Appeal No. UKEAT/0622/07/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 12 March 2008
Judgment handed down on 19 March 2008

Before

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

MS K BILGAN

MR D G SMITH

THE CHIEF CONSTABLE OF LINCOLNSHIRE POLICE — APPELLANT

MR P B WEAVER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LOUISE CHUDLEIGH (of Counsel) Instructed by: Force Solicitor Lincolnshire Police Legal Services Police HQ P O Box 999 LINCOLN LN5 7PH
For the Respondent	MS RACHEL WEDDERSPOON (of Counsel) Instructed by: Messrs Russell Jones & Walker 1st Floor, St James House 7 Charlotte Street MANCHESTER M1 4DZ

SUMMARY

Disability Discrimination – Reasonable adjustments

The Employment Tribunal found that there has been a failure to make a reasonable adjustment. The EAT held that the tribunal had misdirected itself in determining that question and remitted the case to a fresh tribunal.

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

1.This is an appeal against the Tribunal sitting at Lincoln where it unanimously found that the Claimant had been subject to disability discrimination. The Respondent employer, The Chief Constable of Lincolnshire Police, now appeals We will continue to refer to Mr Weaver the Claimant, as he was below.

The background

2.Mr Weaver was a police officer. He served with the Lincolnshire Police for over thirty years. He joined the force in November 1976 and held a variety of posts.

3.In 2000 he began to develop health problems and was placed on restricted duties. Officers placed in that category cannot perform the entire range of work required of a fully operational officer. For example, they may not be able to participate in activities requiring significant physical exertion or risk of injury, such as arresting a reluctant suspect, or crowd control.

4.The Claimant was diagnosed in December 2000 as having hereditary motor and sensory neuropathy type 1 ("Charcot Marie Tooth" disease). This is a nerve condition affecting the Claimant's mobility. It is common ground that this disease rendered the Claimant a disabled person within the meaning of the **Disability Discrimination Act 1995** with effect from 2000.

5.Given the illness, the Claimant applied in 2001 for a vacancy in the Central Ticket Office based at Police Headquarters. In that capacity he had to investigate offences relating to road safety speed cameras. He was still in that post at the Tribunal hearing. The post he occupies was not, in fact, identified as one specifically suitable for employees on restricted duties, and he was appointed to it following a selection procedure. He does, however, accept that it is ideally suited

for those on restricted duties.

6.The Claimant completed thirty years service in 2006. He was then aged 49. Thirty years is the full pensionable service and those reaching that age can retire on a full pension, which includes a substantial tax free lump sum and a pension based on 50% of their then current earnings.

7.However, an officer may choose not to retire and remain employed until he or she attains the ordinary retirement age. He would then have to make pension contributions, but would not get the full benefit of those by way of additional reckonable years' service. Because of this, a number of officers choose to retire.

8.The Home Office appreciated that the skills of valuable officers were being lost because of the reluctance to stay on after thirty years and accordingly introduced a scheme in 2002 called the "Thirty + Retention Scheme". This permits officers to retire from the force on achieving full pensionable service, and then be re-employed immediately thereafter. Their re-employment may be in a different post, or even in a different force.

9.The advantage is that they may take their lump sum pension benefit immediately and pay no further pension contributions. Their pensions would start to be paid and they would receive an additional sum from the force to make up the income to the salary rate commensurate for their post.

10.There were certain disadvantages in this Scheme for officers. For example, they were subject to annual reviews and the period of continuing employment was limited to four years, although it could be extended by a further three. Generally, however, it favoured them and also benefited the force.

11.In order to be considered for the scheme, the applicant would have to fill out a form stating an intention to retire. Selection criteria for the Thirty + Retention Scheme was set out in a Guidance document and the relevant part is as follows:-

> **"The application process will include a Divisional Commander/Head of Department recommendation and, where required, completion of a business case. The Deputy Chief Constable will, upon consideration of the application against the business needs of the Force, decide whether or not the application should be accepted. For applicants above the rank of Chief Inspector, the Chief Constable will make a recommendation to the Home Office."**

There is a right of appeal from the decision of the Deputy Chief Constable to the Chief Constable by way of review.

12.There is an Appendix which sets out frequently asked questions and answers. One of the questions is this:

> "**Is Thirty Plus available to restricted duty applicants?"**

The answer is:

> **"Yes. The Thirty Plus Retention Scheme requires you to be fit for the role you are currently performing. This does not necessarily equate to being declared fit to undertake all operational duties. The key is further service should be operationally useful and should not expose an officer's disablement or health to undue risk of deterioration."**

13.The Claimant made an application to retire and join the Thirty + Retention Scheme on 26 July 2006. There was a recommendation from the Area Human Resources Manager, Dawn Cooper, that he should be retained. The Deputy Chief Constable confirmed that recommendation, subject to medical clearance and vetting procedures. The Tribunal noted that these would normally be mere formalities. That was on 9 August 2006. It appeared therefore that the application to join the Scheme had been successful.

