Appeal No. UKEAT/0011/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 8 December 2016

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

KINGSMOOR PACKAGING LIMITED — APPELLANT

MR T FYTCHE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MS KATHERINE REECE (Representative) Peninsula Business Services The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	MR CHRISTOPHER EDWARDS (of Counsel) Instructed by: Minster Law Alexander House Hospital Fields Road York North Yorkshire YO10 4DZ

SUMMARY

DISABILITY DISCRIMINATION - Disability related discrimination

DISABILITY DISCRIMINATION - Direct disability discrimination

DISABILITY DISCRIMINATION - Reasonable adjustments

DISABILITY DISCRIMINATION - Justification

The Claimant brought four claims under the **Equality Act 2010** before the Employment Tribunal: direct disability discrimination, indirect disability discrimination, failure to make reasonable adjustments and discrimination arising from disability. The only finding in the Judgment as distinct from the Reasons was of direct discrimination on the grounds of disability. The Tribunal failed to consider or make any findings of less favourable treatment, an essential ingredient of a claim under section 13. The Tribunal erred in failing to consider the different legal ingredients of each complaint, and make necessary findings of fact and conclusions. For example the Tribunal failed to specify what adjustments were reasonable to make and when. The Tribunal also misstated the effect of the medical reports as only precluding operating hazardous machinery and considering it relevant that the Respondent's machine was not hazardous as it was guarded when the Consultant Neurologist and the Occupational Health report advised against operating or being near machinery.

THE HONOURABLE MRS JUSTICE SLADE DBE

Introduction

1. Kingsmoor Packaging Ltd, the Respondent, appeals from the Judgment of the Employment Tribunal - Employment Judge Housego and members - sent to the parties on 13 August 2015. The Employment Tribunal held that the Respondent discriminated against the Claimant on the grounds of his disability. The Respondent was ordered to pay the Claimant the sum of £35,417.85. The Respondent, represented by Ms Reece, appeals both from the finding or findings of disability and also from the award of compensation. The Claimant, represented by Mr Edwards of counsel, cross-appeals from the refusal of the Employment Tribunal to add a **Simmons v Castle** [2012] EWCA Civ 1039 uplift to the award.

Outline Facts

2. The parties agreed that the Claimant was a disabled person by reason of epilepsy. The fundamental facts or chronology set out in the Claimant's ET1 were adopted by the Employment Tribunal to a large extent.

3. The Respondent makes moulded plastic trays for food products that are sold in supermarkets. The Employment Tribunal found at paragraph 16 of the Judgment that there are some substantial machines in the Respondent's works, they run 24 hours a day, 6 days a week. A large roll of plastic film weighing between 250kg and 400kg is brought on a forklift truck and offered up to the machine, a steel bar goes through the middle of the roll, and then the roll of film is lifted hydraulically. The machine is then set into operation. It is a sealed machine into which it is impossible to fall. The machine heats up the roll of plastic to a very high temperature. There is then a combination of impression and vacuum suction to form the plastic

containers. The containers are then ejected from the roll of film and automatically stacked. An employee stands on a step to reach the plastic trays that are produced. The remainder of the plastic film is wound around a spindle at the far end of the machine. When sufficient of the material has been wound round, it is taken away and recycled on-site in a granulator. This cannot be described as the operation of heavy machinery and, apart from the heavy roll of plastic film, is light industry. There was no description of the number of employees in the factory or their job roles or duties save to the limited extent referred to, namely that the Claimant was a packer. He was then promoted and was for a short time an assistant quality assurance charge hand.

4. The Claimant's employment commenced on 18 April 2011 as a packer. He was promoted to assistant quality assurance charge hand on 16 July 2012. He worked 40 hours a week. On 14 March 2013 the Claimant collapsed when away from work. He was taken to hospital. On 27 March 2013, the Claimant had a seizure and was admitted to hospital. He was subsequently diagnosed with epilepsy. Because of his epilepsy the DVLA were notified, he was not allowed to drive, and in the usual way he would have had to have been seizure-free before being able to regain his driving licence. On 12 April 2013 whilst off sick he was demoted to packer. On 17 May 2013 the Claimant's GP signed him off work. In the statement of fitness to work the GP stated:

> **"Must not operate machinery. Needs work hours reduced at present and hours to fit in with public transport."**

5. The Claimant was signed off not fit to work for a period. There was a meeting between the Claimant and Mr Morris the Managing Director of the Respondent. Mr Morris gave reasons why the Claimant could not return to work. The reasons were that:

> **"- if he had a seizure it could cause trauma to his colleagues, because of witnessing such a seizure, and they could sue the company**

- there was no one at the company who could deal with a seizure

- he was unable to operate machinery

- they could not hold a job open until September as they were busy and it would be difficult to employ somebody until September

- the company was unable to accommodate flexible work hours

- the company actively discouraged lift sharing."

