

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

At the Tribunal
On 5 June 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR R AGBAKOKO

APPELLANT

ALLIED BAKERIES

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR RICHARD AGBAKOKO
(The Appellant in Person)

For the Respondent

MR ANDREW BURNS QC
(of Counsel)
Instructed by:
Eversheds LLP
115 Colemore Row
Birmingham
West Midlands
B3 2AL

SUMMARY

DISABILITY DISCRIMINATION - Disability

DISABILITY DISCRIMINATION - Direct disability discrimination

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

Two points were permitted to proceed to this Full Hearing:

(1) The Employment Tribunal sought to draw a distinction between “perceived” and “suspected” disability. That was unhelpful. However, the Employment Tribunal’s answer to the “reason why” question: why was the Claimant (a) suspended and (b) dismissed, showed that neither had anything to do with his actual (he denied mental health problems) or perceived disability.

(2) There was no inconsistency between the Employment Tribunal’s finding as to (a) the reason for dismissal, ill-health capability, for the purposes of section 98 **Employment Rights Act 1996** and (b) his conduct leading to their answer to the reason why question under section 13 **Equality Act 2010** (see above).

Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Manchester Employment Tribunal. The parties are Mr Agbakoko, Claimant, and Allied Bakeries, Respondent. The Claimant was employed by the Respondent, initially as a Dispatch Operator, from 19 May 2008 until his dismissal on 9 May 2012. He brought complaints of both ordinary and automatically unfair dismissal, the latter under section 103A of the **Employment Rights Act 1996** (“ERA”) and disability discrimination. He withdrew the protected disclosure claim. The ordinary unfair dismissal claim was upheld on procedural grounds only. The Tribunal made a nil compensatory award under the **Polkey** principle. He received a basic award only. The disability claim was dismissed. That Judgment was delivered with Reasons on 3 February 2014 by a Tribunal chaired by Employment Judge Holmes.

2. Against that Judgment the Claimant appealed. The appeal was sifted to a Preliminary Hearing which came before HHJ Eady QC on 7 January 2015. Having heard submissions from counsel, then appearing on behalf of the Claimant under the ELAAS pro bono scheme, Judge Eady dismissed all grounds of appeal save for two grounds formulated by counsel in revised grounds. It is on those two grounds only that this case comes before me for a Full Hearing. An application by the Claimant for a review of the Preliminary Hearing ruling was dismissed by Judge Eady by an order dated 2 March 2015. Today the Appellant appears in person. The Respondent is represented by Mr Andrew Burns QC, who did not appear below.

Background

3. The Claimant performed well in his employment but issues arose concerning his behaviour towards other employees. Following complaints he received a final written warning

on 8 January 2010. He was then off work with “stress” until 8 March 2010. Meanwhile he raised a grievance which made its way through the Respondent’s procedure.

4. On 26 April 2010 the Claimant’s Community Mental Health Nurse, Sharon Hall, wrote to the Respondent’s HR Department (Louise Wrighton) raising her concerns about the Claimant’s mental health.

5. In May 2010 the Claimant was first referred to the Respondent’s Occupational Health adviser, Dr Karen Nightingale. She reported on 18 May that the Claimant had suffered a psychiatric incident but was on medication and appeared to be coping well. She thought it was likely that he was disabled within the meaning of the then **Disability Discrimination Act 1995**.

6. In February 2011 the Claimant underwent training to drive fork lift trucks. In the course of a medical assessment for that role it emerged that he had ceased taking his medication some months earlier.

7. On 19 April 2011 the Claimant was involved in an incident in the canteen which led to complaints about his behaviour towards other employees. He blamed others for the incident. On 16 May he was told by management that no further action would be taken on that matter.

8. Nevertheless further reports about the Claimant’s behaviour were received by his line manager, Robert France, during May 2011. He became increasingly concerned at the Claimant’s reported behaviour.

9. He received advice from Angela Byrne, an Occupational Health adviser, that the Claimant should be suspended from fork lift truck driving. That occurred on 1 June. The Tribunal characterised the situation as one of agreed paid leave rather than suspension (see paragraph 8.15). The Claimant, in the event, never returned to work.

10. Attempts were made to ascertain his mental health condition. The Claimant has always denied that he has any mental health problems.

11. On 9 June 2011 he was suspended on medical grounds (paragraph 8.21).

12. Ultimately, Mr France dismissed the Claimant on ill health grounds on 9 May 2012. He did not then have a report from the Claimant's Consultant Psychiatrist, Dr Simon Darvill. Nor was such a report before the Appeals Manager, Mr Wightman, who rejected his appeal against dismissal following hearings held on 6 and 21 June 2012.

13. Thereafter the Claimant disclosed a report from Dr Darvill originally dated 5 July 2011 and then updated on 19 September 2012. That showed a clearly documented history of mental illness, including the Claimant's detention under section 3 of the **Mental Health Act** in hospital in June 2011. Dr Nightingale, having seen that information and the GP's records, was of a firmer opinion than before that the Claimant could not have returned to work (see paragraph 8.66).