14.However, the Respondent's financial position was poor. It had a significant number of staff

absent sick and a number of officers on restricted duties.

15.In July 2006 Elizabeth Walker, a senior member of the Human Resources Department, had produced a paper on the operation of the Scheme. She noted that there were 17 officers on the Scheme working for the Respondent and that in every case the reason for admitting them was to obtain skills and experience. Her conclusion was:

> **"It is important that all applications to the Scheme are carefully considered, particularly in light of the review of officers on restricted duties and work force modernisation. There should be a clear business case for retaining officers either in their current role or in other suitable roles in the organisation. The application process should therefore also take into account whether it is beneficial to the force to retain their particular skills, experience and knowledge."**

She recommended that in all cases there should be a business case submitted with the application. That case should take into account the wider implications of retaining the officer.

16.This paper came before the Chief Officer Group on 30 August 2006, that is, shortly after the Deputy Chief Constable had recommended re-engagement for the Claimant. The Group confirmed the report and recommended that it should be implemented as from October 2006, with guidance to applicants showing the need for a clear business plan. In fact, for various reasons it did not come into force at that time.

17.About a week before that meeting Dawn Cooper sent a memo to Mr Peter Davis, the Acting Chief Constable, regarding the Claimant's application. Ms Cooper had previously supported the Claimant's application, but she now indicated that at the time she had not been aware that the Claimant was on restricted duties. She asked for certain issues to be taken into account, including the fact that he would be unlikely ever to be fit for fully operational duties within the Lincolnshire Police; that other fit officers were denied the opportunity to apply for his current post; and that his retention would only be a temporary solution to planning his succession. The memo went to Mr

Davis because Mr Crompton, the Deputy Chief Constable, was on annual leave. In fact, however, Ms Cooper later re-issued the same memorandum to Mr Crompton.

18.A handwritten endorsement was contained in the memorandum from the Director of Human Resources indicating that he could no longer support the application. The post was one which could be done by a restricted duties officer and it was in the best interests of the organisation to enable another officer to take up the post.

19.On the basis of this on 11 September 2006 Mr Crompton decided he could no longer approve the Claimant's application as the post was one that could be done by those on restricted duties.

20.The decision was confirmed in writing to the Claimant on 29 September. The key paragraph is as follows:

> **"There are a number of restricted officers currently employed with Lincolnshire Police, which has a direct impact on the Force's resilience. Therefore it is vital that we retain posts that can be undertaken by restricted officers available. A restricted officer can undertake your post as CTO Enquiry Officer whilst still within their period of service, and so it is within the best interests of the organisation to retain this post."**

21.As the Tribunal noted, rejection from the Scheme did not, however, prevent the Claimant continuing to work in the force. It simply meant that he would continue to work under his normal terms and conditions.

22.The Claimant appealed in writing to Mr Lake, the Chief Constable. He considered the appeal on paper and considered also submissions that the decision involved a breach of the 1995 Act, but he rejected the appeal. In his letter of refusal he said this:

> **"…I have been mindful of the aims and requirements of the scheme and it may be useful to start by mentioning these. The scheme was introduced for the operational benefit of the Police Service, not as a benefit or entitlement for police officers who achieve 30 years' service. In order for us to approve the application we need to be sure there is a clear business benefit to the force."**

He went on to praise the officer for his skills, experience and professional attitude, but nonetheless refused the application commenting that there were more officers on restricted duties than posts available and that the force was in the process of identifying which posts would be suitable for restricted duties officers.

23.The Tribunal noted that with other applications no business plan had been included and yet they had been successful. In many cases, such as officers who are detectives, there was an accepted business reason for keeping them, but the Tribunal were referred to the case of a Mr Harrison, who also was on a restricted duties post, being a vulnerable witness interviewer. It was recognised that he would not be fit to work full operational duties and Mr Crompton recommended that he should not be allowed into the Scheme either. In his case Mr Lake allowed an appeal, having heard vigorous representations from Mr Harrison's senior officer who was incensed by the refusal to take him onto the Scheme.

24.The Claimant lodged proceedings against the Chief Constable alleging that he had been subject to direct disability discrimination; disability-related discrimination, and a failure to make a reasonable adjustment, namely in this case permitting him to be allowed onto the scheme. The Tribunal rejected the direct discrimination claim but upheld the claim that there had not been a reasonable adjustment and as a consequence, held that the claim of disability discrimination was also established.

