Appeal No. UKEAT/0295/09/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 17 November 2009

Before

THE HONOURABLE MRS JUSTICE SLADE

MR D EVANS CBE

MISS S M WILSON CBE

THE CHIEF CONSTABLE OF AVON
& SOMERSET CONSTABULARY — APPELLANT

MR N T DOLAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS S FATIMA (of Counsel) Messrs Beachcroft LLP Solicitors Portwall Place Portwall Lane Bristol BS99 7UD
For the Respondent	MISS E SMITH (of Counsel) Messrs Russell Jones and Walker Solicitors Landore Court 51 Charles Street Cardiff CF10 2GD

SUMMARY

DISABILITY DISCRIMINATION: Disability related discrimination
PRACTICE AND PROCEDURE: Striking-out/dismissal

Disposal of appeal including remission

On a previous appeal the EAT remitted the issue of justification of disability related discrimination for reconsideration by the ET. After the EAT judgment but before the remitted hearing the HL gave judgment in **Malcolm v London Borough of Lewisham [2008] IRLR 700**. At the remitted hearing the Appellant Chief Constable contended that the ET should consider first whether the Chief Constable had treated the claimant less favourably than others for a reason relating to his disability before, if necessary, considering the issue of justification. The EAT held that the ET did not err in holding that it had no power to consider the issue of less favourable treatment as it was bound by the terms of the order on remission to consider only the issue of justification. **Aparau v Iceland Frozen Foods PLC (No 2) [2000] IRLR 196** applied. If this were a case of issue estoppel the relevant facts did not fall within the exception referred to in **Arnold v National Westminster Bank PLC [1991] 2 AC 93** relied on by the Chief Constable. Further, the ET did not err in refusing to consider the issue of less favourable treatment at the remitted hearing if and insofar as it relied on the possibility that it may have wished to hear additional evidence if it were to consider that new issue.

Understandably on the then state of authority, until the judgment in **Malcolm**, the Chief Constable had not asserted that the claimant's treatment was not less favourable than others. This was not an issue in the ET3, no such issue was identified at a CMC or raised at the liability hearing. No application was made to amend the original Notice of Appeal or the terms of the Order on remission from the EAT. Employment Tribunals are creatures of statute. The ET did not err in refusing to decide an issue which it was not empowered to consider (see **Aparau** para 24).

THE HONOURABLE MRS JUSTICE SLADE

1. This is an appeal from the judgment of an Employment Tribunal sitting at Bristol determining two issues remitted to it by the judgment of Employment Appeal Tribunal, HHJ Clark, on 22 April 2008. The judgment of the Employment Tribunal was entered in the register on 5 December 2008. We will call this the ETRJ. Following a Rule 3(10) hearing, Keith J ordered that:

> **"This appeal is set down for a full hearing only on the issue relating to the Employment Tribunal's refusal to reconsider its finding that the Respondent was treated less favourably when threatened with being placed on half pay."**

2. The Respondent before the Employment Tribunal, the Chief Constable of the Avon and Somerset Constabulary, is the Appellant in the appeal before us and Nicholas Dolan, the Claimant before the Employment Tribunal, the Respondent to this appeal. We will refer to the parties to this appeal by their descriptions in the proceedings before the Employment Tribunal.

3. We will summarise only those facts which are relevant to the appeal before us. The Claimant is a former police officer. He joined the Respondent's force on 6 October 1975 and was promoted to Detective Inspector in the CID on 12 May 2003. Following periods of absence from work due to a stress related illness he received a letter dated 18 August 2006 signed by Chief Inspector Padgett. The letter informed the Claimant that if he were able to give an early return to work date, then his pay would not be reduced to half pay. If he were to remain on sick leave, he would receive half pay.

4. The Claimant resigned with effect from 6 October 2006. He brought claims under the **Disability Discrimination Act 1995** ('DDA') of direct and disability related discrimination and discrimination by failure to make reasonable adjustments. He also claimed constructive unfair dismissal. By the time of the substantive hearing before the Employment Tribunal, the

Respondent had accepted that the Claimant was a disabled person within the meaning of the DDA and the Claimant had withdrawn his claim of direct disability discrimination.

