Case No: A2/2010/2193/EATRF

Neutral Citation Number: [2011] EWCA Civ 648
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
HIS HONOUR JUDGE SEROTA QC
UKEAT/0286/09/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2011

Before :

LORD JUSTICE WARD
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE ELIAS

- -

Between :

JP MORGAN EUROPE LTD	**Appellant**
- and -	
RUSSELL CHWEIDAN	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Ms Emma Smith (instructed by **Beachcrofts LLP**) for the **Appellant**
Ms Anna Beale (instructed by **Messrs Leigh Day & Co**) for the **Respondent**

Hearing date : 5 May 2011

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Judgment
As Approved by the Court

Lord Justice Elias :

1. This appeal falls within a small compass. The Employment Tribunal heard various claims made under the Disability Discrimination Act 1995. It found that the claimant (as I shall continue to call him, although he is the respondent to this appeal) had been the subject of direct disability discrimination, but his claims of disability related discrimination failed.

2. The appellant contended that given the way the arguments were advanced, the conclusions were contradictory and could not stand together. The claimant does not dispute the Tribunal's finding that there was no disability related discrimination. In the circumstances the appellant submits to us, as they did before the EAT, that the finding of direct disability discrimination must be overturned and that the only proper conclusion open to the Tribunal was to reject the complaint. The EAT (His Honour Judge Serota QC presiding) accepted that the findings on direct discrimination could not stand but it did not accept that this was the only conclusion open to the Tribunal. It agreed with the claimant's submission that there was evidence from which direct discrimination could properly be inferred. Accordingly it allowed the appeal but remitted the case back to the same Tribunal for the issue of direct discrimination to be considered afresh. The precise terms of that remission were not entirely clear and have been the subject of further clarification by the EAT. Notwithstanding that, they remain a matter of dispute between the parties. If the appellant's submission is correct, however, that particular disagreement is irrelevant because on that premise the case should not be remitted at all.

3. Accordingly, the principal issue in this case is whether the findings of the Tribunal when properly analysed leave open the possibility that it could, on reconsideration, conclude that there was direct disability discrimination. If that is not a possible conclusion open to the Tribunal, and the only proper result was for the Tribunal to dismiss the direct discrimination claim, then the EAT was obliged to substitute its own view for that of the Tribunal and to conclude that there was no direct discrimination in this case: see e g the observations of Sir John Donaldson in *O'Kelly v Trust House Forte* [1983] ICR 728, 764 and *Hellyer Bros v MacLeod* [1987] ICR 526,547.

The relevant law.

4. The relevant legal principles are not in dispute. Nonetheless, before turning to the facts, it is necessary in order to understand the arguments to consider in very general terms certain basic features of discrimination law and the relationship between direct disability discrimination and disability related discrimination. Those two forms of disability discrimination were at the material time found in sections 3A(5) and 3A(1) of the Disability Discrimination Act 1995 respectively.

5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment - not necessarily the only reason but one which is significant in the sense of more than trivial - must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal

can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in *Shamoon v Chief Constable of The Royal Ulster Constabulary* [2003] ICR 337 paras 8-12. That is how the Tribunal approached the issue of direct discrimination in this case.

6. In practice a Tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a *prima facie* case, i.e if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason: see Peter Gibson LJ in *Igen v Wong* [2005] ICR 931, para 37.

7. Disability related discrimination was for a long time thought to be directed at a different problem to direct discrimination. The leading case was the decision of the Court of Appeal in *Clark v Novocold Limited* [1999] IRLR 318. The court held that where a disabled person was adversely treated for a reason which was related to his disability, that would be unlawful disability related discrimination unless the employer could justify the treatment. This would be so even if a non-disabled person would also have been treated in the same way if the reason had applied equally to him. To take an example, if an employer dismisses an employee because he cannot drive, and the reason why the employee cannot drive is that he is disabled, the employer would have to justify the dismissal. That is so even if the employer would have dismissed a similarly placed non-disabled person who could not drive.

8. In the case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43 [2008] IRLR 700, which was not in fact an employment case, the House of Lords held by a majority of 4-1 (Baroness Hale dissenting) that the Court of Appeal had been wrong in their analysis of disability related discrimination in *Novocold*. Their Lordships held that if the employer would have treated a non-disabled person in the same way as the disabled claimant, there could be no disability related discrimination. Disability related discrimination could only be established if a non-disabled person would have been more favourably treated. However, if a non-disabled person would be treated differently and more favourably, then that is direct disability discrimination. The effect of *Malcolm*, therefore, was virtually to eliminate the concept of disability related discrimination as a self standing ground of discrimination; for all practical purposes it adds nothing to the concept of direct discrimination as Lord Brown recognised in his judgment (para.114).