6. The Claimant in answer said that he could negotiate a lift or get to work with public transport by 6.45am. However, that was not acceptable to the Respondent; they were against lift sharing. On 12 July 2013 the Claimant's GP surgery notified the Respondent formally that the Claimant had been diagnosed with epilepsy for which he was now on treatment. The Claimant was seen by a Neurologist, who on 12 September 2013 wrote a report. He wrote to Mr Morris saying as follows:

"2. It is, of course, not possible to comment on how long the condition will persist as in the majority of cases epilepsy is not curable and is, infact, a longterm condition [sic]. It is therefore unlikely merely to be a matter of months and, indeed, is likely to be a chronic condition, although we hope that we will be able to bring his seizures under control.

…

6. With respect to 'reasonable adjustments we can make to accommodate any disability or facilitate his return to work'. I think it would be important, given the unpredictability of this disease, to try and accommodate him in a role that did not involve working with machinery and to avoid shift work wherever possible, primarily to avoid the underlying risk factor of sleep disturbance. This, indeed, I hope answers the subsequent point."

7. In a further fit note, the GP, having given a fit note statement on 24 October 2013, wrote of the Claimant as follows:

"Is having infrequent more minor seizures now. He is rarely incapacitated by his seizures now. Is likely to be fit for work that does not involve working at heights, complete lone working or working in front of unguarded machinery. A full occupational health assessment is recommended including a personal risk assessment of any job he would carry out prior to his return."

8. Such an Occupational Health report was then prepared following an assessment on 14 January 2014. The Occupational Health doctor wrote in his report as follows:

> ***"Current Situation***
>
> **[The Claimant] is now diagnosed as an Epileptic. He has not quite completed the 12 month fit free time interval, when the DVLA might allow him to have his driver's licence back. His VT needs more control as he has some episodes in the afternoon/evening which is 8-10 hours after the morning dose of medication.**
>
> ***Capacity for Work***
>
> **[The Claimant] wants to go back to work. He is fit to return to work, but he will need some adjustments.**
>
> ***Adjustments and Rehabilitation***
>
> **The main adjustment is that he cannot be allowed to operate or be near machinery, in case he has another fit, for at least a year.**
>
> **If he remains well and is fit free, on medication, then the situation can be reviewed. He was also employed working a shift system. It would be better when he does return to work to be employed on a regular day shift, for at least the first 6 months."**

9. There was then on 18 March 2014 a welfare meeting and a discussion about the Respondent's requirements that the Claimant work a pattern as a packer between 6.00am and 2.00pm or 2.00pm to 10.00pm. The Claimant said he could not work that pattern as public transport was not available to allow him to get to and from work at those times. On 8 July 2014 he was certified by his doctor as fit to work with adjustments. However, no agreement on adjustments having been reached, on 10 September 2014 the GP certified him as not fit for work; that fit note or not-fit note was for the period from 13 June 2014 to 15 December 2014. On 14 November 2014 the Claimant resigned.

The Claims Before the Employment Tribunal

10. The Employment Tribunal outlined the four distinct claims that had been made by the Claimant. The first, referred to at paragraph 7 of the Reasons, was a direct disability discrimination claim. The second was indirect discrimination. The provisions, criteria or practices referred to and relied upon were two: first, the requirement to work a shift pattern between 6.00am and 2.00pm or 2.00pm to 10.00pm, rotating; and secondly, to operate machinery. The Claimant did not accept that those PCPs were justified. The decision for the Tribunal therefore on the indirect discrimination claim was whether the two PCPs were or were

not justified. The Tribunal then referred at paragraph 9 to the claim for failure to make reasonable adjustments. The claim is phrased as "including failure to" (although no other matters are referred to in the Judgment) alter the shift pattern, train first aiders, work without involvement of machinery and work a day shift. The Tribunal then said at paragraph 10 that there was a claim under section 15 of the **Equality Act 2010** ("EqA") of discrimination arising from disability, that the Claimant was prevented from returning to work for a variety of reasons put forward by the Respondent. These were that he could not return to work until he obtained a driving licence. He could not work the Respondent's shift pattern. He was unable to operate machinery. He might have an epileptic fit whilst at work. He was unable to return as an assistant quality assurance charge hand because of his absence.