25.In fact, although the Claimant filled out the form stating that he had an intention to retire, he did not do so. He has been allowed to remain in post.

The law.

26. The relevant legislation is found in a number of provisions of the **Disability Discrimination Act 1995**. That Act obliges employers in certain circumstances to make such adjustments as are reasonable in favour of disabled employees so as to overcome any substantial disadvantages resulting from their disability:

> **"4A Employers: duty to make adjustments**
>
> **1) Where –**
>
> **(a) a provision, criterion or practice applied by or on behalf of an employer, or**
>
> **(b) any physical feature of premises occupied by the employer**
>
> **places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect…."**

27. The failure to make adjustments is one form of disability discrimination: see section 3(2) of the Act. There are two others, namely direct disability discrimination (which is not now in issue in this case) and disability-related discrimination which is defined in section 3A (1) as follows:

> **"(1) For the purposes of this Part a person discriminates against a disabled person if -**
>
> **(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and**
>
> **(b) he cannot show that the treatment in question is justified."**

28 Subsection (3) provides that treatment will be justified

> **"if, but only if, the reason for it is both material to the circumstances of the particular case and substantial."**

29. Subsection (6) identifies the relationship between the reasonable adjustment form of discrimination and disability-related discrimination:

"(6) If, in a case falling within subsection (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he complied with that duty."

30. Section 18B then deals with the factors which will be taken into account when determining whether an adjustment is reasonable.

"18B: Reasonable adjustments: supplementary

1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to –

a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

b) the extent to which it is practicable for him to take the step;

c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

d) the extent of his financial and other resources
e) the availability to him of financial or other assistance with respect to taking the step;

f) the nature of his activities and the size of his undertaking."

31. Subsection (3) then sets out a series of examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments. They include making adjustments to premises; permitting flexibility in working hours; allocating certain job duties to others and providing mentoring and training. It is fair to say that they are all concerned with integrating the worker into the business and making it possible for him or her to function effectively. However, they are only examples and are not intended to be exhaustive.

<u>The Tribunal's decision</u>.

32. The Tribunal considered and rejected the claim that there had been direct disability discrimination, i.e. they found that he was not discriminated against specifically because he was a

disabled person. There is no appeal against that finding.

33. They then considered whether or not there had been a failure to make reasonable adjustments. As the courts have pointed out on a number of occasions, logically it is sensible to consider that question before considering the issue of disability-related discrimination since, by section 3A(6), the question of whether disability-related discrimination can be justified can only be determined once it is considered whether there has been a duty to make reasonable adjustments and if so whether it has been complied with.

34. The Tribunal analysed section 4A of the Act and directed themselves that it required the Tribunal to:

1) identify a provision, criterion or practice (PCP)

2) determine the pool of employees touched by the PCP

3) decide whether disabled persons were at a substantial disadvantage compared with non-disabled persons in that pool because of the effect of the PCP.

35. That approach is in fact erroneous. There is no requirement when considering the issue of reasonable adjustments to consider whether the disabled as a group are disadvantaged by the PCP in issue; the question is whether the particular claimant suffers a substantial disadvantage.

36. The approach which tribunals should adopt when dealing with section 4A cases has been set out in a number of cases, and was reiterated most recently by His Honour Judge Clark giving the judgment of the EAT in **Secretary of State for Work and Pensions v Macklin** UKEAT/0370/07 (para 20):

> **"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**."

37. That was not what the Tribunal did, although in fact nothing turns on the misdirection here. The Tribunal found that the Claimant was subject to a PCP, namely "where an officer was

in a post suitable for officers on restricted duties, he would not be permitted access to the scheme as his departure might enable another officer to take up that post."

38. Actually, this does not seem to have been wholly accurate since being on restricted duties was not an absolute bar to being placed on the scheme, as the case of Mr Harrison shows. Even so, it was the reason why this Claimant was denied access to the scheme. They also found that this placed the Claimant at a substantial disadvantage when compared with a non-disabled employee. They did not in terms identify the comparator but we think it is implicit that it is someone who made an application and was not on restricted duties. They then had to go on to consider whether a reasonable adjustment should have been made. Since the Respondent accepts that it is only this last stage which they wish to appeal, the misdirection does not matter.

What adjustments could be made and was it reasonable to make them?

39. The Tribunal accepted the evidence of Mr Crompton that the only conceivable adjustment to meet this case was to put the Claimant onto the scheme, despite the fact that this would defeat the very purpose of the PCP.