5. By its judgment entered in the register on 22 August 2007 on the substantive hearing (ETSH) the Employment Tribunal upheld some of the Claimant's complaints of breach of the duty to make reasonable adjustments and of disability related discrimination and dismissed others. The Employment Tribunal upheld the Claimant's claim of unfair constructive dismissal.

6. The Respondent appealed four of the Employment Tribunal's findings. Only one is relevant to the appeal before us. The Employment Tribunal found that the threat in the letter of 18 August 2006 signed by Chief Inspector Padgett to put the Claimant on half pay if he did not return to work was an act of disability related discrimination which the Respondent had not justified.

7. The Employment Appeal Tribunal, HHJ Peter Clark, on 22 April 2008, held that the Employment Tribunal had erred in two respects, only one of which is material to this appeal. The Employment Appeal Tribunal found in paragraph 42 of its judgment that the Employment Tribunal had erred in "explaining why it concluded that the Respondent had failed to justify the threat of half pay".

8. The Employment Appeal Tribunal remitted the case to the Employment Tribunal for it to "reconsider and articulate its reasoning in relation to two discrete issues which we have identified" (paragraph 44 of the Employment Appeal Tribunal's judgment).

9. The Employment Appeal Tribunal held that if on the remitted hearing the Employment Tribunal were to dismiss either of the claims to which the remitted issues related the

Employment Tribunal must necessarily revisit its conclusion that the Respondent was in repudiatory breach of trust and confidence which was a necessary basis for the success of the constructive dismissal claim.

10. The Respondents, up to this point, had not contended that the Claimant had not received less favourable treatment than others by having been sent the letter of 18 August 2006 regarding being put on half pay. That issue was not raised in the Respondent's ET3. It was not argued before the Employment Tribunal at the substantive hearing and it was not in the original Notice of Appeal which was determined by HHJ Peter Clark and there was no subsequent application to the Employment Appeal Tribunal to alter the terms of the remission.

11. On 26 June 2008 judgment in the case of **Malcolm v Mayor and Burgesses of London Borough of Lewisham** [2008] 1 AC 1399 was handed down. Ms Fatima for the Respondent rightly says that this case changed the approach to the question of less favourable treatment in the disability discrimination legislation. Albeit that **Malcolm** was a landlord and tenant case, it was generally appreciated that judgment of the House of Lords would most likely have an impact in other areas of discrimination covered by the DDA.

12. As a result of **Malcolm**, the comparison to be made in determining whether less favourable treatment has been afforded to a disabled person is to make a comparison with others who do not have the Claimant's disability. This was a departure from the established approaches laid down in **Clark v Novacold** [1999] IRLR 318 (CA).

13. Immediately after **Malcolm**, it was not yet established that the principles in that case would apply to the employment sections of the DDA but, as we have said, it was readily appreciated that it was likely, if not certain, that they would.

14. On the remitted hearing to the Employment Tribunal, Ms Fatima for the Respondent contended that, in view of the judgment of the House of Lords in **Malcolm**, the Employment Tribunal should decide whether the Claimant had been less favourably treated for a reason related to his disability before it considered the remitted issue of justification (see paragraph 4 of the Employment Tribunal's judgment on the remission hearing).

15. It was the unanimous view of the Employment Tribunal that they were "not prepared to reopen the issue of less favourable treatment". The Employment Tribunal articulated its reasons for refusing to consider the issue of whether the claimant had been treated less favourable than others in paragraphs 7 and 8 of its judgment:

> **"7. Firstly, we concluded that the Employment Appeal Tribunal's remission to us was very limited and even though we accepted that that was because "*Malcolm*" was not in contemplation at the time - and unavoidably so - we would be very reluctant to take upon ourselves a far more wide-ranging review of our findings than the Employment Appeal Tribunal had ever envisaged. In our view, the default position ought to be that we do what the Employment Appeal Tribunal tells us that we should do; we do not embark upon an exercise upon the basis that the Employment Appeal Tribunal has not specifically said that we should not.**
>
> **8. Moreover, we would have wished, had the *Malcolm* test applied at the time to have asked more questions of the witnesses about the actual application of the two procedures in other cases and may well have wished to ask questions in respect of the half-pay issue also. That opportunity was not available to us, and we note that the Employment Appeal Tribunal made it plain that it was not envisaged that further evidence should be called before us in this exercise. We therefore concluded that we should restrict the issues before us strictly to those which had been remitted by the Employment Appeal Tribunal and that we should not consider the wider question of whether there was in fact less favourable treatment in respect of these matters."**