The Findings and Grounds of Appeal

11. The Respondent appeals both against the finding of the Tribunal on liability and also on remedy. It is agreed between the representatives, Ms Reece for the Respondent and Mr Edwards counsel for the Claimant, that if the conclusion of this court on liability is that the appeal succeeds then if the matter of liability is remitted to an Employment Tribunal to decide the remedy appeal would fall away, as would the cross-appeal. If the Claimant succeeded on liability at the remitted hearing those issues would be determined by the Tribunal to whom the matter is remitted.

12. The first ground of appeal, raised by way of amendment, is that the Employment Tribunal failed to set out its findings in relation to each of the claims. Ms Reece understandably says that no findings regarding any of the claims were properly made by the Employment Tribunal. The closest that the Employment Tribunal got to considering each of the claims was that of failure to make reasonable adjustments. However, even in relation to that

claim Ms Reece says that the Employment Tribunal did not make the necessary findings as to what adjustments were needed and whether and why it was reasonable to make such adjustments.

13. So far as the indirect discrimination claim was concerned, it was said that there was no or no proper consideration of the justification for the two PCPs. Further, Ms Reece contends that the Employment Tribunal failed to consider the changing situation over the period of the Claimant's absence from May 2013 to his resignation in November 2014. In particular if the Employment Tribunal considered that reasonable adjustments should have been made to enable the Claimant to return to work they made no finding as to the periods in which they would have applied, for what number of hours and in what role the Claimant would have been able to return to work if reasonable adjustments had been made.

14. So far as the response to those contentions is concerned, Mr Edwards acknowledged that this was not the best Employment Tribunal Judgment; however, he valiantly sought to suggest that the findings of the basis of the finding of discrimination could be gleaned from various passages in the Judgment. Mr Edwards had an insuperable task in supporting the only conclusion that was the subject of the Judgment, namely that the Respondent had discriminated against the Claimant on grounds of disability. Mr Edwards recognised that section 13 **EqA** provides that for direct discrimination to be found there has to be a finding of less favourable treatment, that the Respondent treats "B", in this case the Claimant, less favourably than he treats or would treat others. There has to be a comparator, actual or hypothetical, as one sees from section 23 **EqA**. No actual comparator was referred to in this Judgment. Mr Edwards sought to suggest that the basis of the decision must be read as being based on a hypothetical comparator, no actual comparator having been identified.

15. Mr Edwards sought to say that one should read into the Tribunal's Judgment that they proceeded on the basis that there was a hypothetical comparator because of stereotyping by the Respondent. However, the only glimmer of stereotyping referred to in the Judgment of the Employment Tribunal may be that Mr Morris was concerned at how "the ladies" would react if they saw the Claimant have a fit. There is no finding anywhere in the Tribunal's Judgment of stereotyping on grounds of disability. Moreover, there is no suggested link in the reasoning of the Employment Tribunal that they reached a conclusion that there was discrimination on grounds of disability because of stereotyping against disabled persons by the Respondent. As there is no basis for the finding of direct disability discrimination in this Judgment of the Employment Tribunal, that decision is set aside.

16. I go on to consider the other claims and findings in so far as there are any on the other bases of claim. It is to be noted that technically it may well be that the direct discrimination claim is the only one on which the Tribunal had reached a Judgment because that is the only one that is referred to in what in European terms would be termed the operative part of the Judgment. However, this Employment Tribunal, in the Reasons though not in the Judgment section of their written document, say that (paragraph 42), "the Tribunal has no difficulty in concluding that every aspect of the claim succeeds".