40. The Tribunal then said this:

> **"7.5 ……In determining whether it was reasonable to take this step the Tribunal has looked at the factors set out under Section 18B(1) of the Act. We note that it would have bee entirely practicable for the Respondent to permit the Claimant to go onto the Scheme, indeed, that had been its original intention. There would have been no cost implication in doing so, if anything the Respondent may have achieved a small saving in respect of pension contributions. Despite its financial difficulties the Respondent is a well resourced and large organisation. Permitting the Claimant to go on to the Scheme would have made no difference operationally; he would have continued to do the same work. There was no suggestion that the Claimant was to be moved from his post or that he might be dismissed before the Respondent's ordinary retirement age if he were not accepted.**
>
> **7.6 Taking all these factors into account we find that there was a reasonable adjustment which could have been made, namely to permit the Claimant access to the Scheme notwithstanding that he was in a restricted duties post. By taking this step it would have removed the disproportionate effect of the PCP that the employer had applied. In essence this step would have placed the Claimant's application on the same footing**

as his non-disabled colleagues. In considering the issue of reasonableness we have borne in mind that many of the employer's aims in taking the approach it adopted were laudable. Mr Crompton was concerned to manage the workforce effectively and to give other employees on restricted duties who might find themselves medically retired without full service, the opportunity of achieving the same full service as the Claimant. However, in considering the question of reasonableness we cannot ignore the fact that it was this very policy which created the substantial disadvantage in the first place. We are also conscious that the test of reasonableness is an objective one. Taking thee factors into account we are satisfied, therefore, that a reasonable adjustment existed; namely permitting this Claimant on to the Scheme. The Respondent failed to do this and it follows, therefore, that the Claimant's complaint of unlawful discrimination under Section 3A(2) of the 1995 Act succeeds."

41. The Tribunal then went on to consider disability-related discrimination. They identified the fact that the treatment of which he complained arose because he was in a post suitable for an officer on restricted duties and he was in that post because of his disability. In that connection the Tribunal noted that the post was not identified as a restricted duties post, but nonetheless it was one which was appropriate for those on restricted duties.

42. Since the reasonable adjustment would have given the Claimant what he was seeking, plainly there could be no justification for the disability-related discrimination. For that reason there is no separate challenge to this conclusion of the Tribunal, but it is common ground that the conclusion cannot stand if the appeal succeeds.

The grounds of appeal

43. Ms Chudleigh, for the appellant runs a number of grounds which can be considered under three heads.

44. First, she submits that in assessing whether the adjustment was reasonable the Tribunal failed to take into account certain wider implications which the proposed adjustment would have. In particular, they failed to have regard to the operational considerations which dictated the Respondent's response. Moreover, the Tribunal actually noted that it would make no difference

operationally to allow the Claimant to go onto the Scheme. That, she submits, is an argument against allowing the Claimant onto the scheme since the basic justification for it is not present.

45. Second, she says that the Tribunal erred in taking into consideration the fact that the Chief Constable had adopted a policy which created a substantial disadvantage in the first place. She submits that that is wholly irrelevant when considering the question of reasonableness.

46. Third, she says that the Tribunal failed properly to have regard to the purposes of the **Disability Discrimination Act**, which she submits is to ensure that the Claimant would be better able to remain in employment. Here, putting him onto the scheme did not have that effect at all.

47. Ms Wedderspoon contends that the Tribunal was plainly aware of the wider implications. They even referred to the Respondent's "laudable aims." The Tribunal analysed the issue fairly and were entitled to approach the case in the way they did. There was no material error of law and the finding was one of fact. In substance the Respondent was seeking to run under another guise a perversity challenge, a notoriously difficult argument to sustain. This was not conceivably a perverse decision.

Conclusions.

48. We will take the submissions in order.

Failure to consider the wider implications.

49. With respect to the first ground, we agree with Ms Chudleigh that the Tribunal assessed the reasonableness of allowing the Claimant onto the scheme merely by focusing on his own position. They were obliged to engage with the wider operational objectives of the force, and in particular the desire to liberate posts for restricted officers. If he were to retire, that would liberate a further post for those in the force who were on restricted duties and would in turn enable a non-disabled officer to be recruited who could undertake the wide range of obligations which the Police usually require.

50. In so far as the Tribunal reached its conclusion on the basis that the Claimant would have remained in his post anyway – and that does appear to have been a significant part of the reasoning- we think it was an unjustified premise. At the time he applied to go onto the Scheme, the Claimant had indicated an intention to retire. Moreover, if the Scheme were to be properly applied, and not merely to give a benefit to an officer with thirty years' experience, there could be no justification for invoking it if the officer is going to remain in post in any event. It is not then necessary to put him onto the Scheme to retain his skills.