16. Having held that it would not consider whether the Claimant had received less favourable treatment, the Employment Tribunal reconsidered whether the Respondent had justified sending the Claimant the letter of 18 August 2006. The Employment Tribunal accepted that Chief Inspector Padgett sent the Claimant the letter of 18 August 2006 in error. However, it concluded that:

> **"She was still very much involved with this case and, in those circumstances, her error in sending out the letter of 18 August, though an innocent mistake, was nonetheless a blameworthy one."**

17. The Employment Tribunal held at paragraph 13:

> **"13. It was our unanimous conclusion, therefore, that to rely upon one's own culpable error lies outside the range of what a reasonable employer would have relied on as a material and substantial reason for less favourable treatment of the claimant. In all those circumstances, having reconsidered the issue in the light of counsel's representations on both sides, we unanimously concluded that the proper course was to confirm the view which we had already formed and find that the respondent had failed to justify the treatment in this instance."**

18. There was no appeal against these findings.

Ground of Appeal

Respondent's Submissions

19. Ms Fatima on behalf of the Respondent submits that the form of the remittal by the Employment Appeal Tribunal (HHJ Clark) did not preclude a consideration of the question of whether the sending of the letter of 18 August 2006 was less favourable treatment within the meaning of section 3A of the **DDA**. It is said that the question is whether in light of the subsequent judgment in **Malcolm** it could be said that the Employment Tribunal was not precluded from considering on the remitted hearing the question of whether there was less favourable treatment of the Claimant.

20. It is contended by Ms Fatima that liability for disability related discrimination in relation to the sending of the letter of 18 August 2006 was an issue on remittal to the Employment Tribunal. To exclude from its considerations a change in the law on the issue of less favourable treatment would be to require the Employment Tribunal to base its decision on a false premise.

21. Ms Fatima recognises that the judgment of the Court of Appeal in **Aparau v Iceland Frozen Foods Plc (No.2)** [2000] IRLR 196 is binding on this court. However, she takes issue with its application to the facts of this case and, in summary, says that the Employment Tribunal can enlarge on the terms of the remission by the Employment Appeal Tribunal.

22. Insofar as the Employment Tribunal relied on the need for additional evidence as a reason for refusing to consider the issue of less favourable treatment, Ms Fatima contends that it erred. The Employment Tribunal recorded at paragraph 5 of its judgment that:

> **"Neither side indicated that they would actually wish to call fresh evidence were we to accede to Ms Fatima's application."**

23. Ms Fatima contends that the decision contained sufficient material for a tribunal to consider and determine the issue of less favourable treatment on the **Malcolm** approach by reason of the fact that the letter of 18 August 2006 was said to be a standard letter. She says that it must be implied that there may be exceptions to the sending out of such a standard letter. In principle that is all that a tribunal needs to know: that there was a standard letter which would routinely be sent out to police officers who were on sick leave or absent from duty for certain periods of time.

24. Ms Fatima contends that consideration of whether less favourable treatment is shown is not precluded by issue estoppel or that even if it is that it falls within recognised exceptions. She says that the Employment Tribunal at its substantive hearing did not make clear and precise findings on whether the claimant had received less favourable treatment than others in regard to the threat of half pay. Secondly, that there was no final decision on the Chief Constable's liability regarding the half pay letter at the time when the **Malcolm** issue was raised. There had been a decision by virtue of the judgment of the Employment Tribunal on the substantive hearing. However, that could no longer be regarded as a final judicial decision after the Employment Appeal Tribunal had remitted the case to the Employment Tribunal.

