Appeal No. UKEAT/0061/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 July 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR D J HALL APPELLANT

XEROX UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS REBECCA TUCK (of Counsel) Instructed by: Thompsons Solicitors 23 Princess Street Manchester M2 4ER
For the Respondent	MR DANIEL TATTON-BROWN (of Counsel) Instructed by: Xerox UK Ltd Legal Department Bridge House Oxford Road Uxbridge Middlesex UB8 1HS

SUMMARY

FIXED TERM REGULATIONS

An employer provided the benefit of an income replacement policy, effected with Unum, in the event of ill-health. The Claimant suffered a hernia, which would have put him off work for the qualifying 26 week period were he not a fixed term employee, whose contract at the time was due to expire within three months. His contract was extended for a further year, but Unum did not admit his claim, relying on a policy provision that restricted benefit to the unexpired period of a fixed-term employee's contract as it was at the time of the injury. An Employment Tribunal of two persons found that there was less favourable treatment than would have been the case if the Claimant had been a permanent employee, but disagreed whether this was suffered by him by an act or deliberate failure to act of his employer. The Employment Judge (who had the casting vote) said it was not – it was an act by Unum, and the employer was merely the messenger to the Claimant of the result of that act; the lay member said it was because the employee had not negotiated non-discriminatory terms when the policy was effected. If she was right, the Employment Judge would have held the discrimination justified as pursuing the legitimate aim of providing employees with PHI at no greater expense than the costs of an annual premium, whereas the lay member would not, holding that the employer could have renegotiated and had the resources to pay the Claimant anyway. **Held** that the conclusion of the Employment Judge as to the cause was one he was entitled to reach, and was not perverse; Unum were not the agent of the employer; the policy with them was not an instrument contracting out of the **Fixed-Term Regulations**; and the Employment Judge was entitled on the evidence to conclude that the only way the employer could reasonably achieve the aim was effecting the Unum policy (or one in substantially identical terms) and it was thus justified.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. An Employment Tribunal at Manchester, for Reasons given on 30 October 2013, dismissed the claim which the Claimant had been brought that he had been discriminated under the **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002**. The Tribunal consisted of two persons, Employment Judge Little and Miss Jarvis. They disagreed as to the result. The Judge exercised his casting vote. In those circumstances the appeal comes to this Tribunal.

2. The central legislative provision is Regulation 3 of the 2002 Regulations. It provides:

> **"(1)A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee—**
>
> **(a) as regards the terms of his contract; or**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer."**

3. Regulation 3(1)(b) requires, relevantly for the purposes of this appeal, there not only to be less favourable treatment when compared to a comparable permanent employee but that this should be caused by an act or omission of his employer.

4. The central facts were in some, but not great, dispute. All the employees of the Respondent, Xerox, employed after 2009 were entitled to the benefit of an income protection policy offered by Unum if they had been off work for over 26 weeks as a result of a qualifying injury. The policy provided to the employer by Unum provided that if a member was on a fixed-term contract he would:

> **"...cease to be a member on the earlier of**
>
> - **attaining terminal age, or**
> - **at the conclusion of his fixed-term contract, or**

- **if temporarily absent in accordance with paragraph 4.8 at the conclusion of his fixed-term contract, on the day before temporary absence."**

5. The policy thus drew a distinction between those who served under a fixed-term contract, on the one hand, and others. The employer contracted in the same terms with those who were both permanent and fixed-term employees. The contract provided that the benefit was governed by the terms of the underlying insurance policy and subject to the acceptance of the claim by the insurer, and that Xerox was only liable to make payments to the employee under the scheme if payment had been received by Xerox from the insurer for that purpose. There would be no obligation to provide any replacement benefit of the same or a similar kind if that payment was not forthcoming.

6. The Claimant had worked for Xerox under a fixed-term contract which, in the Judge's words, was regularly extended. Initially employed in August 2010, he was employed under an extension of that contract, due to expire on 20 July 2012, when on 12 April 2012 he suffered a hernia caused by his work in repairing and maintaining photocopying equipment provided by Xerox to Wigan Council. It is plain that he could not, within the anticipated currency of his contract, be off work for the 26 qualifying weeks, since he did not have long enough left. As it happens, his fixed-term contract was subsequently extended to 20 July 2013. Nonetheless Unum decided that, in those circumstances, in reliance upon the contract which it had with the employer, it would not admit the Claimant as a member to whom the benefit of the policy applied. It was accordingly accepted by the parties that the Claimant was in a less favourable position than would have been an employee on an open-ended or permanent contract who had suffered a similar hernia on the same occasion, and this was simply because he was a fixed-term employee whose contract at the time of his injury was due to expire within 26 weeks.