51. The obligation to have regard to all the circumstances, including the benefits to the force and the consequences for other officers, as well as the precedent it sets for other cases, is in our view self evident. It is also in fact supported by para.5.42 of the **Disability Rights Commission Code of Practice: Employment and Occupation [2004]** which notes that in assessing the question of reasonable adjustment, it may be relevant to take into account both **the effect on other employees** and adjustments made for other disabled employees.

52. Again, to take an obvious example, questions of finance which are plainly material to the

question of reasonable adjustment will loom larger if there are a number of disabled persons who are seeking or may in future be seeking to take advantage of a particular benefit than if there is simply one. That was a point recognised by the Court of Appeal in **O'Hanlon v Commissioners for Inland Revenue & Customs** [2007] IRLR 404 in which it accepted that the Employment Tribunal was entitled to have regard to the overall cost of altering sick pay rules in favour of the disabled when assessing whether an adjustment in a particular case was reasonable.

The deliberate adoption of the policy.

53. The second ground of appeal challenges the Tribunal's reasoning in having regard to the fact that the employers had deliberately adopted a policy which operated to the disadvantage of disabled people.

54. We agree that this cannot be a relevant consideration. The prior question the Tribunal has to determine is whether there is a PCP in operation which results in a substantial disadvantage. If it does, the question which then arises is whether a reasonable adjustment can be adopted which will mitigate or ameliorate the disadvantage. In every case it will be a PCP adopted by the employer which creates the substantial disadvantage. This is not a factor which can properly weigh with the Tribunal at all in answering that question whether a reasonable adjustment can be made. If no relevant reasonable adjustment can be made, then the question of whether the PCP is justified will generally arise in the context of disability-related discrimination. That is the stage at which the Tribunal tests whether the policy deliberately adopted by the employer is permissible in law, notwithstanding its adverse effect on the disabled.

55. Ms Wedderspoon submitted that this was a relatively minor feature of the Tribunal's reasoning which did not affect its basic analysis. We do not accept that. In our judgment it must have had the effect of raising the standard of reasonableness, as far as the Tribunal was concerned. We think that this error on its own would have been sufficient to invalidate the

Tribunal's conclusion.

The purposes of the Act.

56. The third ground is the alleged failure to take account of the purpose of the **Disability Discrimination Act.** Reliance was placed upon certain observations of mine in the **O'Hanlon** case [2006] IRLR 840 in the EAT when I commented that:

> **"the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce"**

57. There are observations to similar effect in the decision of the ECJ in **Chacon Navas v Eurest Collectividades SA** [2006] IRLR 706, paras.43 and 50.

58. Ms Chudleigh submits that it cannot possibly be said that that is the purpose of this adjustment. It merely has the effect of financially benefiting the disabled employee and does not render him in any way more able to be integrated into the workforce. That was never in issue since he could remain in his post in any event, and indeed has done so.

59. The observations in those cases must be considered in context. In **O'Hanlon** the Claimant was claiming that the sick pay rules should be amended in her favour to give her more favourable terms than applied to other workers. That of itself may in principle constitute a reasonable adjustment (although the EAT thought that it would be highly exceptional), but the observation was made that it might have the effect of discouraging a return to work, which is what would be inconsistent with the underlying objective of this legislation.

60. However, it cannot be the case that only adjustments which bring about integration into the job are required. The issue, as the questions posed by HH Judge Clark in the **Macklin** case demonstrate, is whether an adjustment will mitigate or eliminate the substantial disadvantage and is reasonable. So if the disadvantage relates, say, to terms of employment, then the question is whether a reasonable adjustment can be made to counter the disadvantage even if it does not in

any way affect the job or the way it is carried out.

61. Such cases may be relatively rare, but the employer is plainly not relieved from the obligation to make any reasonable adjustments merely because they will not affect the extent to which the employee can function in his post. Accordingly, we reject this ground of appeal.

Disposal.

62. In our judgment, and for the reasons we have set out, the Tribunal has erred in its approach to the question of reasonable adjustment. We have considered the guidance given in **Sinclair, Roche and Temperley v Heard** [2004] IRLR 763 and have decided in the circumstances that the matter must be remitted to a fresh tribunal to consider this question of reasonable adjustment and, depending on the outcome of that ruling, disability-related discrimination. The evidence falls within a relatively brief compass and the cost will not, we suspect, be much greater than if the case were remitted to the same tribunal.