25. The Respondent relies on **Arnold v National Westminster Bank Plc** [1991] 2 AC 93 page 106, to the effect that if the decision of Employment Tribunal were to be regarded as a

final decision and, therefore, give rise to issue estoppel, it should be regarded in the same light as the position for example of an interlocutory judgment and a judgment on an issue at an earlier stage of litigation. In this regard, reference is made to the quotation on page 106 B-F of the judgment of Diplock LJ in **Fidelitas Shipping Co Ltd v Exportchleb** [1966] 1QB 630, 642.

26. If issue estoppel were to be established in this case on the question of whether the Claimant had been less favourably treated than others were or would have been treated, Ms Fatima contends that the situation falls within the exceptions contemplated in **Arnold**. In this regard she refers to passages in the speech of Lord Keith at pages 109 A and B and also to 109D and in particular to page 110 H in which Lord Keith said:

> **"Upon the whole matter I find myself in respectful agreement with the passage in the judgment of Sir Nicolas Browne-Wilkinson V.-C. where he said [1989] Ch. 63, 70-71:**
>
> *'In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can never be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case.'"*

27. In this regard Ms Fatima recognises that Mance LJ in the Court of Appeal in **Aparau** at paragraph 29 when considering whether there was, in that case, issue estoppel held that there was none such because it was not a case of a party in a second set of proceedings relying on a point which was or could have been relied upon by him in the first set of proceedings in which case failure by the other party to object could have been very material. Principles of cause of action or issue estoppel and the principle in **Henderson v Henderson** [1843] 3 Hare 100 considered in the context of an employment tribunal in **Staffordshire County Council v Barber** [1996] IRLR 209 and **Church West Lancashire NHS Trust** [1998] ICR 423 do not apply.

Mance LJ continued:

> **"What has occurred as a result of the tribunal acceding to the respondents' invitation to go into matters outside those remitted to it by the Employment Appeal Tribunal on 9th October 1995 is unfortunate and, although this has not been identified until the matter reached this court after a further appearance before the Employment Appeal Tribunal, invalid."**

28. Ms Fatima contends that if there were issue estoppel in this case on the question of whether there had been less favourable treatment by the Respondent of the Claimant, then the case fell within the exception to issue estoppel in that **Malcolm** brought about a change in the law which rendered it just to reopen the issue of whether there had been less favourable treatment.

29. Ms Fatima contends that if the **Malcolm** approach to the comparator had been adopted in the instant case, the Employment Appeal Tribunal would have concluded that the Respondent had not treated the Claimant less favourably by sending him the half pay letter. Accordingly, it would have dismissed the disability related discrimination claims based on the letter. In the light of such conclusion it would also have reconsidered whether the Respondent had been in repudiatory breach so as to entitle the Claimant to resign and claim constructive dismissal.

30. If we conclude that the terms of the remission to the Employment Tribunal did not in their terms permit the Employment Tribunal to enlarge its considerations to include that of the question of whether the Claimant had received less favourably treatment, Ms Fatima seeks to persuade us that we have power to do that or to regard the Notice of Appeal as constituting an application for enlargement of the terms of the question or the issues to be remitted.

Claimant's Submissions

31. Miss Smith, on behalf of the Claimant, submits that the extent to which an Employment Tribunal's jurisdiction is revived in consequence of a remission from the Employment Appeal Tribunal depends entirely on the scope of the remission. The Employment Tribunal lacks jurisdiction to hear and determine matters outside the scope of the remission. Miss Smith relies in this regard on the judgments of the Court of Appeal in **Aparau.**

32. Miss Smith submits that **Arnold**, relied upon by the Respondent, is distinguishable from the instant case. The special circumstances contemplated by Lord Keith in **Arnold** at page 109 are not present. The Respondent could have raised the argument which it now seeks to advance before the Employment Tribunal at the substantive hearing.

33. Like Ms Fatima, Miss Smith submits that issue estoppel does not arise. However if it does then she, unlike Ms Fatima, says that the case does not fall within the exception to its application. Miss Smith contends that the point now sought to be raised would, in the view of the Employment Tribunal, have required the hearing of further evidence. The point which the Respondent sought to reopen at the remitted hearing was not purely a point of law. Even if the parties would not have wanted to call evidence on the point, the Employment Tribunal could have required witnesses to attend using their powers under Rule 10 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**.

