Appeal No. UKEAT/0370/07/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 8DS

At the Tribunal
On 29 January 2008
Judgment handed down on 28 February 2008

Before
HIS HONOUR JUDGE PETER CLARK
MR B BEYNON
MR T MOTTURE

SECRETARY OF STATE FOR WORK AND PENSIONS — APPELLANT

MISS D MACKLIN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS I OMAMBALA (of Counsel) Instructed by: Messrs Field Fisher Waterhouse LLP Solicitors 35 Vine Street London EC3N2AA
For the Respondent	Miss D Macklin (The Appellant in Person)

SUMMARY

Disability discrimination −Disability related discrimination/Reasonable adjustments Unfair dismissal−Reasonableness of dismissal Practice and procedure −Disposal of appeal including remission

DDA reasonable adjustments −disability related discrimination −unfair dismissal. Statutory questions to be asked and answered by ET. Appeal allowed and remitted to fresh ET.

HIS HONOUR JUDGE PETER CLARK

1. This is an appeal by the Secretary of State for Work and Pensions, the Respondent, before the Stratford Employment Tribunal, against the reserved judgment of an Employment Tribunal chaired by Employment Judge Goodrich, sitting with Mr Edwards and Mr Khwaja, promulgated with reasons on 15 May 2007 following a hearing held between 19 February and 2 March 2007. The members of the Employment Tribunal spend a further day considering the matter in Chambers on 31 March. By that judgment the Employment Tribunal, by a majority, upheld Miss Macklin, the Claimant's, claim of disability discrimination in part and her claim of unfair dismissal. We shall refer to the parties as they appeared below.

Factual background

2. The Claimant commenced employment with the Respondent on 1 October 1979. She rose through the ranks and was promoted to the substantive grade of SEO in June 2001. She had previously held that position on temporary promotion. She was a capable, hardworking and high performing member of staff,

3. On 6 June 1989 she was diagnosed as having diabetes. That required managing through insulin injections, proper and regular eating and maintaining a healthy lifestyle, including monitoring of her weight. From her medical records we note that her GP observed on 12 August 1995, that she had "Poor lifestyle. Recently overworking, inadequate eating, meals etc, moved house. Healthy eating discussed..." That was followed, in the same year, by chicken pox and shingles.

4. From July 1997 the Claimant was engaged in work on 4 different projects. Latterly, from January 1999 until April 2001 she worked on the "one" project and from April to September 2001 on the "Pathfinder Project". On that last project her line manager was Lisa Potter.

5. In late 1998 the Claimant was diagnosed as suffering from depression. Between 21 May−3 June 2001 she was off work due to an abscess related to her diabetes.

6. In May 2001, shortly after joining the Pathfinder Project, the Claimant was informed of an allegation of bullying and harassment raised by a female member of staff whom she had managed on the One Project, relating to an alleged incident in January 2001. A lengthy disciplinary process ensued; one of the allegations was upheld but on 20 May 2002 a decision was finally reached not to take punitive action against the Claimant. By then she had been off sick suffering from anxiety and depression since 20 September 2001. On the previous day Ms Potter had had a discussion with the Claimant about a further complaint made against her.

7: She never returned to work before her dismissal on 3 months notice on 2 April 2004. That notice duly took effect on 2 July 2004.

8. During the period 20 September 2001 until 2 April 2004 the Respondent commissioned 3 Occupational Health Service reports. The chronology prepared for the Employment Tribunal hearing lists a steady stream of telephone and email contacts made by her new manager, Sue Venton, who took over that role on 10 February 2003.

9. On 8 October Ms Venton visited the Claimant at home. The main points raised at that meeting are set out by the Employment Tribunal at paragraph 101 of their reasons. The

Claimant expressed the view that she could not foresee that she would ever return to work with the Respondent. She hoped for ill−health retirement rather than dismissal. In the event that option was not supported by medical opinion; instead she was dismissed on grounds of her sick absences. During the period from 20 September 2001 she received pay, gradually reducing over time. On termination she was 44 years old.

The claims

10. The claims brought by the Claimant under the Disability Discrimination Act 1995 pre−dated the amendments to the Act effected by the 2003 Regulations. The Employment Tribunal was therefore concerned with the original provisions.

11. The relevant claims may be divided into four:

(1) failure to make reasonable adjustments during the period 1997−2001. (Period 1)

(2) failure to make reasonable adjustments during the period 20 September 2001−2 July 2004. (Period 2)

(3) disability related discrimination in dismissing the Claimant

(4) unfair dismissal

The law

12. Appeals to the EAT lie on a point of law only. It follows that our primary focus must be on the Employment Tribunal's application of the law to the facts as found.

