Appeal No. UKEAT/0264/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 November 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR R THYAGARAJAN — APPELLANT

CAP GEMINI UK PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS ANNA BEALE (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS LISA HATCH (of Counsel) Instructed by: Pinsent Masons LLP 3 Colmore Circus Birmingham B4 6BH

SUMMARY

DISABILITY DISCRIMINATION - Disability

Whether the Employment Judge failed to apply her self-direction (see **Richmond Adult Community College v McDougall** [2008] ICR 431) to consider likelihood of adverse effect lasting for 12 months or recurring. On a fair reading of the Reasons as a whole she did not. The finding that the Claimant was not disabled because long-term requirement not made out upheld. The Claimant's appeal is dismissed.

HIS HONOUR JUDGE PETER CLARK

1. The issue before Employment Judge Woffenden, sitting on a Pre-Hearing Review at the Birmingham Employment Tribunal heard on 11-12 July 2013, was whether or not the Claimant, Mr Thyagarajan, was disabled within the meaning of the **Equality Act 2010**. By a Judgment with Written Reasons promulgated on 12 September 2013 she found that he was not. His appeal against that ruling, containing Grounds of Appeal running to 40 pages, was initially rejected on the paper sift by Singh J on 13 December 2013. Up to that stage the Claimant had self-represented. However, at an Appellant-only Rule 3(10) Hearing before HHJ Richardson held on 23 July 2014 the Claimant was represented by Ms Anna Beale of Counsel under the ELAAS pro bono scheme. That Judge was persuaded to allow the appeal to proceed to this Full Hearing on Amended Grounds of Appeal, which challenge on the Employment Judge's finding that the substantial adverse effects of the Claimant's physical impairment, double retinal detachment, on his ability to carry out normal day-to-day activities was not "long-term": see the **Equality Act** section 6(1). The Respondent is Cap Gemini UK Plc, by whom the Claimant was employed between 7 February and his summary dismissal with pay in lieu of notice on 26 August 2011. Ms Lisa Hatch appears on behalf of the Respondent, as she did below.

The Facts

2. During the two-day Pre-Hearing Review the Employment Judge heard oral evidence from the Claimant and his wife and, for the Respondent, Miss Chonkria, HR Manager, and Mr Blake, Business Information Management Practice Director. As with this appeal hearing, unhelpfully, the parties were unable to agree a bundle of documents and so two large bundles were lodged. In this appeal the Respondent's bundle runs to 287 pages; the Claimant's to 415. There is considerable overlap between the two. The vast bulk of that documentation is not

necessary for determination of the comparatively narrow live issue in the appeal. Why parties, represented or not, believe that information overload wins appeal is a complete mystery to me. I have read what I consider to be necessary, supplemented by the submissions of Counsel. In particular, I have read the joint expert medical report of Mr Stappler dated 29 June 2013 and the Occupational Health report of Dr Prajapati dated 18 May 2011, but not the Claimant's report from Mr Suttie, to which the Employment Judge attached no weight, preferring the medical opinion of Mr Stappler (see Written Reasons paragraph 4.26). Finally, I also note that the Employment Judge did not find the Claimant and his wife credible witnesses (paragraph 4.27).

3. Based on the Employment Judge's findings the following facts are material. Two days after joining the Respondent as a Managing Technical Strategy Consultant, on 9 February 2011, the Claimant suffered a retinal detachment to the left eye, leading to surgical treatment on 11 February. On 11 March he suffered retinal detachment of the right eye, was operated on on the same day and on 8 April again suffered retinal detachment on the left followed by an operation the following day.

4. Following the first incident the Claimant was off work until 21 March, then off again on 26 March finally returning on a phased basis on 23 May. He was able to continue at work until his dismissal on 26 August.

5. Prior to his return on 23 May Dr Prajapati produced his Occupational Health report dated 18 May, noting that the Claimant had undergone vision saving surgery (without which, Mr Stappler opined, the Claimant would be blind) and that the long-term risk of further retinal detachment was low following surgery. He thought that the final visual outcome could take up to three months.

6. It was the Claimant's oral evidence to the Employment Judge, supported by his wife, that he continued to suffer the adverse effects of his earlier eye problems up until the hearing in July 2013. The Employment Judge rejected that account (see paragraph 4.27).