17. So far as the claim of indirect discrimination is concerned two PCPs were identified. The first was a requirement to work a shift pattern 6.00am to 2.00pm or 2.00pm to 10.00pm rotating; the second was to operate machinery. So far as the shift pattern issue is concerned, Ms Reece contended that there was no or no proper consideration of the justification for the insistence on the shift pattern. Mr Edwards contended that the Tribunal carefully considered or considered the justification for insisting on the particular shift pattern, the justifications

advanced by the Respondent in respect of the shift pattern did not support a finding that it could be justified and the Tribunal was entitled to conclude that the PCP regarding shift pattern was not justified by the Respondent. I agree with that submission.

18. So far as the second PCP is concerned, that there was a requirement for the Claimant to operate machinery, Ms Reece relies on the medical evidence leading up to the Occupational Health report. The medical evidence was replete with warnings that the Claimant, being epileptic, albeit his epilepsy being drug controlled, should not operate machinery and should not be involved with machinery. However, the PCP here relied on is "should not operate machinery". Mr Edwards says, referring to paragraph 33 of the Employment Tribunal's Decision, that the Employment Tribunal was entitled to use their common sense and to conclude that as long as the machinery was guarded there was no real risk to the Claimant. In particular the Employment Tribunal held:

> **"33. …**
>
> **- The medical reports had consistently stated that the claimant should not work with machinery were [sic] he might injure himself if he had a fit. This involves two criteria. First the machinery had to be such that a fit might cause him to be injured, and secondly that he might have a fit. The machines were not unguarded such as would cause him injury if he had a fit, and from the end of May 2014 he was not considered at risk of having a fit, and there was no reason why he could not work. The small part of his job that involved standing on the step to collect the product of [sic] the machine, and so being slightly off the ground does not amount to operating hazardous machinery. …"**

19. In my judgment, having regard to the very clear medical evidence that was given to the Respondent both in the Neurologist's report of 12 September 2014 and in the Occupational Health report, it is not the role of the Employment Tribunal on their non-expert assessment to conclude that it would have been safe for the Claimant to work with and operate machinery because the machinery was guarded. It is likely that an employer who disregarded the clear medical advice that an employee should not carry out work involving machinery or operate or be near machinery would have very little prospect of answering a personal injury claim if injury

were to result from ignoring and disregarding such very clear medical advice. In my judgment, it is difficult to understand and unsustainable on what the Employment Tribunal recited to conclude that the employer had not justified a PCP of being able to operate machinery. Clear advice had been given that the Claimant should not operate machinery.

20. Accordingly, although the Employment Tribunal were entitled to hold and justified in holding that the PCP regarding the shift pattern had not been shown to be justified, it does not avail the Claimant, because, although he may have been able to get to work with the reasonable adjustment regarding shift pattern, the PCP regarding the operating of machinery, which, in my judgment, the Employment Tribunal erroneously held had not been justified, would have precluded him at certain times and on the findings of the Employment Tribunal from actually doing work when he was at work save for the limited extent of 25 minutes out of every 60, when he was not working with or near machinery. Accordingly, the finding that the Respondent had indirectly discriminated against the Claimant cannot stand and is set aside.

21. So far as the claim for failure to make reasonable adjustments is concerned, the first adjustment that is relied upon is alteration of the shift pattern, and the same arguments apply to that reasonable adjustment as apply to the PCP regarding shift pattern. Although, in my judgment, Ms Reece is correct in her criticism of the way in which the Employment Tribunal dealt with the reasonable adjustment claim in that they did not set out or set out with any necessary clarity what adjustment should have been made and why that was reasonable, nonetheless here I accept what Mr Edwards says about drawing inferences from the Tribunal's findings that it could be said that alteration of the shift pattern is something that was a reasonable adjustment for the Respondent to have made. However, the argument of Ms Reece as to the period of time at which that reasonable adjustment would have had any relevance to

A the Claimant's situation is not dealt with or considered at all by the Employment Tribunal. That is a matter which would have to be considered on any remitted hearing.

