Appeal No. UKEAT/0433/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 April 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MS K BILGAN

MR B WARMAN

MS K PODKOWKA — APPELLANT

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NICHOLAS FERRARI (of Counsel) Instructed by: P R Employment Law Specialists 1 Elm Close Campton Shefford Bedfordshire SG17 5PE
For the Respondent	MS ELAINE BANTON (of Counsel) Instructed by: London Borough of Hammersmith & Fulham Legal Services Division Hammersmith Town Hall King Street London W6 9JU

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

DISABILITY DISCRIMINATION – Reasonable adjustments

The Claimant and two witnesses alleged that a lay member of the Employment Tribunal had frequently slept or given the appearance of sleeping during a 5 day hearing. The Respondent's three witnesses denied that this was the case, as did the ET. The Employment Appeal Tribunal, after hearing oral evidence, and applying **Stansbury v Datapulse** [2004] ICR 523 and **Shodeke v Hill** UKEAT/0394/00 RN, rejected the allegation.

A separate ground of appeal concerning the ET's reasoning in respect of a reasonable adjustments claim was also dismissed.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Ms Kazia Podkowka ("the Claimant") against a judgment of the Employment Tribunal sitting in Watford dated 11 October 2011. By its judgment the Employment Tribunal upheld the Claimant's claim of unfair dismissal but dismissed her claims of disability discrimination and harassment. These claims had been brought against the London Borough of Kensington and Chelsea ("the Respondent").

2. The appeal has taken some time to reach this hearing. It was lodged on 23 November 2011, a day out of time, and an extension of time was refused. I allowed an appeal and granted an extension of time on 11 July 2012. A preliminary hearing took place on 28 January 2013. Two grounds were sent through to a full hearing. That hearing was originally listed on 27 September 2013, but it was taken out of the list and re-listed for today before a freshly constituted panel of the Appeal Tribunal.

3. The two grounds which were sent through to a full hearing may be summarised as follows. Firstly, it is argued that the Claimant was denied a fair hearing because a lay member, Mr Lowndes, fell asleep on a number of occasions during the hearing. Secondly, it is argued that the Tribunal erred in law in relation to a claim of breach of the duty to make reasonable adjustments because it failed to address the question of the Claimant's tinnitus.

4. These are very different grounds. The first, as we shall see, is the subject matter of dispute. It is not accepted by the Respondent that Mr Lowndes fell asleep during the hearing. In such a case the Appeal Tribunal hears evidence as to what happened at the Tribunal, makes findings upon that evidence, and determines whether the parties received a fair hearing. The second is a quite short, discrete question of law, which the Appeal Tribunal decides after

hearing argument. In this judgment we will give a short introduction to the case and then deal separately with the two aspects of the appeal.

The background

5. The Claimant was employed by the Respondent as a Customer Liaison Officer from 11 September 2000 until her dismissal on 18 December 2009. She was a disabled person. The disability relevant to her claim was bilateral hearing loss, associated with tinnitus, vertigo, claustrophobia, and panic attacks. From at least January 2007 onwards, the Claimant worked on a night shift, dealing with telephone calls from members of the public. She used special hearing equipment to enable her to deal with those enquiries.

6. In September 2008 the Claimant dishonestly falsified a sickness certificate by altering a date on it. In November 2008 she was suspended and made subject to disciplinary proceedings. As the Tribunal said, she might have been dismissed. The Respondent showed leniency but, concerned that a Customer Liaison Officer must be honest, chose to move her to the day shift where she could be more closely supervised.

7. The Claimant was informed of this outcome by letter dated 29 December 2008 and asked to return to work on 3 January 2009. She did not do so. She said that her disabilities were such that the move would be unacceptable. There followed a long process of assessment during which the Claimant was for the most part absent sick. She also raised grievances. Eventually, after a workstation and special telephone equipment were installed, she returned to work on about 3 November 2009. She worked for about nine days. On 23 November 2009, however, she was again signed off with stress-related illness. On 18 December 2009 she was dismissed by reason of her sickness absence, the Respondent considering that there was no assurance she would be able to return to work and maintain an acceptable level of attendance.

