Appeal Nos. UKEAT/0510/13/JOJ
UKEAT/0511/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 April 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR C WADE — APPELLANT

CT PLUS COMMUNITY INTEREST COMPANY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS E DAVIS (Representative) Free Representation Unit Ground Floor 60 Grays Inn Road London WC1X 8LU
For the Respondent	MR E NUTTMAN (Solicitor) Gordons LLP Riverside West Whitehall Road Leeds LS1 4AW

SUMMARY

PRACTICE AND PROCEDURE – Amendment

UNFAIR DISMISSAL – Reasonableness of dismissal

Employment Judge entitled to refuse Claimant's application to amend form ET1 to add a complaint of disability discrimination (failure to make reasonable adjustments) to a claim of unfair dismissal; this was a new cause of action based on different facts.

Further, the EJ was entitled to conclude that the Claimant's dismissal by reason of ill-health incapability was fair. Claimant's appeals dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This case has been proceeding in the East London Employment Tribunal. The parties are Mr Wade (the Claimant) and CT Plus Community Interest Company (the Respondent). I have before me for full hearing two appeals brought by the Claimant. The first in time was the ruling of Employment Judge McLaren, made at the start of a substantive hearing held on 23 November 2012, refusing the Claimant permission to amend his form ET1 to add a claim of disability discrimination by way of failure to make reasonable adjustments. Reasons for that ruling were given on 6 March 2013 ("the amendment appeal"). The second appeal lies against the same Judge's substantive judgment dated 13 December 2012 dismissing the Claimant's complaint of unfair dismissal. Reasons for that judgment were provided on 17 January 2013 ("the unfair-dismissal appeal").

Background

2. The Claimant commenced employment with the Respondent as a bus driver on 26 February 2007. In March 2010 he was diagnosed with a condition in his right eye that required surgical intervention. The medical advice he received was that his eye needed to be stabilised before surgery, and I am told today by Ms Davis that surgery still has not taken place. In the event he was never fit to return to driving duties before his eventual dismissal on 8 May 2012. The Respondent operated an attendance policy procedure that provided, in the case of long-term absence, that a number of interviews had to take place, the first within four weeks of absence, the second at the end of six weeks and a third at the end of eight weeks.

3. In this case the first meeting on 30 March 2010 fell within the initial four-week period. The second meeting took place on 7 November 2011. The delay between meetings, on the Respondent's case which the Employment Judge accepted, was to await an appropriate prognosis. Subsequent meetings were then held on 23 November 2011, 13 February 2012 and 23 April 2012, that last meeting following an occupational health report dated 20 April from Dr Vijay Sivakumaran in which that doctor expressed the view that the Claimant was still not fit to return to his driving duties and that it was impossible to say how long it would take for a full recovery. He also advised, in effect, that the Claimant was disabled within the meaning of the **Equality Act 2010** (EqA). He added that in his opinion the Claimant was not fit to drive any vehicle and that the DVLA should be informed.

4. Following that 23 April meeting the Claimant was dismissed by a letter dated 8 May. The letter stated that the decision to dismiss was based on the Claimant's medical condition and the fact that there was no suitable alternative employment available for him. He lodged a claim form ET1 at the Tribunal on 31 July 2012. He received assistance in preparing that claim form from his local Citizens Advice Bureau (CAB). His claim was one of unfair dismissal only; he did not indicate any disability discrimination claim. The Respondent responded to that unfair dismissal claim, contending that he was fairly dismissed on grounds of ill-health capability.

5. The CAB forwarded the papers to the Free Representation Unit (FRU) on 5 October 2012, and the allocated representative promptly made application to amend on 19 October to add a complaint of disability discrimination. A direction was given by Employment Judge Foxwell on 12 November for that application to be determined at the outset

of the substantive hearing then fixed for 23 November. It was so dealt with by Employment Judge McLaren.

The ET decisions

6. As to the amendment application the key issue was whether, applying the **Selkent Bus Co Ltd v Moore** [1996] ICR 836 guidelines, this was simply a re-labelling exercise, as was submitted on behalf of the Claimant, or an attempt to raise a wholly new course of action based on different facts, as the Respondent contended. The Judge accepted the Respondent's characterisation. Having considered the factors identified by Mummery P, as he then was, in **Selkent**, the Judge concluded that the balance of prejudice favoured the Respondent and refused permission. On the unfair dismissal claim she found that the Respondent's reason for dismissal was ill-health capability, a potentially fair reason. She found dismissal for that reason to be fair, having concluded: (a) that the delay between the first and second meetings of 30 March 2010 and 7 November 2011, although not strictly in accordance with the Respondent's policy, was not unfair given the wait for an appropriate prognosis (without that, an earlier meeting would have added nothing); and (b) she accepted the hearsay evidence of Ms Steel that Mr Arundel had made enquiries about possible alternative employment and none was available for the Claimant. Although a possible role was raised by the Claimant in evidence before the Tribunal, he did not mention that possibility in his form ET1.