7. The difference between the Employment Judge and Miss Jarvis was that the former took the view that the Claimant was treated less favourably because he did not get the benefit under the scheme and that was not caused by any act or deliberate failure to act by the employer. It was a decision made by Unum. In those circumstances, he said (see paragraph 9.2.1):

> **"I cannot accept that this rejection was treatment of the Claimant by the Respondent. The Respondent was simply the messenger."**

8. Miss Jarvis, on the other hand, thought that Xerox had infringed Regulation 3 because they had taken insufficient steps to ensure that the income protection scheme, which partially had replaced ill-health provisions in a previous final salary pension scheme, would adequately address the gap caused by the closure of that pension scheme and the ill-health early retirement benefits included therein. In short, at the time that the contract was negotiated by Xerox, she thought Xerox should have taken steps to ensure that the policy did not include any provisions which might in some circumstances treat fixed-term employees less favourably than in those circumstances a comparable permanent employee would be treated.

9. It followed, from their different approaches to whether the failure to receive benefit was caused by an act of the employer, that one thought that the Act was potentially discriminatory subject only to justification and the other did not. As to justification, the two differed. Both accepted that the test for justification required the identification of a legitimate aim, and that the potentially unlawful discrimination was caused in addressing that aim in a manner which was both appropriate and necessary, applying transparent criteria. Such criteria, as Miss Tuck pointed out, were described in **Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud** [2008] ICR 145, at paragraph 58 as being "precise and concrete" factors – or, in other words, objective and transparent criteria.

10. The Judge concluded that justification was made out by the employer for these reasons:

> **"I observe that the evidence in relation to what other insurers might have been able to provide is not as clear as it could be. That being said, I note that Aviva's terms were the same in relation to the provision of benefits to fixed-term employees. It may be that, on fuller analysis, the position is not very much different with Friends Life and Canada Life. This is relevant to the question of whether the Respondent had any other reasonable way of achieving its aim in a way which would not have resulted in the Claimant not benefiting. In the circumstances I consider that there was no realistic alternative for this employer which was bound by the apparently universal approach taken by insurance providers in this regard. Accordingly, if I had found there to have been less favourable treatment by the employer, I would have concluded that the justification defence was made out."**

11. Miss Jarvis's conclusion was that:

> **"...the employer had a duty when it became aware of the less favourable treatment to both pay the Claimant and renegotiate the arrangements with the insurance company to ensure no further inequality of treatment in relation to fixed term employees."**

In reaching this decision she reminded herself:

> **"...that the scheme was introduced to address the gap in employee benefits due to the closure of the final salary pension scheme. The Respondent was a large employer who should have ensured, in addressing the gap, that employees on fixed-term contracts were not treated less favourably."**

12. This approach suffers, as Miss Tuck recognised in argument, from its post-fact nature. The principal reason on which Miss Jarvis relied was her view that the employer should have renegotiated the policy after the rejection of the claim by the Claimant and should have paid the Claimant. Whether it should have paid the Claimant or not after the event cannot logically operate as a justification for having agreed terms in the form in which they were before the event. Nor can renegotiation be relevant to justification of having entered into terms earlier.

<u>The Grounds of Appeal</u>

13. The Claimant appeals on four grounds. The first is that the Judge erred in finding that the less favourable treatment was not treatment by the Respondent. Secondly, and linked to the first, only becoming necessary to argue should the first fail, was that the Tribunal erred in finding that the insurance company was not acting as an agent of the employer. If it had been,

then Regulation 12 of the 2002 Regulations would have applied, paragraph 2 of which provides:

> **"Anything done by a person as agent for the employer with the authority of the employer shall be treated for the purposes of these Regulations as also done by the employer."**

As to that, she faced the unanimous view of both Judge and lay member that Unum was not, in these circumstances, the agent of Xerox.