8. The Claimant brought Employment Tribunal proceedings, alleging unfair dismissal, disability discrimination, and harassment. The proceedings were heard over five days in July 2011. The Tribunal reserved judgment. The Tribunal, which heard the claim in July 2011, comprised Employment Judge Liddington, Mrs Indu Sood (called Mrs Bhatt on the written judgment), and Mr Paul Lowndes. Both parties were represented by counsel: Mr Renton for the Claimant, Ms Helen Wolstenholme for the Respondent.

9. By its judgment dated 11 October 2011 the Tribunal rejected her claims of disability discrimination. The Tribunal found that her dismissal was unfair because she should have received a final warning in December 2011, but found that a fair dismissal would have taken place 15 weeks later. It reduced her compensation by 80% by reason of her dishonesty in amending the GP's note and her unwillingness to co-operate with the Respondent's efforts to make adjustments to enable her to work on the day shift.

Ground 1: the alleged conduct of Mr Lowndes

Evidence

10. We heard evidence from the Claimant and from five witnesses.

11. The Claimant's case concerning Mr Lowndes is set out in a statement signed on 22 November 2011, subsequently sworn at the Appeal Tribunal's direction. She included a schedule which set out "an almost exact approximation" of the frequency and patterns or number of periods when Mr Lowndes was asleep. The attached sleep chart was split into morning and afternoon sessions on Days 1-4 with a morning session on Day 5. Against most of these sessions the Claimant has written "5-minute intervals". Against the afternoon sessions on Days 2, 3 and 4 the Claimant has written "5-10 minute intervals". In her evidence to us the Claimant largely adhered to her statement. She confirmed that she meant Mr Lowndes was

asleep for up to five or ten minutes. She described him with his head down so that his chin was right on his chest. Once, she said, his papers almost fell off the table. It was put to her she was telling untruths or exaggerating. She denied it. It was put to her that she had convictions for benefit fraud. She said they were irrelevant. She did not herself raise the conduct of Mr Lowndes with her counsel.

12. On behalf of the Claimant Mr Peter Kendal, who has been her carer for some ten or 11 years, provided a supporting statement. That statement includes the following passage:

> **"4) I confirm whilst I did not record the precise length and duration that Mr Lowndes nodded off during the course of the 5 day hearing due to the frequency he intermittently slept during the proceedings at various times which can only be described as catnapping.**
>
> **5) I can confirm that the quality of attention he devoted to the hearing over the course of the 5 days catnapping was of grave concern."**

13. He said also that he was directly in front of Mr Lowndes. He said that he raised the matter with the Claimant's counsel. In his evidence to us Mr Kendal said at one point, "Every time I looked at him he was in a state of catnapping". He was asked how often he looked at Mr Lowndes. He said perhaps ten times a day. He slightly resiled from this evidence later, but even then he said that on the majority of occasions when he looked at Mr Lowndes Mr Lowndes was catnapping.

14. Also on behalf of the Claimant Mr Owolabi, a trainee solicitor, provided a supporting statement dated 21 November 2011. He said that he attended the Tribunal with the exception of one day on his firm's behalf as the allocated case worker. He said that he concurred with the Claimant's statement. He said:

> **"4) I confirm that whilst I did not make a scheduled note (chart) of the specific length and duration of time that Mr Lowndes slept off during the trial in a schedule, that I observed him to sleep off during the proceedings on what can be described as a cat-nap, which lasted on**

> **average 2-3 minutes, terminating with a jolting nod of the head which seemed to re-awaken him back to proceedings."**

He said that the matter was an embarrassment and a concern for him and a work experience student. In his evidence to us he was asked whether he raised the matter with Mr Renton. He said that he did raise it with Mr Renton, who just wanted to get on with the hearing. He took no note of any timing or specific instance of falling asleep, and indeed, apart from the Claimant's reference to some papers nearly falling off the table, no specific instances were given in the evidence before us.