The appeals

7. Both appeals were initially considered and rejected on the paper sift by HHJ Shanks for the reasons given in the EAT's letter of 13 August 2013. However, at a rule 3(10)

Appellant-only oral hearing, at which the Claimant was represented by Ms Davis, Lady Stacey was persuaded to allow both appeals to proceed to this full hearing. She gave her reasons for so doing. As to the amendment application, she considered it arguable that this was no more than a re-labelling exercise and pointed out that when the original claim form ET1 was lodged it was in time for a discrimination claim. She added that had the amendment been allowed then that might impact on the question of alternative employment that arose in the unfair dismissal complaint.

8. Having now had the advantage of submissions, both written and oral, from Ms Davis and Mr Nuttman on behalf of the Respondent, I shall consider each appeal in turn.

The amendment appeal

9. Ms Davis submits that this was a mere re-labelling exercise falling within the first category of amendment as characterised in *Harvey on Industrial Relations and Employment Law, Volume III: Practice and Procedure*, paragraph 312. Mr Nuttman contends that the Judge was correct in regarding it as a category 3 amendment; that is, an entirely new claim unconnected with the original claim as pleaded. I prefer Mr Nuttman's submissions. Although in his pleaded ET1 claim the Claimant refers to his medical problem with his right eye, there is no suggestion of a disability claim based on a failure to make reasonable adjustments. The highest Ms Davis puts the point is that the Claimant there complains that no consideration was given to training for alternative employment with the company until the decision was taken to dismiss him. However, the proposed amendment dated 19 October 2012 not only raises the new cause of action under now **EqA 2010**, the factual basis for the reasonable-adjustment claim materially differs from the ET1 pleading. There, the Claimant does not suggest that alternative

employment was available for him at the time of dismissal. In the proposed amendment he puts forward two possible adjustments, either transferring him to another role (that of passenger assistant is mentioned) or creating an unspecified role for him to perform.

10. That raises, first, the possibility of evidence being called on both sides in relation to the availability of a passenger assistant post, contrary to the evidence of Ms Steel accepted by the Judge (see paragraph 26) that no alternative employment was available as at the effective date of termination. Secondly, whereas there is no duty on an employer to create a job for a claimant dismissed on grounds of ill-health capability for the purposes of section 98(4) ERA (see **Merseyside & North Wales Electricity Board v Taylor** [1975] ICR 185, 192B-C, QBD, O'Connor J), such a duty may exceptionally arise in a reasonable-adjustment claim under the EqA (see **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 745, paragraph 45, per Cox J, adopting the observations of the EAT, HHJ Birtles presiding, in **Southampton City College v Randall** [2006] IRLR 18, paragraph 22).

11. The question of creating a job raised in the proposed amendment makes clear that the Judge's observation about the need for fresh evidence (paragraph 22 of her amendment Reasons) accepting the Respondent's submission (see paragraph 16) is self-evidently sustainable. In these circumstances, I reject Ms Davis' first submission as to the characterisation of the proposed amendment.

12. Secondly, Ms Davis suggests that the Judge did not properly apply the **Selkent** guidelines in concluding that the amendment ought not to be allowed. Again, I disagree. I adopt Mr Nuttman's helpful analysis of the Judge's findings in relation to what seems to me to be an

impeccable self-direction on the law at paragraph 8 of her Reasons, set out at paragraph 32 of his skeleton argument. In short, I can see no grounds in law for interfering with the amendment ruling.

The unfair dismissal appeal

13. The thrust of Ms Davis' challenge to the finding of fair dismissal lies in the gap between the first meeting of 30 March 2010 and the second meeting on 7 November 2011. The lack of contact, she submits, during that lengthy period meant that any possibility of finding suitable alternative employment for the Claimant during that time was lost. That theoretical possibility does not sit well with the evidence and the findings of fact below. The Judge accepted that no progress towards a return to driving duties could be made until a clear prognosis was available. None was available even at the point of dismissal. Further, at the meeting on 7 November 2011 the Claimant did not suggest returning to work in any role other than as a driver (see paragraph 14). The finding is that there was no alternative role available for the Claimant, certainly from February 2012 onwards. Ms Steel checked the position in the course of the litigation; none was available as at the effective date of termination (see paragraph 26).

14. I remind myself that it is not for the EAT either to re-try the facts or to substitute its view for that of the Employment Tribunal. In these circumstances, I am unable to accept that there are any grounds in law for interfering with the finding of fair dismissal.

Disposal

15. It follows that both appeals fail and are dismissed.