14. The third ground was that the Tribunal failed to address an issue which had been raised, it was said, in submissions though not separately as an issue before the Tribunal, that reliance on the insurance arrangements as a defence to the claim represented an attempt to contract out of the Regulations contrary to Regulation 10.

15. Finally, there was an attack upon the conclusion as to justification, arguing that the Respondent did not discharge the burden of justifying the discriminatory treatment.

16. As to the first, Miss Tuck, who did not appear below, began to argue that the claim came under Regulation 3(1)(a). Although the terms of the contract were in exactly the same form for those who were both permanent and full-time employees, they had a different impact on each class. It was as if the employer had provided the benefit of free gym membership for all, only for those who were men to find that, when they went to the gym, that the terms under which the gym operated excluded all but women.

17. The difficulty with this approach was that it was not the way in which the matter had been put to the Judge below. Had it been, it is certainly not inconceivable that there would have been a need for different evidence and a different set of submissions. It is necessary to do no

more here than refer to the decision of **Glennie v Independent Magazines UK Ltd** [1999] IRLR 719 CA. It is too late now to change the tack that the case is taking. This does not, however, mean that Miss Tuck does not have an argument to advance under Ground 1 in respect of the 3(1)(b) claim. Here, she argues that the act of the employer was, in effect, that identified by the lay member. It was granting a benefit without taking the steps to ensure that the benefit would be provided in a way which did not discriminate between fixed-term and permanent employees.

18. The question of whether an employee has been subjected to less favourable treatment by any act or deliberate failure to act of his employer is one which looks to the cause of that act or deliberate failure to act. As Underhill J pointed out in a familiar passage in **Amnesty International v Ahmed** [2009] ICR 1450, at paragraph 33, sometimes discrimination is inherent in the act complained of, as for example in the application of a criterion, apparently neutral upon its face but in effect of a discriminatory nature, e.g. by permitting free entry to a swimming pool only for those who are of pensionable age. In other cases, it is a question of establishing, on the evidence, what for the purposes of the complaint may be said to have caused the detriment.

19. The submission of Mr Tatton-Brown, which I accept, is that it is for the Tribunal as primary fact-finder to identify what it considers factually is the cause of the less favourable treatment. It is a fact of life that many events may be said to be causes of later consequences. In the search for a cause or a principal cause, to answer the legal question whether a wrong has been done or a whether a remedy is required, it is likely to be unhelpful to include every possible cause of a later consequence (even if one could). A Judge not only is entitled, but has to, come to a view as to what, in sensible, practical or (as has sometimes been termed) robust

terms, is the cause of what has occurred about which complaint is made. Provided that he is not perverse in doing so, and has adopted an approach to determining this question which displays no error of law, that finding cannot be upset.

20. Mr Tatton-Brown's essential case here is that the Judge, who by reason of his casting vote was in the majority, was entitled to his conclusion that the reason why the Claimant did not get the benefit was because Unum refused to pay the employer the amount of benefit to which he would otherwise have been entitled. That was an act, so defined, of Unum. It was not an act of the employer. That cannot be said to be a conclusion which was outside the entitlement of the Employment Judge. It was open to him on the evidence.

21. I accept that reasoning. This is not a case which is analogous to the example of the women-only gym. The nature of the scheme was not such as to exclude fixed-term employees from benefit. There were particular provisions which related to their potential receipt of benefit which in fact applied, but it is not and could not, in my view, be the type of criterion case to which Underhill J in **Ahmed** made reference by mentioning **James v Eastleigh Borough Council** [1990] IRLR 572.

22. This is subject to the second argument which Miss Tuck advances. If Unum were properly to be regarded as the agent of the employer for the purposes of providing the benefit, then if Unum discriminated, that discrimination would be taken to be that of the employer. Here, Unum would have to be regarded in law in this context as agent of the employer. In **Ministry of Defence v Kemeh** [2014] ICR 625 Elias LJ considered a case in which a soldier had been abused whilst in the Falklands by an employee of a private company which provided catering services to the army. The soldier claimant worked alongside him. A decision by the

