to the compensatory award, bearing in mind the words in the Employment Rights Act 1996. We will start with loss of earnings to date. The Respondents challenged strongly Miss Mears’ attempts to mitigate her loss. We have considered this carefully and we consider it was irresponsible of Miss Mears not to seek a reference from the Respondents and unwise of her to mention to all the agencies she contacted that she had a pending case before these Tribunals. We believe that these matters brought problems upon Miss Mears in getting a new job. If in fact Miss Mears had sought a reference we conclude that there is no reason to believe that in the circumstances the Respondents would not have provided an adequate reference. It was in the Respondents’ interest where a case was being brought that Miss Mears should get work as quickly as possible and they would have been aware of their legal duty to provide a fair and balanced reference. In fact during this initial period Miss Mears did obtain work but of a temporary nature as a secretary. In March 2000 Miss Mears earned £703 gross, in April 2000 £406 gross and in May 2000 £1,370 gross. Miss Mears had good experience and qualifications as a senior legal secretary, including having passed part 1 of the Legal Executive exams, and we believe that she should have obtained a permanent position by the end of three months from her ultimate dismissal.”

6 So they imposed a cut-off point of three months full pay based on a net figure agreed between the parties as £5,325, less temporary earnings during that period. As appears from the Applicant’s Schedule of Loss, she claimed full loss of earnings up to the date of the Tribunal hearing, just over two years, and future loss at the same rate.

7 Mr Reed submits that in arriving at the three month cut-off point the Tribunal wrongly took into account an irrelevant factor – irrelevant so far as her duty to mitigate was concerned – namely that she had informed employment agencies that she had a pending application before the Tribunal against her former employer; an unwise move in the view of this Tribunal.

8 Mr Reed relies on the statement of principle found in the judgment of Sedley LJ in **Wilding v British Telecommunications Plc** [2002] ICR 1079, paragraph 55, that it is for the Respondent to show that the Applicant has behaved unreasonably in steps which she has or has not taken in mitigation of her loss.

9 Mr McHugh argues that, although the reference by the Tribunal to the Applicant's statement to employment agencies was itself unwise, it was not a factor which they took into account in fixing the cut-off point at three months. What they did take into account, permissibly, was that the Applicant was well-qualified and ought to have sought a reference from the Respondent which, they found, would have been provided in adequate form. He accepts that if they did take that factor into account it was improper to do so. The Applicant did not act unreasonably in telling employment agencies the true position as to her pending Tribunal application.

10 Having carefully considered the way in which the Tribunal express their reasoning at paragraph 14, on a fair reading we are persuaded to accept Mr Reed's submission. We are satisfied that the Tribunal did improperly take into account an irrelevant factor in setting the cut-off point for full loss of earnings. That was an error of law.

11 We are not ourselves able to discern what influence that factor had on the Tribunal's overall conclusion. Accordingly, we see no alternative but to allow the appeal on this ground and to remit the question of mitigation of loss to a fresh Tribunal for reconsideration, without taking into account the impermissible factor.

### **The Partial Loss of Earnings Figure**

12 As indicated earlier, the parties agreed a figure of £5,325 as representing the Applicant's net loss of earnings over the three month notice period, at a gross salary of £29,000 per annum. That equals £1,775 per month net. The Tribunal went on to find that after three months following summary dismissal on about 9 February 2000, the Applicant would have found a permanent position, but at the lower salary of £24,000 per annum gross. They found that it would then take 18 months for her to obtain her former salary level. Thus the partial loss was £5,000 per annum gross, £7,500 over 18 months. In netting down that figure they applied a deduction of 22% for tax and 10% for National Insurance, giving a partial net loss figure of £5,100.

13 Mr Reed attacks that figure, first on the basis that the Tribunal were shown the Respondent's Schedule which showed a net difference of £319 per month, based on gross earnings of £29,000 and £24,000 per annum. Over 18 months that results in a loss of £5,742, as opposed to the £5,100 awarded by the Tribunal.

14 Mr McHugh accepts that the Respondent's Schedule was in the trial bundle but tells us that the Tribunal were never referred to it, contrary to the Applicant's witness statement in these appeal proceedings and that of her witness, Mr Foreman. The Chairman and members, in commenting in writing, do not recall seeing that Schedule.

15 Neither the Applicant nor Mr Foreman are here today to give evidence, nor is the Respondent's deponent, Mr Lloyd Sinclair Green.

16 Happily, it is unnecessary to attempt to resolve that conflict because Mr Reed takes a further point; that the Tribunal's findings as to loss for the first three months, £5,325, are based on a net monthly figure of £1,775; whereas the method used to calculate the partial loss, deducting 22% tax and 10% National Insurance, necessarily leads to a logical inconsistency within the decision. Applying that formula to a gross salary of £29,000 per annum gives a net monthly figure of £1,643, which is less than the agreed basis for the initial three month net full loss.

17 In these circumstances we shall also remit the question of the Applicant's net earnings to the next Tribunal for resolution. The appeal is allowed and the matter remitted to a fresh Tribunal on these limited issues: mitigation of loss and net earning figures.