Appeal No. UKEAT/0008/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 July 2014

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

LONDON BOROUGH OF SOUTHWARK — APPELLANT

MR G CHARLES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel) Instructed by: Legal Services Southwark Council PO Box 64529 London SE1P 5LX
For the Respondent	MR FRANCIS WILDMAN (Representative) Yourlaw 8 Bybrook Road Kennington Ashford Kent TN24 9JA

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

The Employment Tribunal was entitled to find the employer did not make reasonable adjustments – not requiring the employee, who was to be redeployed because his own job had disappeared to attend, a formal interview – in consequence of his disability.

THE HONOURABLE MR JUSTICE MITTING

Introduction

1. The Claimant is 28. Between 2 May 2008 and 26 August 2011, when he was dismissed by reason of redundancy, the Claimant was employed by the Respondent local authority as an Environmental Enforcement Officer at grade 9. His dismissal resulted from a re-organisation, which resulted in the "deletion" of the Claimant's grade 9 post. The Employment Tribunal found it was by reason of redundancy and that the procedure was fair. Nevertheless it found that the Claimant, to the knowledge of the Respondent, suffered from a disability, an inability to attend administrative meetings including redeployment interviews, and that the Respondent had both discriminated against him by requiring to attend such an interview and had failed to make reasonable adjustments by dispensing with the need for such an interview and that in consequence he was placed at a substantial disadvantage by being dismissed. The Employment Tribunal therefore found that the Respondent was in breach of its duties, both under section 15 and under section 20 of the **Equality Act 2010**.

2. In this appeal Mr Matovu, for the Appellant/Respondent, submits that the findings are erroneous in law.

The facts

3. It is necessary to set out the relevant part of the history in rather greater detail to understand the issues that have to be dealt with on this appeal. A number of events occurred in series. On 28 January 2011 the Claimant was suspended from work for allegedly falsifying documents. At a disciplinary meeting held on a date that I do not know in March 2011 he produced a letter from his general practitioner explaining that his health problems could have caused what was described as this "procedural error".

4. On 24 March 2011 the Claimant was told that his position as an Environmental Enforcement Officer at grade 9 was to be deleted, but that he had been ringfenced for three other posts: a Noise Support Officer at grade 7, an Envirocrime Officer at the same grade and a Senior Envirocrime Officer at grade 8. The last two did not require shiftworking; the first did. The Claimant told the Employment Tribunal that he had difficulty working shifts due to his disability and that he was not interested in the Envirocrime posts.

5. On 5 April 2011 he attended an interview for the Noise Support Officer post. He was one of ten candidates, all of whom like him would otherwise face dismissal by reason of redundancy. Six of them were unsuccessful and four were successful. On 11 April 2011 the Claimant asked to be placed in the redeployment pool, in which he would have three months to find an alternative post.

6. On 30 April 2011 the Claimant requested the redundancy payment figures, which were provided to him on 3 May 2011. On 9 May 2011 the Claimant was told that he would be dismissed by reason of redundancy, but he was also urged in the same letter to seek feedback from the interview at which he had been unsuccessful on 30 April 2011 (he alone had not done so) and to re-apply when the post was re-advertised. Also on 9 May 2011 the Claimant was told that the disciplinary hearing to which he would be subject would be held on 25 May 2011. On 10 May 2011 the Claimant was given formal notice of dismissal, expiring on 3 August 2011. On 13 May 2011 the Claimant's general practitioner signed him off sick for three months due to "sleep paralysis agitans and depression". Mr Wildman, who appeared for the Claimant below and on appeal, has helpfully explained that that was a condition in which

the Claimant woke up at night, paralysed, and so felt unable to go back to sleep. Unsurprisingly, that led to the depression which the general practitioner diagnosed.

7. The Respondent's case, which was not rejected by the Employment Tribunal, was that this was the first occasion on which they knew of the Claimant's disability and its cause.

8. The Claimant was referred to Occupational Health, Atos Healthcare. On 20 May 2011 the Respondent sent an e-mail to all in the redeployment pool, offering interviews for the Noise Support Officer and Envirocrime Officer posts on 26 May 2011. The Claimant did not tell the Respondent that he was interested in the Noise Support Officer post. On 25 May 2011 the Claimant was assessed by Occupational Health by telephone. They concluded "no adjustment required at present".

9. On 26 May 2011 interviews occurred for the Noise Support Officer post. Three out of the six who had not succeeded at first interview attended, of whom two succeeded. The Claimant did not attend.