34. Miss Smith contends that the Employment Appeal Tribunal should exercise its power to vary the terms of a remission to the Employment Tribunal only in exceptional circumstances. Those are not present in this case and nor had the Respondents applied to the Employment Tribunal to review its decision on the substantive hearing.

35. Miss Smith points out that an application to the Employment Appeal Tribunal to review and enlarge on the terms of remission would be after a very considerable delay, bearing in mind that the judgment in **Malcolm** was handed down 25 June 2008. If such application is being made today, that application would be nearly 18 months after it could have been made. If such an application were to be regarded as having been made by way of the Notice of Appeal, that notice was lodged on 29 January 2009, some six months after the **Malcolm** judgment.

36. Further Miss Smith says that the arguments advanced on behalf of the Respondent infringe principles of legal certainty. Reopening of a matter which may well require further evidence would be likely to require the Employment Tribunal to consider a difference in treatment three years after the original hearing.

Discussion

37. In our judgment, the Employment Tribunal did not err in law in considering that it only had power to determine the issues remitted to it by the Employment Appeal Tribunal. That it adopted the right approach in this regard is clear from the judgment of the Court of Appeal in **Aparau**. Employment Tribunals are creatures of statute. Their powers derive from statute.

38. Moore-Bick LJ at paragraph 24 of the judgment in **Aparau** explained that Employment Tribunals have a limited power to review their decision in accordance with the review power in the Rules of Procedure, but they do not have any general right to reopen proceedings once they have disposed of them by a final decision.

39. Moore-Bick LJ held:

> **"Rule 11 gives industrial tribunals a limited power to review their decision but does not give them any general right to re-open proceedings once they have been disposed of by a final decision. It follows in my judgment that an industrial tribunal, like any other tribunal, has exhausted its jurisdiction once it has delivered a final decision disposing of all the issues before**

> **it. Thereafter, apart from the limited power of review given by Rule 11 of the Rules of Procedure, it has no power to re-open the hearing or reconsider its decision unless the matter is remitted to it for that purpose by the Employment Appeal Tribunal."**

40. Further, at paragraph 25, Moore-Bick LJ held that the extent to which the Tribunal's jurisdiction is revived in consequence of an order remitting the matter to it depends entirely on the scope of the remission. If, as occurred in the present case, the matter is remitted for the Employment Tribunal to consider certain specific issues, it will have no jurisdiction to hear or determine matters outside the scope of those issues. It must follow that the Employment Tribunal has no power to allow one party to amend its case to raise issues which were not previously before it.

41. Moore-Bick LJ continued at paragraph 27:

> **"If Iceland wished to raise that issue, [and that is an issue which was outside the terms of the remission] the proper course was to apply to the Employment Appeal Tribunal to remit the case to the industrial tribunal for that purpose."**

42. It must be very doubtful whether an application of that kind in the case before us would have had any prospect of success in the light of the way in which the proceedings have been conducted. That would have been a matter for the Employment Appeal Tribunal itself to consider. However, that only serves to emphasise the fact that for the Employment Tribunal to reopen the matter itself, even with the consent of the parties, necessarily involves disregarding previous decisions including the order of the Employment Appeal Tribunal. That is not something which, in our judgment, it had the power to do and accordingly its decision on the fairness of Mrs Aparau's admitted dismissal was not a nullity.

43. Miss Smith quite rightly drew our attention to provisions in the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004** in which it is made clear that a judgment by an Employment Tribunal on an issue is a judgment which may be subject to

review and may be the subject of an appeal. However there was no application for a review of the issue of less favourable treatment or of an appeal in that regard.

44. In our judgment the Employment Tribunal did not err in law in declining to hear argument on an issue which was not remitted to it. Its lack of power to do so is sufficient to dispose of this appeal. In addition, in our judgment, it is understandable that the Employment Tribunal observe that it may well have wished to ask some additional questions of the witnesses if the less favourable treatment point had been taken. The Employment Tribunal did not err in regarding the question of less favourable treatment as one of mixed fact and law and as another reason why it should restrict its inquiry to the issues remitted to it by the Employment Appeal Tribunal.