The Tribunal Decision

14. The Tribunal found that the reason or principal reason for dismissal for the purposes of section 98 **ERA** was that Mr France believed that the Claimant was incapable of performing his

duties due to ill-health. They made that finding in part because the Claimant did not dispute that belief (see paragraph 14).

15. The dismissal was unfair because the Respondent had not obtained sufficient medical evidence, particularly the GP notes and Dr Darvill's report, before dismissing the Claimant and rejecting his appeal; and also because Mr France, who did not give evidence below, did not consider redeployment for the Claimant within the business.

16. That rendered the dismissal procedurally unfair. However, since there was no alternative employment for the Claimant and the further medical evidence strengthened the view that the Claimant could not return to work, he had suffered no loss for the purposes of a compensatory award. As I have indicated, he did receive his basic award.

17. As to disability discrimination the Tribunal took it upon itself to draw a distinction for the purposes of section 13 of the **Equality Act 2010** between suspected and perceived disability. Those terms do not appear in the statute. Headed "direct discrimination" section 13(1) provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

18. That formulation apparently embraces two concepts from past learning, associative and perceptive discrimination. Whether it is helpful to seek to distinguish between suspected and perceived disability is a point to which I must return.

19. The Tribunal appear to have held that suspected disability is not enough to trigger a finding of section 13 direct discrimination whereas perceived disability may be (see paragraph 32).

20. However, they go on to answer what seems to me to be the critical “reason why question”, formulated long ago by Lord Nicholls of Birkenhead in **Nagarajan v London Regional Transport** [1999] ICR 877 and concluded, first, that the reason for the Claimant’s suspension in June 2011 was not his perceived disability but because complaints had been made about his conduct by work colleagues which, absent any explanation or mitigation, would have amounted to misconduct warranting disciplinary action (see paragraph 33).

21. As to the dismissal, that was not because of his perceived or suspected disability. It was primarily his conduct and the Respondent’s concern that it may be repeated or that he may become more ill if he returned to work. They dismissed him not because they perceived he had a disability but because they could not find whether he did or did not have a disability. But they could not take the risk of him returning to work without a clear indication of his medical condition. In any event he was not less favourably treated than a non-disabled comparator (see paragraph 33).

22. Accordingly the section 13 direct discrimination claims were dismissed.

The Appeal

23. I should set out the two revised grounds of appeal, which alone were permitted to proceed to this Full Hearing:

“1. The tribunal has erred in law in seeking to distinguish between ‘suspected disability’ and ‘perceived disability’ in paragraphs 32 and 33 of its reasons which is not a distinction known to sections 13 or 26 [the harassment section] of the Equality Act 2010.

2. The tribunal has made confusing and/or contradictory findings as to the reason for the Claimant's dismissal: in paragraph 14, it finds it to be capability and in paragraph 39, it finds it to be conduct and/or the inability of the Respondents to obtain clear, reliable and correct medical information as to his medical condition.

It is not open to the tribunal to come to different conclusions of fact as to the reason for dismissal in determining the discrimination claim compared to the unfair dismissal claim."

Ground 1

24. I resist the temptation to embark on a philosophical analysis of the distinction, if any, between suspected and perceived disability. I agree with Mr Burns that such a distinction is unhelpful. The crucial question, not actually raised in the first revised ground of appeal, is the reason why question. It seems to me that the Tribunal's answer to that question, both in relation to suspension and later dismissal, is unassailable. That is an end to the point.

Ground 2

25. I do not accept that the Tribunal made contradictory findings as is here suggested. The question under section 98 **ERA** was, first, has the Respondent established a potentially fair reason for dismissal. Since there was no dispute as to the ill-health capability reason (see paragraph 14) no further analysis by the Tribunal was required.

26. When it came to the reason why question under section 13 of the **Equality Act** the Tribunal's response was more nuanced. The reason why he was suspended (paragraph 33) was because the Claimant's colleagues had complained about his conduct, that is behaviour towards them, and the Respondent wished to know whether there was a medical explanation for that behaviour. It was not because of his perceived or indeed suspected mental health disability. Similarly, it was his conduct or behaviour and the risk of it being repeated or indeed the risk that he would become more ill if he returned to work (paragraph 39) which led to his dismissal.

27. Ground 2, if I may say so, represents a ground of appeal erected from a single word, “conduct”, in paragraph 39 of Reasons extending to some 25 pages. It seeks to compare apples and oranges (the section 98 **ERA** question and the section 13 **Equality Act** question) and in truth leads nowhere. There is no inconsistency in my judgment between the Tribunal’s findings on unfair dismissal and section 13 direct discrimination. The latter claim was not made out and the Tribunal was entitled to dismiss it.

Disposal

28. It follows that this appeal fails and is dismissed.