10. On 17 June 2011, Occupational Health told the Respondents that the Claimant was not fit to attend administrative meetings. From that date onwards, therefore, the Respondents knew that the Claimant suffered from the condition diagnosed by his general practitioner and that it had a practical impact on his ability to take part in the redeployment process because he could not attend administrative meetings. The Employment Tribunal, understandably and sensibly, concluded that those meetings included interviews for new jobs.

11. On 19 July 2011 the Claimant submitted a grievance about a complaint that he had made in 2010 about shift work. On 29 July 2011 notice confirming the date of his dismissal as

3 August 2011 was sent to the Claimant. On 1 August 2011 the Claimant sent a detailed letter of appeal against his impending dismissal to the Respondents.

12. On 3 August 2011 Ms Williams, the Respondent's Human Resources Adviser, e-mailed the Claimant to ask if he still wanted to be considered for the Noise Support Officer post. He said that she knew he was unwell. She noted that the last sick note issued to him would expire on 30 August 2011 and said:

> **"If you are interested in the above opportunity, can you let me know when you feel that you would be well enough to attend an interview."**

On 4 August 2011 the Claimant was notified that his dismissal would be put back to 26 August 2011. On 5 August 2011 the Claimant's general practitioner issued a further sick note, expiring on 5 November 2011. On 7 August 2011 the Claimant replied to Ms Williams, apologising for the delay and expressing interest in the Noise Support Officer post. He said he understood it involved shift work and unsocial hours and would give a formal reply when he had received her response. On 9 August 2011 Ms Williams replied, saying that the post did involve shift work, but if he was successful at interview the Respondents would look at reasonable adjustments. There was no reply to that e-mail from the Claimant.

13. On 11 August 2011 the Respondent asked occupational health if the Claimant was well enough to attend an interview. Occupational Health then made several attempts to contact the Claimant, unsuccessfully because, as the Claimant explained to the Tribunal, he had switched off his mobile telephone.

14. On 12 August 2011 Ms Williams e-mailed details of four vacancies to the Claimant, asking him to let her know if he was interested. The Claimant did not respond.

15. On 25 August 2011 the Respondents confirmed the Claimant's dismissal on the following day by a letter to him "in the absence of receiving an expression of interest from you regarding vacancies" and "no indication as to whether you are able to attend interviews".

16. On 5 September 2011 the Claimant appealed against his dismissal in a detailed letter. On 8 November 2011 his appeal was dismissed following a hearing which he did not attend, but at which he was represented by a union official.

The Employment Tribunal decision

17. Having set out the facts as I have summarized them, with one or two additions drawn from the documents, the Tribunal went on to analyse the issues and give its reasons for the conclusions that it reached. It concluded that there was a redundancy situation, that there was adequate consultation, and that the Claimant had been offered alternative posts. Accordingly, his straightforward unfair dismissal claim failed.

18. On the disability discrimination issues, it found that the fact, as was the fact, that the Claimant had not attended interview skills training was not any responsibility of the Respondent's but was simply his choice. It also found that, in the offers of jobs that had been made to him, there was no discrimination. It did, however, find for him in two respects. It set out its conclusions on those two issues in paragraphs 70, 71, 72, 73 and 75 of its determination and reasons:

> **"70. The Respondent did impose a requirement for the Claimant to attend an interview for the post of Noise Support Officer at grade 7. The Claimant's disability meant that he was unfit to attend meetings and interviews. His inability to attend meetings was acknowledged by the Respondent in the dismissal letter at page 470. In the first paragraph the letter said: 'I appreciate that you are currently on sick leave and am aware that you have informed management of your inability to attend meetings due to medical reasons.' We find that as the Claimant was unable to attend meetings, this necessarily encompassed interviews.**

> **71. We find that although the Respondent may have had a legitimate aim in selecting redeployees for newly created posts, the requirement for a formal interview was not a proportionate means of achieving that aim in relation to a disabled person. At the appeal hearing the Claimant's trade union representative suggested for example that an interview could have taken place at the Claimant's home, or information could have been required from him in advance, or a less formal interview process could have taken place. The Claimant had been employed by the Respondent since May 2008 so we find there was also the option to consider consulting his managers for an assessment of his abilities. This was also a post at 2 grades below his existing grade and the Claimant was not seeking appointment to a higher graded position. We find there was discrimination arising from disability in the requirement for an interview."**

19. That paragraph informed its later conclusions on the issue which arose under section 20. Those conclusions were set out in paragraphs 72, 73 and 75:

> **"72. The Claimant was placed in a redeployment pool and said that he was unable to participate because of his disability. The redeployment process required him to attend an interview and we repeat our findings above in relation to this.**
>
> **73. He was placed at a substantial disadvantage in that he was dismissed. Had he been appointed into the Noise Support Officer's role, without the need for an interview, the disadvantage would have been avoided...**
>
> **75. ... We find that the Respondent failed in the duty to make reasonable adjustments in applying the requirement of a selection interview."**

Thus the Tribunal found that there had been both discrimination against the Claimant under section 15 and a failure to make reasonable adjustments under section 20.