9. In *Aylott v Stockton on Tees Borough Council* [2010] IRLR 994, the Court of Appeal confirmed that the reasoning in *Malcolm* applied equally to disputes in the employment field. It follows, therefore, that in practice any disability related discrimination will amount to direct discrimination, and if a tribunal finds that the reason why there is no disability related discrimination is that the employer would have treated a non-disabled person the same way, that is necessarily inconsistent with the conclusion that there is direct disability discrimination. (The position has changed under the Equality Act 2010 which has in effect restored the law as it was before Malcolm, but that does not assist this claimant.)

The background.

10. The claimant was employed by the appellant as an executive director within the hedge funds credit sales team in its sales and marketing division (Europe, the Middle East and Africa). He was employed by the appellant and its predecessors from 5 November 1994 until the termination of his contract on 14 July 2008.

11. He lodged two separate claims to the Employment Tribunal; the first, lodged before his dismissal, was in relation to his bonus for the year 2007, and the second, lodged following his dismissal, concerned the dismissal itself. In relation to both he alleged, inter alia, that he had been subjected to disability discrimination.

12. The claimant's disability resulted from an accident on a work skiing trip in March 2007 when he seriously injured his thoracic spine. He had to spend two weeks in hospital and thereafter was off work for a month. He came back to work on 24 April 2007 but his hours were limited, initially being 9 am until 12 noon. By the end of the year he was working from 8 am until 3 or 4 pm. He had to wear a back brace to work every day and took medication and was obviously in a lot of pain and discomfort. When he was not at work he was contactable by colleagues and clients and often spent time at home working.

13. The appellant's occupational health specialist assessed the claimant as being disabled under the Disability Discrimination Act on 22 January 2008. He recommended that the claimant should continue to have flexibility with his finishing time and would probably need to leave at about 3 or 4 pm each day.

14. The complaint relating to his bonus for 2007 was essentially that he had been given an unacceptably small bonus and that this was because of his disability, and/or was for a reason relating to his disability The claimant earned $24.6 million sales credit for the appellant in 2007 notwithstanding his injuries. This was in fact $8 million more than his previous year's performance. Accordingly, he anticipated a higher bonus. His bonus was $450,000, for most people a large sum, but he submitted that given his performance, it was less than he ought to have received. He had been awarded $798,000 the previous year when his sales had been lower.

15. However, the bonus was in part a function of the overall bonus pool and that was reduced with respect to 2007 bonuses. Nonetheless the claimant contended that he was subject to a striking and disproportionate reduction in his bonus, greater than some others who might have been expected to be treated no more favourably, and the obvious explanation was unlawful discrimination. In fact he alleged not only disability discrimination, but also age discrimination.

16. Some time after lodging his bonus complaint with the Tribunal, he was dismissed for redundancy. The basis on which it was alleged he had been selected was that he relied too heavily on a particular client and had not taken sufficient steps to broaden his client base.

17. He claimed that he had been unfairly dismissed. He further alleged that the dismissal was on grounds of his disability. As with his bonus claim, he alleged that it was either direct disability discrimination or disability related discrimination. The basis of the latter claim was that he was dismissed for not putting in the hours necessary to extend

his client base, such as socialising with clients in the evenings, but it was his disability which prevented him from working those hours. On the *Novocold* analysis, this would have required justification.

The Tribunal's reasoning.

18. The Tribunal concluded that the claimant had been unfairly dismissed. It also found that he had been subject to direct disability discrimination both with respect to the bonus payment and the dismissal. It found that there had been no age discrimination and it also rejected his claim to have been subjected to unlawful disability related discrimination, either with respect to the bonus or the dismissal. An unfortunate feature of the case was that the employment judge suffered a serious illness (from which he is now happily fully recovered) between the hearing and writing the decision, although the deliberations between the members of the Tribunal had been completed. The lay members commendably stepped in and wrote the judgment; not an easy task in a complex discrimination area.

19. The Tribunal dealt in its decision with the bonus and unfair dismissal aspects of the case separately. With respect to its findings on bonus, it noted that the employers had relied on two matters to explain the reduction in bonus, namely the reduction in the overall bonus pool because of the poor trading conditions in 2007, and the fact - which the Tribunal accepted was true - that the claimant relied heavily on a particular client and had not broadened the client base as he himself agreed he should do.