15. On behalf of the Respondent Helen Wolstoneholme, the Respondent's counsel at the hearing, provided a witness statement and gave evidence. In her witness statement she said:

> **"I have no recollection whatsoever of Mr Lowndes sleeping during the course of the hearing, whether as alleged or at all. Had it appeared to me that Mr Lowndes was sleeping, I am sure that I would have raised this with Counsel for Ms Podkowka and, equally, I am sure he would have raised it with me. We had frequent frank and open exchanges during the course of the proceedings but at no time did we discuss any concern about the quality or attention of the Tribunal. Moreover, had I noticed Mr Lowndes sleeping during the course of the proceedings, I consider that it would have been my duty to draw this to the attention of the Tribunal at the time."**

16. In her evidence to us, it was put to her that she would not necessarily have been looking at the Tribunal for most of the case. She said that the extent to which she would be looking at the Tribunal depended on what she was doing. If she was examining a witness or speaking, she would have been looking at the Tribunal to see the effect of what she was doing on the Tribunal. She confirmed expressly that she never saw Mr Lowndes in the way in which the Claimant described, namely asleep with his head on his chin. She did, of course, see him looking down at documents.

17. There was also a witness statement by Mr Andre Jaskowiak, a qualified solicitor in the employment of the Respondent, with 21 years' experience. He said:

> **"7. I was present in the court room throughout the five days of the trial. I never once saw Mr Lowndes asleep or exhibit signs of 'nodding off'."**

In his evidence before us, Mr Jaskowiak accepted that he was taking a note during the proceedings and would have been looking down for a substantial proportion of the time.

18. Finally we received a witness statement and evidence by Mr George Bishop, former Director of Personnel and General Services with the Respondent. He was a witness for the Respondent, being the person who took the decision to dismiss the Claimant. He was also a lay member of Employment Tribunals. Care had been taken to ensure there was no conflict with any member of the Employment Tribunal in Watford. He said:

> **"5. I attended on four days of the five day trial and was examined as a witness for about a day and a half. I was not aware of Mr Lowndes sleeping during the hearing. I do recall that he did ask questions of the witnesses independently and did engage with Judge Liddington in regards to her prompting of each [of] the wing members as to whether they had any further questions. I would have informed our counsel Ms Wolstenholme if I had noted Mr Lowndes sleeping as it would have given me cause for concern."**

19. In his evidence before us, he explained that while he was giving evidence he turned to the Tribunal in the process of giving his answers. This room is set out rather as a Tribunal room would be, and we noticed that in this room too he turned to us when he answered questions. As for the rest of the days when he was present, he said that he was not taking notes. He was in a position to see Mr Lowndes, and he did not see Mr Lowndes asleep in the manner which the Claimant said.

20. Those were the witnesses from whom we heard. We should mention also the comments we have received from the Employment Tribunal while making it clear that these comments are not binding on us and that we decide the case for ourselves, primarily on the evidence and materials that we have heard. Employment Judge Liddington said that she did not notice

Mr Lowndes nodding off or sleeping at any point during the entire proceedings but that it was only fair to say that her attention would be focussed on the witness and the evidence being presented. She said that Mr Lowndes asked pertinent questions of three witnesses, participated fully in chambers discussions, and that she had sat with him on many occasions. She confirmed that not point was raised during the hearing about Mr Lowndes' conduct. Miss Sood, the other lay member, confirmed that while she may not have been in a position to see or observe Mr Lowndes during the hearing, he engaged with the proceedings, asked questions where appropriate and took part in the discussions about the evidence when making their decision. Mr Lowndes himself denies that he was in any way asleep during the hearing. The furthest he goes is as follows. He says:

> **"I would never claim that I never close my eyes, I do so very occasionally as it can help me to focus when evidence has been given that impacts across a number of events and people, but I would be careful to avoid doing so during the actual giving of the evidence or which to do so would give the impression that I was not paying attention to the witness evidence, and then it would only last a few seconds."**

21. We would finally add a word about the Tribunal room and its organisation. This emerged from the evidence of a number of witnesses. The Tribunal room was relatively small. Looked at from the back, in other words looking forward towards the Tribunal, the Employment Judge was in the middle, Mr Lowndes was on the left, Miss Sood was on the right, and the witness table was on the right. Then came the row which might be used by counsel. The Claimant's counsel, Mr Renton, would have been on the left, in other words in front of Mr Lowndes, Ms Wolstenholme more to the right. The same would have been true of the Claimant's and the Respondent's supporting witnesses and representatives. Those of the Claimant would have been on the left; those of the Respondent on the right.

