Appeal No. UKEAT/0417/06/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 9 November 2006
Judgment handed down on 20 December 2006

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

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1) ATTRIDGE LAW (a firm of solicitors) APPELLANTS
2) MR S LAW

MS S COLEMAN RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants

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(of Counsel)
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For the Respondent

MR ROBIN ALLEN QC
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SUMMARY

Disability Discrimination – Disability; Victimisation

Practice and Procedure – Striking-out-dismissal

Associative disability discrimination – whether covered by Framework Directive – whether DDA is capable of being read in conformity with Directive; if it is – whether reference to ECJ by ET was wrong in law.

HIS HONOUR JUDGE PETER CLARK

1. This appeal raises, for the first time in this jurisdiction according to the researches of Counsel, the question as to whether an Employment Tribunal Chairman was wrong in law to refer a question to the European Court of Justice (ECJ).

2. The case is presently proceeding before the London (South) Employment Tribunal. The parties are Miss Coleman, Claimant and (1) Attridge Law, a firm of solicitors and (2) Mr Steve Law, a partner in that firm, Respondents. The Claimant seeks to bring a claim of unlawful disability discrimination against the Respondents. Mr Robin Allen QC, appearing with Mr Paul Michell for the Claimant, tells me that a separate claim of constructive unfair dismissal will not be pursued.

3. The Claimant is not herself disabled within the meaning of the **Disability Discrimination Act 1995** (DDA). Her complaint of unlawful disability discrimination is advanced on the grounds that she is the carer of a disabled person, her son (A) born in 2002. It is accepted that A is disabled; he is subject to apnoeic attacks and congenital laryngomalacia and bronchomalacia requiring specialised and particular caring requirements.

4. At a case management discussion, held before a Chairman, Mr M Houghton, on 7 November 2005 it was directed by consent that the case be listed for a pre-hearing review (PHR) to consider the question whether the Claimant is entitled to bring a claim of unlawful disability discrimination against the Respondents based on the concept of "associated [sic] discrimination" on account of the alleged disability of the Claimant's son. I shall refer to the concept as that of "associative discrimination".

5. That PHR took place before a Chairman, Ms M E Stacey, on 17 February 2006. By an order with Reasons promulgated on 23 May 2006 that Chairman ordered that the question of whether discrimination by way of association with a disabled person, or associative discrimination, is prohibited by the Equal Treatment Framework Directive (2000/78/EC), is referred to the Court of Justice of the European Union for a preliminary ruling. The complaint of unfair dismissal, not now pursued, was stayed meanwhile. It is against the reference order that this appeal is brought by the Respondents.

6. The Chairman further directed that the parties draft and agree the precise formulation of the questions to be put to the ECJ. That direction was followed and as a result, on 6 July 2006, Ms Stacey made a further order formulating the questions referred to the ECJ for preliminary ruling and setting out the assumed facts on which the questions were to be answered by the Court.

7. It is common ground that if the ECJ rules that the Directive does not contain a prohibition on associative disability discrimination then her claim necessarily fails and should be struck out. The Directive is not directly enforceable between these private parties and it is also common ground that the DDA 1995 does not, on its face, prohibit associative discrimination. It is only if (a) the Directive prohibits associative discrimination and (b) the DDA can be read consistently with such a construction of the Directive that the Claimant establishes a valid cause of action.

Preliminary

8. Shortly before the hearing of this appeal I was shown a faxed letter from Mr Robin Lewis, solicitor, to the EAT dated 3 November. Acting on behalf of the Department for Work and Pensions (DWP), Mr Lewis set out the Department's position on the issue in the appeal as

to whether the questions raised in this matter ought to be referred to the ECJ. Having read that letter *de bene esse* I directed that a copy be forwarded to the parties so that they could make oral representations on what account, if any, I should take of the Department's position in determining this appeal. It seemed to me that the Department had an interest as the Government Department responsible for the DDA.

9. Mr Moretto indicated that he broadly agreed with the Department's submissions, which accorded with his own case; Mr Allen objected to my taking into account those submissions separately in the absence of any application by the Department to be joined as a party under EAT Rule 18 and then to make submissions orally through Counsel.

10. I accepted the submissions of Mr Allen; since the ground covered by the Department's written representations was to be traversed by Mr Moretto I have not taken separate account of the Department's submissions.

ECJ Reference

11. There is no question but that an ET has power to make a reference to the ECJ (Article 234. Treaty of Rome) where the question involves, as in this case, interpretation of a Directive. The power is discretionary. It is sparingly used at that level; normally it is left to the higher Courts to make a reference. The ET Rules of Procedure 2004, Rule 58, make procedural provision for a reference to be made. Thus the question, it seems to me, in this appeal is whether in referring the questions identified in this case the Chairman has failed to exercise her discretion judicially or has erred in principle.

Should a reference be made?

12. Mr Moretto submits that a reference should only be made where it is necessary to enable the ET to give judgment in this case (Article 234). **Bulmer Ltd v J Bollinger S.A.** [1974] 1 Ch 401.

13. In the present case, whatever the true interpretation of the Directive, he contends that it is not possible to construe the domestic DDA in such a way as to include protection for associative discrimination. In these circumstances the reference is academic. It ought to be revoked.

14. The Chairman was persuaded that it may be possible, with appropriate interpolations, to construe the relevant provisions of the DDA (ss 3A, 3B and 4) in such a way as to include associative discrimination if that accords with the proper interpretation of the Directive (Reasons para 28).