20. The Tribunal nonetheless commented that the "bonus decision appeared remarkably unfair as it was 44% less than in the previous year", whilst at the same time observing that it did not know how the size of the 2007 bonus pool compared with the 2006 bonus pool. The Tribunal referred to certain comments made about the claimant's disability by his manager which in some contexts may have been construed as insensitive or worse, but the Tribunal accepted that they were in the nature of badinage between the two men. In my judgment, the Tribunal plainly and correctly did not consider this to be any evidence to support a finding of disability discrimination.

21. The Tribunal also rejected a contention from the claimant that the reduction in bonus was specifically designed to encourage the claimant to leave, but the Tribunal then added somewhat cryptically:

> "Having regard to matters taken into account in relation to the value of the claimant, the Tribunal has concluded that the reasoning of the respondent was that it would be difficult to find somewhere else to move while he was still suffering from his back problem."

I think the most likely meaning of this sentence is that the Tribunal is finding that since the claimant could not easily leave, there was no need to encourage him with a high bonus. The Tribunal also noted that following the claimant's injury, he had not worked for a full day.

22. The Tribunal then set out the reason why it concluded that there was direct disability discrimination in the following terms (para 6.7):

> "The Tribunal has on balance concluded that the dramatic decrease in the Claimant's bonus, particularly when compared with that of a person regarded by Mr Hayward as a comparator, albeit that the Tribunal does not know the circumstances of that person so that person is not a comparator for the purposes of the 1995 Act, suggest, in conjunction with the references to the Claimant's impairment from time to time, that the reason for the substantial decrease in the bonus was because he was disabled. Having regard to the explanation provided by the Respondent as to the basis on which it chose to award the bonus, the Tribunal has concluded that the Respondent has not proved that it did not treat the Claimant less favourably in any sense whatsoever on the ground of his disability. The Tribunal is of the view that the lack of a wider client base was a contributing factor to the decision but that equally the Claimant's disability also contributed to the decision for the reasons given above."

23. I pause to note that the Tribunal has here concluded that the claimant had raised a sufficient case to discharge the evidential burden so that the onus fell on the employer to provide a non-discriminatory explanation for treatment. (As my Lord, Lord Justice Moore-Bick pointed out in argument, however, banks are normally concerned with performance above all and they are likely to be quite indifferent to any disability, provided at least that it does not impinge on performance. It ought not, therefore, in most cases at least, be too difficult for an employer to discharge the burden of showing that the disability itself, as opposed to the consequences to which it gave rise, was a matter of no consequence to them and did not influence their decisions.)

24. It seems to me to be relevant that having found that the burden shifted to the employer, the Tribunal did not thereafter simply state that the appellant had failed to provide a satisfactory explanation negativing discrimination. Rather it sought to make a positive finding that disability had played a part "for the reasons given above." The parties were divided as to what that phrase is referring. Ms Smith, counsel for the appellant, submitted that it was a reference back to the fact that the disability caused the claimant to be able to work only limited hours, which in turn made it difficult for him to increase his client base, and meant that he would find it difficult to leave. Ms Beale, counsel for the claimant, submits that it was a shorthand reference to the fact that the claimant had established evidence from which an inference of discrimination could properly be drawn, and that the burden had not been discharged.

25. The Tribunal then considered the separate claim based on disability related discrimination applying the *Malcolm* principle, after correctly rejecting the claimant's submission that the authority did not apply in the employment field. It concluded there had been no such discrimination for the following reason (para 6.8):

> "The Tribunal has concluded that if the circumstances of Mr Chweidan had been the same but his limited hours had not been for a reason related to a disability, the result would have been the same. The Tribunal is satisfied that the Respondent's concern was the lack of a broad client base which the Claimant was not able to improve because, for example, he was not

> available in the evenings to entertain potential new clients. Accordingly, the Tribunal has concluded in any event that the Claimant was not treated differently to a hypothetical comparator and therefore the Respondent was not guilty of disability related discrimination."