22. We would also add that the Tribunal had to undertake a good deal of reading. There were 424 pages of documents. There were seven witnesses. We were told by Mr Bishop that his

witness statement was read out loud and we infer that this was probably done with other witnesses in accordance with what was in 2011 Tribunal practice, although it is the practice no longer.

Discussion and conclusions

23. On the question of alleged inattentiveness by an Employment Tribunal member we approach the matter in accordance with two authorities. The first is **Stansbury v Datapulse plc and Another** [2004] ICR 523. It is sufficient to read the judgment of Peter Gibson LJ at paragraph 28:

> **"... it was the duty of the Tribunal to be alert during the whole of the hearing, and to appear to be so. It seems to me that an analogy with cases of bias is appropriate. In cases of bias the appearance of bias, as observed through the eyes and ears of a fair-minded and informed observer, will vitiate a hearing: see, for example, *Porter v Magill* [2002] AC 357 at 394 per Lord Hope. A member of a tribunal who does not appear to be alert to what is being said in the course of the hearing may cause that hearing to be held to be unfair, because the hearing should be by a tribunal each member of which is concentrating on the case before him or her. That is the position, as I see it, under English law, quite apart from the European Convention on Human Rights."**

24. It is also apposite to comment from the judgment of Rimer J, as he then was, in **Shodeke v Hill** [2004] UKEAT/0394/00 at paragraph 98. He said:

> **"Does Stansbury establish that proof, for example, that one of the tribunal members was asleep for, say, three minutes on each of two of the 28 days is sufficient to entitle the losing party to have the decision set aside and a re-trial ordered? If so, it would appear to establish a principle whose consequences could in some cases be devastating, particularly if, for example, the moments of proved inattention were exclusively during parts of the case which could not rationally be regarded as having any impact one way or the other on the ultimate decision: for example, during the unnecessarily extended reading by counsel from a demonstrably irrelevant law report. In such an example, we question whether the informed and fair-minded observer would regard the member's brief inattention as inevitably fatal to the quality of the decision. As it seems to us, it will always be a question of fact in all the circumstances of the case whether the nature and extent of the proved inattention will be sufficient to require the conclusion that the hearing was an unfair one whose decision cannot be allowed to stand."**

25. We should also mention the undoubted fact that the Claimant's counsel did not raise with the Tribunal any objection on the basis that Mr Lowndes was asleep. Here, again, we take our

approach from the judgment of Peter Gibson LJ in **Stansbury v Datapulse** at paragraph 23. He said:

> **"...the EAT could properly decide, as they did in the present case, that the fact that the point had not been raised before the ET should not prevent the point being raised before the EAT on appeal. It is always desirable that a point on the behaviour of the ET be raised at the ET in the course of the hearing, but it is unrealistic not to recognise the difficulty, even for legal representatives, in raising with the ET a complaint about the behaviour of an ET member who, if the complaint is not upheld, may yet be part of the ET deciding the case."**

We will follow this approach. While many counsel would raise such an issue with the Tribunal and while we think it is always desirable that a matter should be raised at the time, we do not think all counsel would do so and we do not think there is any legal duty to do so. So the fact that no objection was raised at the time is not a legal objection to the taking of the point on appeal, and it is not a knockdown answer to the Claimant's factual case. We have looked at the evidence in the round in deciding whether the complaint about Mr Lowndes was made out.

26. Having looked at the evidence in the round, we are not satisfied that Mr Lowndes was asleep or inattentive in the way in which the Claimant and her witnesses have suggested. Our reasons are as follows.