13. The Employment Tribunal Rules of Procedure 2004, for the first time, set out

mandatory requirements for the contents of an Employment Tribunal's written reasons (~30(6» . That provision no doubt owes much to the earlier jurisprudence as to the adequacy of an Employment Tribunal's reasons. To use the expression coined by Sedley LJ in Tran v Greenwich Vietnam Community Project [2002] IRLR 735, para 17; are the reasons "Meek− compliant", a reference to the seminal judgment of Bingham LJ in Meek v City of Birmingham District Council [1987] IRLR 250.

14. However it would, in our view, be over−simplistic to adopt a formulaic approach to the Employment Tribunal's duty to give adequate reasons set out in R.30(6). The present case, as we shall seek to demonstrate, is a good illustration of the point,

15. R.30(6)(d) requires Employment Tribunals to include "a concise statement of the applicable law". In a jurisdiction which is, with the exception of claims for breach of contract under the 1994 Extension of Jurisdiction Order, wholly statutory, that concise statement will inevitably include a reference to the relevant statutory provisions which must be considered and applied to the facts as found by the Employment Tribunal (R30(6)(c) so as to explain how the relevant findings of fact and applicable law have been applied in order to determine the issues in the case (R30(6)(e).

16. However, we do not believe that merely to refer to the relevant statutory provisions (whether set out in full or in summary −the full statutory wording may be obtained from the statute or regulations invoked) necessarily discharges the requirement placed on the Employment Tribunal by R30(6)(d). It may also be necessary to consider relevant judicial interpretation of the statutory provisions. That does not simply mean citing passages from the authorities; what is essential, in our view, is that the Employment Tribunal demonstrates by its reasons that it has identified the relevant statutory questions and has answered them by reference to the facts as found.

17. From those general observations we turn to the particular circumstances of the present case. The Employment Tribunal set out their self−directions as to the law under the DDA at paras 27−34 reasons, dealing first with the failure to make reasonable adjustments under s6 giving rise to the form of discrimination identified at s.5(2) and secondly with disability related discrimination contrary to s5(1), referring to Court of Appeal authority in relation to the defence of justification. We make no criticism of that summary of the statutory provisions. However, they key question in this appeal is whether the Employment Tribunal has demonstrated that it has applied those provisions to the facts. In our judgment it is necessary, in considering this difficult area of discrimination law, to engage in closer analysis of the statutory scheme.

Reasonable adjustments

18. The relevant provisions of the DDA, pre−amendment, were s5(2); failure to comply with a s6 duty to make reasonable adjustments which the employer cannot show to be justified in accordance with s5(4) and Ss6(1)(a) and 6(2)(a) read with s6(4), which sets out factors to be taken into account in determining whether it is reasonable for the employer to make adjustments, of which examples are given in s6(3). S6(4)(a) is of particular importance; an Employment Tribunal must consider the extent to which the step (adjustment) would prevent the arrangements made by the employer placing the disabled employee at a substantial disadvantage in comparison with persons who are not disabled (see s.6(1)).

19. From the early days of the DDA the higher courts have indicated the need for Employment Tribunals to take a step−by−step approach to these statutory provisions. One such example is Morse v Wiltshire County Council [1998] ICR 1023 (EAT Bell J). More recently that requirement has again been emphasised in this EAT; see, pre−amendment, the judgment of HHJ Serota QC in Smiths Detection −Watford v Berriman [2005] ALL ER

(D)56, followed and applied equally by a division presided over by HHJ McMullen QC in a post−amendment case, London Borough of Barnet v Ferguson [2006] ALL ER (D)I92 and affirmed by Judge Serota in Environment Agency v Rowan [2008] IRLR 20, paras 26−27.

20. We repeat that guidance once more for the avoidance of doubt. Before finding that an employer has discriminated against a disabled Claimant in failing to comply with the duty to make reasonable adjustments an Employment Tribunal must identify:

(a) the arrangement (now provision criterion or practice under s4A DDA as amended) applied by or on behalf of the employer

(b) the physical feature of premises occupied by the employer (if applicable; not this case)

(c) the identity of non−disabled comparators (if appropriate)

(d) the nature and extent of the substantial disadvantage suffered by the Claimant

Only then will it be possible to determine the question as to what adjustments it would be reasonable for the employer to make, bearing in mind the extent to which such adjustments would prevent the arrangements made by the employer placing the disabled Claimant at a substantial disadvantage when compared with the non−disabled comparator.