26. The Tribunal then turned to the issue of the dismissal. It found the dismissal to be unfair and that finding was not challenged before the EAT. It also concluded that it was by reason of direct disability discrimination. As to this, the Tribunal noted that there had been an expression of concern by management when told that the claimant had been assessed as disabled within the meaning of the 1995 Act. A manager referred to this as a "new HR challenge" and managers were worried about its consequences. The Tribunal held, principally on the basis of this evidence, that the claimant had raised a sufficient case of disability discrimination to transfer the evidential burden of proof to the employers, and the Tribunal concluded that this burden had not been discharged. The Tribunal's reasoning on this was as follows (paras 6.13 and 6.14):

> "… having regard to the matters that the Tribunal has concluded were of concern to the Respondent, namely the implications of the 1995 Act applying and, as the Tribunal has concluded, this being regarded as a 'new HR challenge', the Tribunal is satisfied that the Claimant has proved facts from which the Tribunal could conclude that his dismissal was on the ground of his disability.
>
> Accordingly, the burden of proof transfers to the Respondent to show that it did not treat the Claimant less favourably in any sense whatsoever on the ground of his disability. Although the Tribunal accepts that part of the reasoning for the Claimant's choice was that he did not have a sufficiently broad client base, being reliant so heavily on Client P, he was also to some extent prevented from broadening his client base because of his limitations regarding working in the evening when he would otherwise have been able to entertain possible new clients. As therefore his disability was a factor in the decision to dismiss the Claimant, the dismissal amounted to direct disability discrimination."

27. Again, however, the Tribunal concluded that although there was direct disability discrimination there was no disability related discrimination, essentially for the same reasons as it found in relation to the bonus. It said this (para 6.15):

> "The Tribunal's conclusion is based on similar reasoning to that in respect of its decision regarding disability related discrimination in respect of the bonus. The Tribunal is satisfied that if a person in the employee's position had not been able to do the full hours and was limited to similar hours to the Claimant, that person would also have been dismissed where

> they had not sufficiently widened their client base. Accordingly, this complaint fails."

The submissions.

28. The appellant submits that when the reasoning of the Tribunal is properly analysed, it demonstrates with respect to both the bonus and dismissal issues, that although the Tribunal had ostensibly found that there was direct disability discrimination, in fact the Tribunal was confusing direct discrimination with disability related discrimination as it had been originally understood in the *Novocold* case. Ms Smith contends that it is plain beyond doubt that the conclusion in paragraph 6.14 (set out at paragraph 27 above) is premised on the assumption there may be direct disability discrimination where the reason for the discrimination is not the disability itself but a reason related to it, namely the inability to work the hours necessary to expand the client base. The Tribunal found that there was direct disability discrimination because the disability was the reason why the claimant could not work the relevant hours. But that is not the test for direct discrimination and so the Tribunal erred in law. If the employers would have dismissed a non-disabled person for the same reason, there is no direct discrimination. In paragraph 6.15, when considering disability related discrimination, the Tribunal found in terms that they would have done. They thereby made a finding which wholly undermined and was inconsistent with the earlier conclusion that there had been direct disability discrimination.

29. Ms Smith accepts that the Tribunal's error is not as clear with respect to the reasoning as regards the bonus but she submits that it is nonetheless clear enough. She accepts that the Tribunal did have a proper basis for holding that the burden of proof shifted to the employer, in particular what the Tribunal perceived to be a striking reduction in bonus compared with that paid the previous year, and the fact that it was less than certain other workers had received. But she says that a careful analysis of paragraph 6.7 (see paragraph 23 above), when read in context, shows that the reason given for finding direct discrimination was again not the disability itself but a reason relating to it, namely the fact that he could not work the hours or easily leave the company. That is what the last few words in paragraph 6.7 ("for the reasons given above") are intending to identify. Yet paragraph 6.8 (reproduced in paragraph 27 above) in which the Tribunal rejected the claim of disability related discrimination, shows that a non-disabled person would have been treated the same way. Accordingly, a finding of direct disability discrimination was simply not open to the Tribunal.

30. Ms Beale, in a forceful and attractive argument, submits that this is too narrow a reading of the Tribunal decision. She submits that properly analysed, the finding on bonus was a classic finding of direct discrimination based on the burden of proof shifting to the employer and that burden not being discharged. She points to a number of factors which justified the Tribunal in finding that the claimant had provided a sufficient evidential basis to transfer the burden to the appellant to demonstrate that there was no discrimination. I will not set them out because I agree (and indeed it is not disputed) that at least with respect to the bonus claim, the Tribunal was entitled to find that it did transfer. She says that thereafter all that the Tribunal was doing was to find that the burden had not been discharged. The words "for the reasons given above" were intending to do no more than confirm this.