45. As Ms Fatima quite properly recognised, the fact that the letter which formed the basis of the Tribunal's conclusion that the Claimant had been subject to disability related discrimination, was a standard letter does not, in any sense, preclude the possibility that there may have been other circumstances and reasons why such a letter was not or would not have been sent out to other people. It is therefore understandable that the Tribunal observed that it may well have wished to ask questions of witnesses if the issue of less favourable treatment in regard to 18 August 2006 letter was to be considered.

46. It is not contended that the terms of the remission from the Employment Appeal Tribunal included a direction to the Employment Tribunal to consider whether the Complainant had been treated less favourably than others before going on to consider the issue of justification which was the subject of the first appeal to the Employment Appeal Tribunal and which succeeded to the extent to which we have referred.

47. The Respondent now wishes to raise an argument that he did not treat the Complainant less favourably than he treats or would treat others because the judgment of the House of Lords in **Malcolm** has given such an argument a good prospect of success whereas previously it had little.

48. Understandably, having regard to the issues between the parties, the Employment Tribunal did not make an express finding of less favourable treatment. The Employment Appeal Tribunal held at paragraph 22 that the Employment Tribunal found that the threat of half pay was plainly for a reason related to the Claimant's disability and we infer would not have been applied to a comparator. In our respectful judgment such an inference was clearly drawn by the Employment Tribunal as must have been well understood by the Respondent who made no complainant of inadequacy of reasons in this regard.

49. As is clear from the judgment of HHJ Peter Clark there was several distinct elements to be established by the Claimant in his claim of disability related discrimination as there are in other claims which are brought before Employment Tribunals. As in this case, it may be that the decision of the Employment Tribunal on only one of those issues is challenged on appeal. If successful and if there is a remission following a successful appeal, only that issue will be reconsidered by the Employment Tribunal. A Claimant for unfair dismissal has to establish that he was employed under a contract of employment for a qualifying period of time and that he was dismissed. If it challenges the decision of the Employment Tribunal on its reasoning on the fairness of the dismissal that does not enable the Respondent to argue that the Tribunal on a remission to reconsider its decision on fairness can consider whether there was a dismissal particularly where, as in this case, that prior issue has never been contested.

50. We agree with the submissions of Ms Fatima and Miss Smith that questions of issue estoppel do not arise. This is not the case of a party in a further stage in proceedings relying on a point which was or should have been advanced by him at an earlier stage. However, if issue estoppel were to apply, the position of the Respondent would not fall within the exception referred to in **Arnold** at page 109 or in the citation from the Vice Chancellor, Browne-Wilkinson LJ at page 110 of **Arnold**. No further relevant material has become available to make the point that the Respondent did not treat the Claimant less favourably than others. It is just that another case gave his argument a much improved prospect of success. This is a situation, which is not entirely unusual in litigation. A point on which the prospect of success may be small or non-existent may be transformed by a subsequent decision of a higher court.

51. The terms of the remission in this case were carried out faithfully by the Employment Tribunal. It did not err in law in doing so. The principle of finality in litigation is important. We had our attention drawn by Miss Smith in this regard to the case of **Biggs v Somerset County Council** [1996] IRLR 203. We refer to two passages. One at paragraph 23 that the decision of the House of Lords under consideration in the **Biggs** case was declaratory of what the law has always been is of application also to this case in relation to **Malcolm**. Further, Neil LJ in **Biggs** observed at paragraph 25 that it would be contrary to the principle of legal certainty to allow past transactions to be reopened because the existing law at the relevant time had not yet been explained or had not been fully understood.

52. In our judgment, there is no justification for permitting an amendment to the terms of remission now which would be well after the determination of the issues to be resolved by the Employment Tribunal and well after the judgment in **Malcolm**. If such an application is made to us, we refuse it. There are no good grounds for allowing such an application now. Further, in

our respectful judgment, this appeal raised no sustainable challenge to the decision of the Employment Tribunal and this appeal is dismissed. We thank both Counsel for their assistance.