Long-Term Effects

7. No criticism is made by Ms Beale of the Employment Judge's self-direction as to the applicable law.

8. At paragraph 8 she noted that the long-term effect question should be answered as at the date of the alleged disciplinary acts, not with the benefit of hindsight as at the date of the hearing: see **Richmond Adult Community College v McDougall** [2008] ICR 431, save in respect of an impairment which has lasted for 12 months: see **Patel v Oldham MBC** [2010] ICR 603.

9. The relevant effect is long-term if it falls within one of the four situations set out at paragraphs 2(1) and (2) of the First Schedule to the **Equality Act 2010** (repeating the definition in the **Disability Discrimination Act 1995**). Those provisions are set out at paragraph 12 of the Reasons.

10. It should be noted that the Claimant's primary case below was that the effects of his physical impairment continued up to the date of the Employment Tribunal hearing in July 2013 (see Schedule 1, paragraph 2(1)(a). That case was rejected on the facts (see paragraph 4.27).

11. Likely means could well happen: see **SCA Packaging Ltd v Boyle** [2009] ICR 1056 (HL); see Reasons, paragraph 13.

12. The issue of the deduced effect, that is disregarding controlling medication, is correctly analysed at paragraph 17; see particularly paragraph C11 of the 2011 Guidance. If medical treatment is likely to permanently cure the condition and therefore remove the impairment so that recurrence of its effects would then be unlikely even without further treatment, that should be taken into consideration when looking at the likelihood of recurrence.

The Appeal

13. The narrow point taken by Ms Beale in the appeal is that, having correctly directed herself as to the law, the Employment Judge then failed to apply the prospective test when considering whether the effect was (1) likely to last at least 12 months (Schedule 1, paragraph 2(1)(b)) or (2) likely to recur (Schedule 1, paragraph 2(2)). That submission focussed on the Employment Judge's reasoning at paragraph 23 of the Reasons.

14. In her Skeleton Argument, but not in the Respondent's Answer, Ms Hatch argued that the Claimant did not put his case on the basis of likelihood of recurrence under paragraph 2(2) of the First Schedule. She did not pursue the point in oral argument.

Analysis

15. The relevant period over which the long-term question fell to be answered prospectively was 23 May 2011, when the Claimant returned to work for the second time and his dismissal on 26 August 2011, subject to the Claimant's contention through Ms Beale that the start date was 18 March 2011.

16. The relevant medical opinion covering the former period is that of Dr Prajapati, contained in his Occupational Health report of 18 May, endorsed by Mr Stappler, whose evidence the Employment Judge accepted.

17. As at the date of his examination on 16 May Dr Prajapati noted the history and that the Claimant had received vision saving surgery. Sight recovery was expected to take up to the three months (not 12); the risk of recurrence following surgery was low; Mr Stappler puts it about 2% after 12 months.

18. Ms Beale focussed on paragraph 23 of the Reasons. I shall not set it out. She submits that there the Employment Judge failed to view the position prospectively during the relevant period, on the Claimant's case 18 March; on the Employment Judge's understanding (see paragraph 1 of the Reasons) 23 May to 26 August 2011, but instead looked forward from September 2011, based on Mr Stappler's retrospective view as at the date of his examination of the Claimant in June 2013. She helpfully formulated the submission in this way: that the Employment Judge failed to consider whether Mr Stappler's evidence to the effect that the risk of recurrence was at its highest during the 3-4 month period post-detachment mean that detachment could well have recurred such that the effect of the physical impairment could well have lasted for the necessary 12-month period; see Schedule 1, paragraph 2(1)(b) read with paragraph 2(2).

19. I accept, as does Ms Hatch, that paragraph 23 of the Reasons is not felicitously worded. However, it is necessary to read the Reasons as a whole. The Employment Judge accepted the Respondent's evidence, including that of Dr Prajapati. In common with Mr Stappler he recognised that the danger of re-detachment is highest during the 3-4 month period post-

detachment. That is borne out on the facts of this case by the further episode experienced by the Claimant in his left eye on 8 April 2011. Thus the question for the Employment Judge, applying the Court of Appeal guidance in **McDougall**, was whether a further detachment could well occur over the next 12 months. Whether starting in March or May 2011 the answer, on the facts found, was permissibly no. Once the 3-4 month danger period passed, the chance of a further detachment was only 2% after 12 months. That does not mean that it could well happen over the next 12 months. Either it happened within three to four months or, if not, it was highly unlikely to occur thereafter.

20. Thus, on any view of the factual matrix in this case, the effect was not long-term. That was the Employment Judge's conclusion. She was entitled to reach it. This appeal fails and is dismissed.