Employment Tribunal that the abuser was an agent carrying out tasks for the Respondent was overturned on appeal to the Appeal Tribunal. That decision was upheld by the Court of Appeal. It was necessary for the court to consider the scope within which the definition of "agent" could fall for the purposes of discrimination. At paragraphs 38 and 39 in his Judgment Elias LJ noted that the concept of agency at common law could not readily be encapsulated in a simple definition, but he thought it necessary (paragraph 39) at least for the claimant to show that a person (the agent) was acting on behalf of another (the principal) and with that principal's authority. He thought that there was no real difference between the approach to be taken under the discrimination statutes from that to be taken at common law once it was recognised that the legal concept did not necessarily involve an obligation to effect legal relations with third parties. The definition in *Bowstead and Reynolds on Agency 19th edition*, Article 11-001, requires that agency be a fiduciary relationship and that there is agreement that the "agent" should act on the "principal's" behalf so as to effect relations with third parties. As Elias LJ points out, in the context of discrimination at any rate, those relations do not necessarily have to be legal relations.

23. Ms Tuck argues that the factual situation here came within the definition in *Bowstead* in its common law form. I cannot accept that. There is, as she acknowledged, a clear distinction between a commercial provider of services contracted by a principal to provide them in most circumstances and a person properly to be described as an agent. The role of Unum here was not to bring Xerox into relations with others, whether legal or otherwise. It was not expressly to fulfil any obligation of Xerox to its own employees. This was a contract between Xerox and a third party. The consequences of the contractual arrangements had effects upon the employees of Xerox. That is a very different matter from saying that in any legal sense Unum were the agent of Xerox. This was an insurance contract. It had nothing to do with agency.

24. As to the third argument, first this was not significantly raised below, although raised in part it was. There is nothing in the contract between the Claimant and Xerox which expressly contracted out of any right conferred by the 2002 Regulations. The case thus has to be that in some way this was implicit. Miss Tuck argued that because the employer relied for saying there was no less favourable treatment within the Regulations upon the fact that Unum had not paid it, Xerox, the money which it needed to pay the employee, Xerox was relying upon a contract with Unum which had the effect of excluding the rights of a fixed term employee. Mr Tatton-Brown submits that is not a realistic way of looking at the circumstances here. There was nothing upon which Xerox relied to suggest that Mr Hall was contractually precluded from making a claim. I accept his arguments.

25. That leaves the fourth ground, the question of justification. I have already commented upon the weaknesses of the view of the minority in the Tribunal. However, that does not mean that the conclusion reached by the Judge was necessarily within his entitlement. However, he approached the matter taking an appropriate legal standpoint. Miss Tuck did not criticise his approach in law. Rather, she criticised the factual conclusion to which he came. It was for the employer to prove justification. Mention had been made of policies offered by Friends Life and Canada Life which appeared not to have the same explicit provisions, restricting the benefits to fixed-term employees as appeared in the Unum and Aviva contracts.

26. Ultimately the question here is one of fact and assessment. The Judge had evidence to which he referred at paragraph 8.1.11 that Xerox had been told that no other policy would provide cover. There was no evidence before the Judge to contradict that. There was no evidence put forward which persuaded him that Friends Life and Canada Life necessarily would have been suitable and proper alternatives. He recognised that the evidence was not as

clear as it might be. He was, however, entitled to draw a conclusion on the evidence as it was. That evidence was capable, submits Mr Tatton-Brown, of justifying his conclusion that there was no realistic alternative for the employer, bound as he was by the "apparently universal approach taken by insurance providers in this regard". Though, in common with Miss Tuck, I might have wished for a fuller exploration of the availability of other policies, I cannot say on appeal that this decision was outwith the Judge's entitlement on the evidence which was before him. He did not have to say that the situation was simply unproved. He was entitled to form a view upon it.

Conclusions

27. Accordingly, in my view, the Judge was entitled to come to the conclusion, as he did, that the less favourable outcome of which the Claimant complained was not caused in any relevant sense by any act or deliberate failure to act of his employer. If it had been, he was entitled to conclude that it was in the circumstances justified, that being the effect of the evidence before him, limited though it was. The argument that Unum had to be regarded as the agent of Xerox cannot, in these circumstances, succeed, and the full Tribunal was right so to conclude. There is here no tenable case that there was a contract excluding the provisions of the Regulations.

28. Accordingly, despite the best efforts of Miss Tuck, this appeal fails.