21. Finally, the question of justification will arise in pre−amendment cases (although not post−amendment, see now s4A), see s5(2)(b) read with s4. Collins v National Theatre Board [2004] IRLR 395. The employer's knowledge of the Claimant's disability is dealt with at s6(6).

Disability related discrimination

22. In this case the Respondent conceded that the Claimant was disabled within the meaning of s.1 DDA in 2 respects; first, her diabetes and its effects and secondly, from September 2001 she was disabled by reason of reactive depression. Further, Ms Omambala accepts that the Claimant's dismissal was disability related for the purposes ofs5(l)(a). Her dismissal was for a reason, her lengthy sick absence, which related to her depression; in that regard she was less favourably treated than a non−disabled employee to whom that reason did not apply. Thus the issue, on this part of the claim, was justification.

23. Again, the structure of s5 requires close attention. *Prima facie* discrimination under s5(1)(a), as here, may be registered by the employer showing that the treatment of the Claimant is justified. By s5(3) the employer's justification for the treatment complained of must be both material and substantial. Where the employee without justification is in breach of his duty under s6 he cannot rely on the justification defence under s5(3) unless the treatment would have been justified even if he had complied with his s6 duty (s5(5) was unfair.

Unfair dismissal

24. Here, it was common ground that the Respondent's reason for dismissal related to the Claimant's capability, a potentially fair reason for dismissal. Thus the issue was whether such dismissal was fair applying s98(4) ERA 1996.

The Appeal against the Employment Tribunal's majority judgment and reasons

25. Before the Employment Tribunal the Claimant had the benefit of representation by

solicitors and counsel, Mr Michael Lane, under the terms of a legal expenses insurance policy. However, the limit of that cover was reached by the end of the Employment Tribunal hearing. Consequently she has been obliged to represent herself at this appeal hearing. Whilst she has been able to give us a clear insight into her perspective on this matter during oral argument, she acknowledges that she has been unable to grapple fully with the legal issues raised by Ms Omambala, who appears before us on behalf of the Respondent as she did below.

26. Thus, whilst Ms Omambala has, in the best of traditions of the bar, not sought in anyway to take advantage of this imbalance and we have examined her submissions critically, it is the case that we have not had the advantage of full legal argument from Mr Lane so as to ensure absolute p[arity between the parties.

27. Ms Omambala submits, we think correctly in view of the majority's findings at para 149, that their reasoning is subject to the domino theory. If their reasoning as to a failure to make reasonable adjustments during Periods 1and 2 is flawed, that will undermine their finding both as to disability related discrimination, in respect of which the defence of justification under s5(3) is excluded where there is a breach of the Respondent's s6 duty (unless the treatment would have been justified even if that duty had been complied with) and unfair dismissal, where the unfairness test under s98(4) coincides with that for justification under sS DDA as the Employment Tribunal concluded by reference to the Court of Appeal approach in Jones v The Post Office [2001] ICR 805.

28. Thus, the proper starting point is the Respondent's challenge to the Employment Tribunal 's findings on breach of their s6 duty. As to Period 1, applying the guidance of Judge Serota in the cases of Berriman and Rowan:

(1) what was the relevant arrangement?

29. We have been taken to the parties' pleaded cases in the forms ETl and ET3 and the further particulars given of the Claimant's case at the Respondent's request. Ms Omambala submits that the Employment Tribunal fell into error in adopting the Claimant's generic description of the working arrangements. They are set out at para 21 sub−paras (i)−(vii). We agree that there is here a conflation of working arrangements and steps which the Claimant alleges ought to have been taken by the Respondent. The point is illustrated further by the Employment Tribunal's observation at para 50 that:

30. On the Employment Tribunal's findings of fact we accept that the relevant arrangements during Period 1 included:

(i) a heavy workload
(ii) extensive travel
(iii) long hours of work
(iv) support to the Claimant
(v) meetings around the country
(vi) the breaks made available to her
(vii) the Respondents rules as to staff eating at work − reflecting the matters referred to at para 21 (i)−(vii).

It is equally clear, looking at the Employment Tribunal's reasons in relation to Period 1 (paras 77−89) that, instead of asking themselves how 'the Claimant was placed at a disadvantage in comparison with non−disabled employees engaged on the same project work, they simply proceeded to ask themselves what steps the Respondent could have taken to improve matters for the Claimant. That is not the correct question. Only if she is

found to be at a disadvantage in that comparative exercise does the duty to make reasonable adjustments arise.