31. She recognises that it is more difficult to sustain this analysis with respect to the Tribunal's reasoning with respect to the dismissal. This is because although the Tribunal stated in terms that there was a sufficient basis for shifting the burden, she accepts that they did thereafter err in saying that disability was a factor in the decision to dismiss giving rise to direct disability discrimination *because* it was the disability which prevented the claimant working long hours. She accepts that this could not constitute direct disability discrimination, although it would have raised the possibility of disability related discrimination under the pre-*Malcolm* law. However, her case is that there is still a proper basis on which the Tribunal could have found direct disability discrimination, and the claimant should not be deprived of that opportunity. The EAT was right to refer the matter back.

Conclusion.

32. In my judgment, the Tribunal's findings, read fairly, suggest that they did err in finding any direct discrimination, and in the light of their reasoning, I do not think that there could be any proper basis for sustaining that conclusion. It follows that in my view the EAT was wrong to refer the matter back, and the issue as to the terms of referral become immaterial.

33. My principal reason for reaching that view is the Tribunal's analysis of the reason for dismissal. The Tribunal states in terms that the reason for finding that disability played a part in the dismissal is that it explained why the claimant was not able to work the hours necessary to increase his client base. It did not say that the employers had failed to discharge the burden which shifted to them by failing to provide an explanation for the dismissal. On the contrary, it accepted that there was an explanation, namely that the claimant could not work the relevant hours, but concluded that this was sufficiently connected to his disability to constitute direct disability discrimination. That was wrong as a matter of law once the Tribunal also found that a non-disabled person would similarly have been dismissed.

34. I should add that I am far from satisfied that the burden did shift with respect to the dismissal. I seriously doubt whether a frank recognition by employers that they are concerned about the legal implications of having a disabled employee and that this creates a new HR challenge is capable of discharging the employee's evidential burden of raising a case to answer. Indeed, if anything one might expect that it would cause the employer to be particularly cautious before dismissing that employee. However, the point was not argued before us and I do not uphold this aspect of the appeal on that basis.

35. I accept that the issue is not so clear with respect to the bonus issue. As I have said, I accept that there was a sufficient basis for saying that the burden had shifted to the appellant to demonstrate that the reason for the treatment had nothing to do with disability, and therefore it would in principle have been open to the Tribunal to find that no adequate explanation had been given so that the burden had not been discharged.

36. The difficulty is that the Tribunal did not say that. (Indeed, had they done so then I do not see why the claimant is accepting that the decision of the Tribunal on this point could not stand.) Rather they held that the disability contributed to the dismissal "for the reasons given above". I do not think that can possibly mean the reasons given

earlier in that paragraph as to why the burden shifted to the employer. Those reasons do not themselves show that disability contributed to the dismissal. I prefer Ms Smith's construction of those words. I think that the Tribunal had in mind the failure to work full time and perhaps the fact that it was not necessary to pay the claimant a higher bonus to encourage him to stay. These were factors explaining why the claimant had received the lower bonus. Whilst these considerations arose only because of the claimant's disability, the Tribunal found that the employers would have treated any other employee to whom those considerations were applicable in the same way, even if he had not been disabled. So the explanation for the treatment which the Tribunal accepted is in fact inconsistent with any finding of direct discrimination.

37. Moreover, this construction of paragraph 6.7 is consistent with the way the Tribunal undoubtedly looked at the matter with respect to the dismissal issue. The underlying reasons for the lower bonus and for the dismissal were essentially the same, and in my judgment, the Tribunal was intending to approach the two issues in the same way.

38. Accordingly, in my judgment, the findings of the Tribunal identify the reasons for the claimant's treatment and recognise that they are for reasons related to the claimant's disability but are not because of the disability itself. Since a non-disabled person would be treated the same way, the claims for direct disability discrimination could not succeed. No purpose would be served by sending the cases back.

Disposal.

39. It follows that the appeal succeeds. I would substitute findings that the appellants did not commit any act of direct disability discrimination with respect to either the 2007 bonus or the dismissal.

Lord Justice Moore-Bick:

40. I agree that the appeal should be allowed for the reasons given by Elias LJ. I very much doubt whether the reduction in the respondent's bonus, dramatic though it was, provided sufficient evidence of direct discrimination on grounds of disability to shift the burden of proof to the appellant, particularly having regard to the Tribunal's finding that it was not designed to encourage him to leave. However, as Elias LJ has explained, the question is ultimately of no significance.

Lord Justice Ward:

41. I also agree.