The Appellant's case and conclusions

20. Mr Matovu submits that the task of the Tribunal was best approached by asking what if any reasonable adjustments should have been made under section 20 and that if the answer to that was that given by the Tribunal, then the claim under section 15 falls away. There is some attraction in that submission.

21. I turn, therefore, to consider whether or not the Employment Tribunal were, as a matter of law, entitled to find that the Respondents failed to make a reasonable adjustment on account of the Claimant's disability. The duty is set out in section 20:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage..."

None of the other parts of section 20 are material.

22. The Tribunal were plainly entitled to find that the practice of the Respondents in requiring those in the redeployment pool to attend for interview for the post for which they were applying was a practice, even though it may not have been a criterion or a provision. The Tribunal were also entitled to find that it put the Claimant at a substantial disadvantage because he could not attend an interview so, following upon the Respondent's practice, he could not demonstrate to them that he was qualified for any of the jobs for which he might have applied and, in particular, the job of Noise Support Officer, for which he had applied and been unsuccessful and in respect of which he had indicated a qualified expression of interest.

23. The Tribunal were entitled to find that the Claimant suffered from a significant disability, the inability to attend management meetings and so interviews, and were entitled to find that the Respondent knew that he suffered from that disability. Accordingly all of the ingredients of the obligation to make a reasonable adjustment were present.

24. Mr Matovu submits that all that was conditional upon the Claimant expressing an unequivocal interest in the post of Noise Support Officer or another post. I do not agree. The Tribunal were right to find that the duty was on the employers and that they were in breach of it.

25. Having so found, it was strictly not necessary to reach any conclusion on section 15, but the conclusion which the Tribunal did reach was one to which it was entitled to come for the same reasons as those justifying its conclusion under section 20. The simple fact is that they did impose a requirement on the Complainant that he attend for interviews and so treated the Claimant unfavourably because of something arising in consequence of his disability. No attempt was made to justify that differential treatment. Consequently the finding under section 15 is sustainable.

26. A Remedies Hearing has been fixed for early next month. Although not a part of the Decision of the Tribunal on liability which is required to be challenged at this stage in the proceedings, the Tribunal has expressed itself in a manner which may cause difficulty at the Remedies Hearing, which should be avoided.

27. As I have noted, in paragraph 73 of its Decision, the Tribunal identified the substantial disadvantage from which the Claimant suffered "in that he was dismissed" and appeared to suggest that had he been appointed to the Noise Support Officer's role without the need for an interview, that disadvantage would have been avoided. So it would have been, but it is not the disadvantage which the Tribunal found should have been the subject of a reasonable adjustment. That was set out in paragraph 71 and 75, namely to dispense with or vary the requirement of a formal selection interview. The Tribunal needs to think through its conclusion at the Remedies Hearing. If the reasonable adjustment which should have been made was that the Claimant should not have been subjected to a formal interview process but that his suitability should have been assessed by some other means, it does not follow automatically that he would have been appointed to the post of Noise Support Officer. As the selection process showed, ten people had applied for the job of Noise Support Officer. Only six of them

had succeeded: three without, as far as I know, any disability, plus the Claimant with a disability had not succeeded. It does not therefore follow automatically that had the Respondents made the reasonable adjustment required by section 20, the Claimant would necessarily have been offered the Noise Support Officer post and so avoided dismissal. These are matters that should be the subject of further submission and may be the subject of further evidence called by either side.

28. Subject to those comments, which go to the manner in which a hearing which is yet to occur will take place, this appeal is dismissed.

The conduct of the employer

29. I am satisfied that the conduct of the proceedings by the Appellant employer was not unnecessary, improper, vexatious or misconceived. This was an arguable appeal on a set of facts that were not entirely straightforward. It went through on the sift to a Full Hearing. Although I had formed a provisional view when I read into the papers, there were nevertheless perfectly proper arguments that could be advanced that were advanced by Mr Matovu, and it would be quite wrong for me to make an order under section 34A of the Rules.