31. Having assessed, without properly deciding, that such duty existed, the Employment Tribunal then went on to consider what steps could be taken; not what steps would probably
prevent the disadvantage found.
32. In these respects the Employment Tribunal fell into error in not following the statutory. steps required by s6. Leaving aside the state of the Respondent's knowledge as to her disability (diabetes) the members of the Employment Tribunal were ultimately divided on what steps they considered were or were not reasonable for the Respondent to take. In our judgment all members arrived at that stage of the enquiry without first identifying the relevant arrangements (a necessary prerequisite, as Maurice Kay.LJ made clear in Smith v Churchill Stairlifts [2006] IRLR 41) and then carrying out the comparative exercise. On the Employment Tribunal's findings of fact we simply cannot tell what disadvantage the Claimant suffered during Period 1.

33. Turning to Period 2, the Claimant was off sick throughout suffering from depression. What was the relevant arrangement? It must be the requirement for the Claimant to attend for work. She was at a substantial disadvantage compared with a non−disabled employee who could attend for work. Thus the duty to make reasonable adjustments arose. The question then is what adjustments ought reasonably to have been made in order to prevent that disadvantage, that is, to get the Claimant back to work.

34. At para 110 the majority members of the Employment Tribunal set out their reasoning in finding that the Respondent failed to make reasonable adjustments in Period 2. Based on their earlier findings of fact they concluded that the Claimant's "mental

breakdown" was
caused by work related stress. An investigation by the Respondent into the underlying causes of her illness could have assisted in identifying the root causes of her illness, which could help with her treatment which may have assisted her in managing her depression and help her identify what adjustments she needed at work. The Claimant informed Ms Venton that her illness was caused by stress caused by excessive work demands and lack of support. All of this might have assisted the Claimant in managing her depression.

35. Whilst we entirely accept that the steps mentioned by the Employment ,Tribunal might have assisted the Claimant in returning to work, that is not the question. Would those steps, on balance, have achieved that aim? Thus preventing the disadvantage identified above? That critical question, it seems to us, has been left unanswered by the Employment Tribunal.

36. Further; whilst it is not our function to embark on a factual analysis of the case, it is not insignificant to note the Employment Tribunal's finding that, at the meeting with Ms Venton on 8 October 2003 , the Claimant made it quite clear that she could not foresee ever returning to work in the department. That is a relevant factor to be taken into account when considering what adjustments, designed to get the Claimant back to work, were reasonable.
Disability related discrimination and unfair dismissal

37. It follows that we are not persuaded that the Employment Tribunal majority's finings as to reasonable adjustments in relation to both Period 1 and Period 2 can stand. Their approach to the statutory questions raised by Ss 5 and 6 are fatally flawed. How does that impact on the majority's finding of disability related discriminatory dismissal?

38. At para 149 the Employment Tribunal majority conclude that, the Respondent having failed to make reasonable adjustments, the Claimant's dismissal amounted both to disability related discrimination and was unfair.

39. We return to Ms Omambala's domino theory. Whilst sustainable findings of a failure by the Respondent to make reasonable adjustments may indeed lead to findings of disability−related discrimination and unfair dismissal, having found those conclusions to be legally flawed it necessarily follows that the findings both of disability−related discrimination and unfair dismissal also cannot stand.

Disposal

40. Ms Macklin submits that if, as we have now found, this Employment Tribunal erred in their approach at law, the remedy for us, in allowing the appeal, is to remit the matter to the same Employment Tribunal to consider in the light of our directions as to the law. We are sympathetic to that proposal, given the time spent by the Employment Tribunal in hearing the case below and we acknowledge that some support for that course may be derived from the judgment of Burton J in Sinclair Roche & Temperley v Heard [2004] IRLR 763 paras 45−46, approved by the Court of Appeal in Barke v Seetec [2005] IRLR 633, para 31. However, we also bear in mind the dangers of remitting a case to the same Employment Tribunal, adumbrated by Dyson LJ in giving the judgment of the Court in Barke, para 47.

41. On balance we are persuaded by Ms Omambala who, having failed to persuade us that we can properly reverse some or all of the findings of the Employment Tribunal

without a further hearing below, submits that it would not be appropriate to remit to the same Employment Tribunal, which was itself plainly divided, a case which requires a re−assessment in accordance with the statutory provisions.

42. The result, which we reach without enthusiasm, is that the appeal is allowed and the matter is remitted to a fresh Employment Tribunal for complete re−hearing. That said we enquired of the parties, the Claimant now being in person and the Respondent being a responsible Government Department, whether any room existed for the parties to compromise this dispute. Both appeared willing to engage in such a process. We would point out that, having remitted the matter for rehearing, the good offices of ACAS will be available to the parties. We urge them to make use of that service.

UKEAT/0370/07/DM