

CA on appeal from the EAT before Ward LJ, Keene LJ. 11<sup>th</sup> March 2002.

**LORD JUSTICE WARD:** Lord Justice Keene will give a short judgment.

**JUDGMENT : LORD JUSTICE KEENE:**

1. It seems to me, having heard Mr Greateorex this morning, that this is a matter where permission to appeal ought to be granted, despite those points which I raised when I refused permission on paper.
2. In my view it is at least arguable that, contrary to what the Employment Appeal Tribunal believed, the applicant was not dismissed by his employer because of the questionnaire results, which it seems may not have been available at the time of his dismissal on the Thursday: see in this connection paragraphs 8 and 10 of the Employment Tribunal's decision. If that is right, then it was the pushing incident alone which led to the dismissal. Presumably it was in respect of that that the Employment Tribunal found that the procedures had been unfair; but it also had qualms, it is said, over whether it was fair to dismiss over the one incident. That is something on which some emphasis has been placed this morning by Mr Greateorex. He contends that the questionnaires seem to have been crucial in the Employment Tribunal's decision to reduce compensation from a normal level to zero. He therefore argues - and I think there is some substance in this - that the questionnaires were not in fact just a matter to which limited weight was being attached in the compensation decision.
3. Of course, an employer is entitled to rely on subsequently available information about an employee's conduct to argue for reduced compensation. For example, it may be that it can be shown that an employee would have been dismissed within a very short time of what in fact was the dismissal date - in this case, once the investigation into the other allegations was completed. But it remains the fact in this case that that investigation by way of questionnaire was never put to Mr Hughes at the time. It was for the Employment Tribunal, therefore, to consider whether these other allegations, when added to the original allegation, would have justified dismissal, so as to merit a zero award of compensation. Yet, of course, as is recorded, the tribunal did not hear evidence from either the members of staff who gave information to the compiler of the questionnaire or even from the compiler of the questionnaire herself. That means that Mr Hughes never had the opportunity before the tribunal to test those allegations against him by way of cross-examination.
4. It is, to my mind, somewhat difficult to see how in those circumstances a hundred per cent reduction in compensation could have been properly based, or justified, on what seems to have been this evidence derived from the questionnaires alone. In those circumstances I take the view that there is here a real prospect of success meriting the granting of permission to appeal.
5. Having arrived at that view, if that be my Lord's view as well, for my part I would nonetheless energetically urge the parties to try to deal with this matter without the costly process of a full appeal to this Court, which might in any event lead to a further Employment Tribunal hearing, as Mr Greateorex acknowledges. All of that process is going to be extremely expensive. The applicant is a young man. The respondent is a nursing home, which could no doubt better devote its resources to the care of the elderly than to litigating before the Court of Appeal. I would, therefore, as I say, strongly urge the parties to see if they cannot settle this matter without a hearing before the full court. Mediation is, of course, available and that in itself might assist; but certainly, in some shape or form, it would be highly desirable if a hearing before the full court could be avoided.

**LORD JUSTICE WARD:**

6. I agree that permission should be given for the reasons given by my Lord, but I wholeheartedly also agree that every endeavour should be made to compromise this unhappy dispute before troubling the full court.

**Order:** application for permission to appeal granted; transcript of this judgment to be provided to both parties at public expense; permission to amend appellant's notice granted.

Mr P Greateorex (instructed by Messrs Steggles, Chester) appeared on behalf of the Applicant Appellant. The Respondent did not appear and was not represented.