B 22. The second reasonable adjustment referred to in the Employment Tribunal's summary of the claims made was provision of trained first aiders. As Mr Edwards quite rightly recognised there were first aiders. This complaint is not pursued. The third reasonable adjustment claimed was to provide the Claimant with work without involvement of machinery. C This is an extremely vague proposition. Its vagueness is illustrated by Mr Edwards himself who said that machinery could mean a computer. That statement illustrates how necessary it is for a Tribunal considering a reasonable adjustment claim to specify exactly what adjustment is D held by them to be reasonable. This Tribunal failed to do that. The closest the Employment Tribunal got to a consideration of working without involvement of machinery was at paragraph 35, in which the Tribunal say that they accepted the Claimant's evidence:

> **"35. … which was not disputed by the respondent, that during his period as an assistant** E **charge hand the claimant would spend 25 minutes of every working hour involved in quality control work. Such work did not involve working with machinery. Almost half the problem simply did not exist until created by the respondent's arbitrary demotion of the claimant, which was itself a breach of contract."**

F 23. The Tribunal did not then go on to say from their observation at paragraph 35 what conclusion they reached about what adjustment was reasonable to be made. Was it an adjustment that the Claimant be employed for half-time, 25 minutes out of every 60? Could the Respondent reasonably have been expected to employ a quality assurance inspector for half- G time not inspecting work on machinery? The suggestion at paragraph 35 is that when the Claimant was demoted their observation about working away from machinery for 25 minutes out of every hour no longer applied. It is entirely unclear what adjustment the Tribunal H considered was reasonable for the Respondent to have made.

24. The final adjustment listed at paragraph 9 of the Judgment is to work a day shift. However, the same observation is made regarding the claim for reasonable adjustments as was made regarding the two PCPs. It does not assist the Claimant if there is a reasonable adjustment to his working hours, but once he gets to work there is no reasonable adjustment that could be made to enable him to actually do some work. Accordingly, the conclusion, if it is a conclusion, that the Respondent had failed to make reasonable adjustments so that there was a breach of **EqA** section 20 is set aside. The Employment Tribunal did not specify what adjustments were reasonable and did not consider the period when those adjustments should have been made and therefore their impact on the Claimant's ability to work for the Respondent.

25. So far as the claim under section 15 **EqA** is concerned, Mr Edwards quite rightly recognises that the same arguments arise in relation to consideration of that claim as did under the claim for failure to make reasonable adjustments. The defects in the Tribunal's Decision on the claim under section 20, apply in the same way to the claim under section 15.

26. Further Ms Reece is right to complain that the Tribunal failed to consider in relation to the claim regarding adjustments the reasonableness of making adjustments at various periods of the Claimant's absence. It was, as Ms Reece says, a changing situation. This failure could have a consequence for any compensation if there were to be a finding of a failure to make reasonable adjustments.

Conclusion

27. This appeal is allowed. The Judgment of the Employment Tribunal is set aside, not only the apparent operative part of the Judgment, namely the finding that the Respondent had

discriminated against the Claimant on the grounds of disability, but also the finding in the text of the Reasons, that all the Claimant's claims succeed. The findings that the claims succeed are set aside. All four claims are to be remitted for rehearing before a differently constituted Employment Tribunal.

Costs

28. Ms Reece for the successful Appellant Respondent applies for costs of the appeal under section 34A of the **Employment Appeal Tribunal Rules 1993**. The provision under which they are sought is that resisting this unanswerable appeal is unreasonable conduct. Mr Edwards for the Claimant rightly says that such orders are unusual and makes no submission as to the amount of the costs order should one be made. The amount of costs sought is £1,200. I am told that the Claimant is insured, and no particular argument is advanced on the amount.

29. I am well aware that costs orders in the Employment Appeal Tribunal are very rare. However, I have concluded that this Judgment of the Employment Tribunal was unsustainable for the reasons set out in the Judgment. This Claimant has been legally represented throughout. He was represented at the Employment Tribunal by Mr Edwards of counsel, who settled the Respondent's Answer and the skeleton argument originally prepared for the purpose of this hearing and, very surprisingly, a further skeleton argument, which I received first thing this morning, which sought to say that the Respondent was not appealing against the liability finding. That was said to be justified on the basis of an email. In my judgment, that email founds no justification for such an interpretation. It was plain that the appeal was against the liability as well as remedy.

30. Taking into account all of these circumstances, very unusually I shall make a costs award that the Claimant pay the Respondent the sum of £1,200 by way of costs of this appeal. This appeal should not have been resisted.