15. Pausing there, it is common ground that para 27 of the Chairman's reasons are infelicitously worded or, on Mr Moretto's case, plainly wrong. The Chairman there said:

> **"The next issue therefore is whether the wording of the DDA is acte claire either to accord with the Framework Directive or incapable of such construction."**

16. I accept that this mis-states the position. The ECJ is not asked to interpret domestic legislation, only the European Directive, in this instance. There are two separate questions; (1) is the Directive *acte claire,* so that no interpretation is required from the ECJ? (2) if not, and depending on the proper interpretation of the Directive, can the DDA be read purposively in such a way as to accord with European Law? Whilst those two questions appear to be conflated at paragraph 27, I am satisfied, reading the Reasons as a whole, that the Chairman did consider

each question separately. She was not persuaded (Reasons para 23-26) that the interpretation of the Directive advanced by the Claimant was either unarguable, or *acte claire*, so that a ruling by the ECJ would be necessary in order to answer the construction question raised by the DDA. I agree with that analysis. Further, the specific questions formulated in the Chairman's second order for the ECJ are directed solely to interpretation of the Directive, not the domestic legislation.

17. Was the Chairman's approach to the construction of the DDA a permissible one? In developing his submission that it was not, Mr Moretto referred me to a number of cases in the House of Lords for the proposition that an ET is under a duty to interpret domestic legislation consistently with the relevant Directive if it is possible to do so, see **Webb v EMO** [1993] IRLR 27, para 22, per Lord Keith. However, he also relied on the speech of Lord Templeman in **Duke v GEC Reliance Systems Ltd** [1998] IRLR 118, para 30, where his Lordship opined that s2(4) of the **European Communities Act 1972** did not enable or constrain a British Court to distort the meaning of a British Statute in order to enforce a Community Directive which does not (as in this case) have direct effect. In **Litster v Forth Dry Dock Engineering Ltd** [1982] IRLR 161, where words were added to the TUPE Regulations to comply with the Acquired Rights Directive, Lord Oliver (para 21) was of the opinion that if the domestic legislation can reasonably be construed so as to conform with obligations arising from the relevant Directive, a purposive construction will be applied even though it may involve some departure from the strict and literal application of the words which the legislature has elected to use.

18. In the present case Mr Moretto submits that the wording of the relevant provisions of the DDA make it clear that the Act is designed to protect those who are disabled from

discrimination. I accept, as does Mr Allen, that on a literal construction of the words used that submission is correct.

19. The question is whether words can be interpolated to cover associative discrimination. There has been some debate as to the precise formulation of words which could be added to the DDA to provide that protection. However, ultimately the precise form of words will depend upon the proper interpretation of the Directive. That is the very question which the Chairman has referred to Europe.

20. Would such interpolation, however framed, offend the principles of construction to which Mr Moretto refers? Would it result in an interpretation which accorded with the manifest intention of Parliament as demonstrated by the legislation as a whole? In this connection Mr Moretto has referred me to the First Report of the Joint Committee on the Draft Disability Discrimination Bill, from which it is clear that the UK Government's interpretation of the Directive is that it does not protect associative discrimination and the domestic legislation does not do so. Thus, when the DDA was recently amended by statutory regulation, no steps were taken to include associative discrimination.

21. Mr Allen points out that the amending regulations (SI 2003/1673) - which, among other things, added s3A DDA, the meaning of discrimination - were brought in to ensure that the DDA fully implemented the disability strand of the Framework Directive (2000/78 EC). In **Pfeiffer v Deutsches Rotes Kreuz Kreizerband Waldshut EV** [2005] IRLR 137, the ECJ made clear that the National Court, when applying domestic law and in particular legislative provisions specifically adopted for the purposes of implementing the requirements of a Directive, is bound to interpret national law, as far as possible, in the light of the wording and the purpose of the Directive concerned in order to achieve the result sought by the Directive

(Judgment, para 119). It is the responsibility of the National Court to ensure that the rules of Community law are fully effective (para 111).

22. That principle, submits Mr Allen, was invoked by the House of Lords in its approach to a question arising under the **Human Rights Act 1998**, and in particular a party's rights under Articles 8 and 14 of the European Convention on Human Rights in **Ghaidan v Godin-Menoza** [2004] 2 AC 557; see per Lord Steyn, para 45.

23. On this critical aspect of the appeal I prefer the submissions of Mr Allen. It seem to me, as it did to the Chairman, that the DDA is capable of interpretation, consistent with an interpretation of the Directive favourable to the Claimant, so as to include associative discrimination without distorting the words of the statute and consistent with the domestic Courts' responsibility to arrive at a construction which ensures that the Directive is fully effective, as Parliament presumably intended when passing the 2003 Regulations.

24. Having answered the principal question in favour of the Claimant, I should deal with the further points raised by Mr Moretto. First, whilst normally it is preferable that a case is referred after all the facts have been found by the domestic Court, I see no bar, in a strike-out case (as this effectively is) for the matter to be referred on assumed facts. See **Thetford Corporation v Fianma** [1987] 3 CMLR 266. Secondly, I accept the formulation of the principle to be found in Anderson and Demetriou, References to the European Court (2002 ed.) at paras 3-117/8 that a reference is necessary not solely where, whichever way the point is decided, it is conclusive of the case (**Bulmer**, per Lord Denning MR, para 27), but also where it is required to do justice. See **R v Plymouth, ex P Rogers** [1982] 3 CMLR 221, 226, per Lord Lane CJ. In my judgment the Chairman was entitled to conclude, in the proper exercise of her discretion, that in order to determine the preliminary issue which the parties, by consent, put before her, namely whether

the Claimant could bring a claim of associative discrimination under the DDA, it was first necessary to obtain the ECJ's opinion as to the proper interpretation of the Directive before deciding whether the DDA should be construed in the way contended for on her behalf.

Conclusion

25. For these reasons, I shall dismiss this appeal