27. We start with the Respondent's witnesses, Ms Wolstenholme, Mr Jaskowiak and Mr Baker. We have no doubt that they gave honest and straightforward evidence to us. Each of them said they did not see Mr Lowndes asleep or appearing to be asleep with his head on his chest, in the manner alleged. They saw him with his head down looking at documents or taking notes. As far as they were concerned, he was not asleep or appearing to be asleep in the manner described. We found them straightforward witnesses. We accept what they said to us.

28. At this point we have to factor in the possibility that Mr Lowndes may have behaved in the manner alleged without the Respondent's witnesses seeing. So far as Mr Jaskowiak is

concerned, this is certainly a possibility. He was the primary note-taker at the hearing. But quite different considerations apply to Ms Wolstenholme and Mr Baker. Like any advocate, Ms Wolstenholme will have been looking at the Tribunal quite frequently to see the effect of her advocacy. She said she did this, and we have no doubt that she did. Mr Baker was at the witness table for one-and-a-half days, answering towards the Tribunal and well able to see the Tribunal. He was present for the other days without the responsibility of taking a note. We have no doubt that if there was sleeping or inattention on the very substantial scale which the Claimant suggests, it would have been noticed.

29. Mr Kendal's evidence was to our view, on any possible assessment, exaggerated. His phrase "every time I looked at him he was in a state of catnapping" is not really reconcilable with the Claimant's own evidence and is inherently very unlikely. We did not find his evidence helpful.

30. Mr Owolabi was a trainee solicitor. We accept that, if there had been sleeping or inattention once or twice, he might have taken no note of it. But if there was sleeping or inattention on the very substantial scale which the Claimant alleges, we find it extremely surprising that he took no note of it at all.

31. The Claimant's evidence was, to our mind, unreliable. While it had apparent verisimilitude, there was very little in the way of detail or specifics. The apparent verisimilitude was largely given by the schedule in her statement, but we remind ourselves that the schedule is a construct after the event and not based on any note at the time. We reject the evidence of the Claimant that Mr Lowndes was asleep or inattentive. No doubt, in the course of several days, where there are many documents being read and, in particular, witness statements being read out loud, a member of an Employment Tribunal will spend a great deal of time

looking down into his papers. It may be that from time to time he closed his eyes, as he accepts that he might have done. But we are entirely satisfied, applying the two cases which we have already explained, that the hearing was fair and that Mr Lowndes did nothing to vitiate its fairness. We are satisfied that there was no sleeping or inattentiveness on the massive scale alleged in the Claimant's evidence.

32. We finish with two points. The Claimant's previous conviction for benefit fraud was put to her as a matter going to her credit. The Respondent's counsel was entitled to do so. We, however, have reached our conclusions not on the basis of her previous conviction but on the basis of our assessment of the evidence as a whole and its probabilities.

33. We also make it clear that we have not decided the case against the Claimant because she has not called Mr Renton. It is surprising, if Mr Lowndes' inattention and sleeping was on the industrial scale alleged, that Mr Renton did not mention it even to his fellow counsel. That tends to show us that the Claimant's account is not to be accepted, but the mere fact that she did not call Mr Renton is not the point. We reach our conclusion on the evidence as a whole, as we have heard it.

Ground 2

34. We can deal with Ground 2 much more briefly. It was part of the Claimant's case that she was placed at a substantial disadvantage with persons who were not disabled by the requirement to use audio equipment, and the Respondent failed to comply with the duty to make such adjustments as it was reasonable for it to have to make by providing suitably modified audio equipment including wireless audio equipment.

35. The Tribunal's written reasons contain a section of findings of fact which are in chronological and narrative form, covering the substantial range of issues between the parties. In the course of its findings of fact, it dealt with aspects of this issue most particularly in paragraphs 4.15, 4.17, 4.25, 4.26, 4.28, 4.29, 4.30, 4.31 and 4.39. The Tribunal set out a full statement of the law, accepted for the purposes of this appeal to be correct. It set out its essential conclusions on this issue in paragraph 8.1 of its Reasons:

> **"8.1 The PCP is the respondent's requirement that its customer liaison officers use audio equipment when taking telephone calls. The question of whether the audio equipment provided to the claimant with wires and cables was appropriate goes to the question of reasonable adjustments. The nature and extent of the substantial disadvantage suffered by the claimant was that she required special audio equipment which amplifies voices thus enabling her to conduct conversations both on the telephone and face-to-face. The respondent knew that the claimant has a hearing impairment which requires her to use specialist audio equipment. The respondent was also aware that the claimant suffers from tinnitus, vertigo and claustrophobia. The evidence before the Tribunal was that the equipment which was provided did allow the claimant to hear conversations satisfactorily. In other words, the equipment which was provided was appropriate and efficacious. The claimant's complaint is that it was cumbersome as there were connecting cables and wires the effect of which was to make her feel constrained ('like a dog on a leash' in her words) and constituted a tripping hazard. Whilst the tribunal can accept that wires and cables can be annoying, the tribunal also accepts that it would have been a relatively simple matter to disconnect the wires connecting the headset to the telephone whenever the claimant wanted to stand up and, if she had given the equipment a genuine trial, she would have begun to disconnect the wire automatically and at any time she wished. The tucking of cables to the right of the claimant's desk was a very simple adjustment which was done by Mr Steeves in any event the tribunal cannot understand why the claimant would have turned to the right and risked tripping over cables when the only thing to the right of her desk was a wall with the exit being to the left of her desk where there were no cables. The fact is that the equipment served its purpose and was sourced with specialist professional advice after two assessments in which the claimant participated. Although the claimant complains, somewhat curiously, of being inundated with equipment that wide range of equipment gave her the option of using either the handset or the headset. Again, had the claimant been genuinely minded to work with that equipment she would have found ways to do so comfortably. The failure to provide wireless equipment (if such equipment were available) does not make the adjustments that were made unreasonable or insufficient. We do not believe that any equipment would have been acceptable to the claimant as her intention was not to work on the day shift at all but rather to be returned to the night shift."**

36. On behalf of the Claimant Mr Ferrari puts his case as follows. The Claimant complained about the equipment, at least in part on the basis that it aggravated her tinnitus and her balance issues (see paragraphs 33 and 35 of her witness statement). The Employment Tribunal made no mention of these issues, particularly the tinnitus. This amounted to an error of law. Either the Tribunal did not ask the question required by statute, whether and to what extent she was disadvantaged in this way, or it reached a perverse conclusion, or its conclusion was not

sufficiently reasoned. On behalf of the Respondent Ms Banton submits that the Tribunal was well aware of the Claimant's tinnitus and made clear findings that the equipment in question was effective for her condition. Given that the tinnitus was not expressly made out as a separate issue, it is understandable that the Tribunal did not deal with it specifically as a separate point. But the Tribunal's Reasons are sufficient to show what conclusions it reached and why it reached them.

37. We have no hesitation in agreeing with Ms Banton. The Tribunal expressly found that the equipment was provided was appropriate and efficacious. It noted that it had been sourced with specialist professional advice after two assessments in which the Claimant participated. These findings are within paragraph 8.1 of the Tribunal's Reasons. But they build on earlier findings of fact. As regards the first assessment, the findings are in paragraphs 4.15 and 4.17. As regards the second assessment and the Claimant's response, the findings are in paragraphs 4.25 and 4.26. As to her return to work, the Tribunal found that she made no complaint about any aspect of the equipment provided apart from the complaint about the telephone wires and a dislike of using the netlink (see paragraphs 4.29-4.30). Paragraphs 36-40 of the Claimant's witness statement set out the complaints the Claimant was making about the equipment when it was installed, and the Tribunal dealt with these matters in some detail. We see no error of law or insufficiency of reasoning in the Tribunal's conclusion. Insofar as tinnitus was an issue, the findings of fact and the reasons which we have quoted deal with it sufficiently. For these reasons the appeal will be dismissed.