Appeal No. UKEAT/0279/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2014

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

MS A MAKUCHOVA APPELLANT

GUOMAN HOTEL MANAGEMENT (UK) LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MURRAY GRANT (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR STEVE PEACOCK (Solicitor) Weightmans LLP First Floor St Phillips Point 47 Cannon Street Birmingham B2 5EF

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

The Claimant was off sick for nearly a year. Her employer was prepared to make adjustments to enable her to return to her previous role but she did not want to do that and instead suggested alternatives. The Employment Tribunal dismissed her claim for disability discrimination on the ground that the Respondent had failed to comply with its duty to make reasonable adjustments. On appeal it was argued on her behalf that the Tribunal had erred in law because it had adopted a test for deciding what was reasonable which was akin to the test in unfair dismissal cases, of whether the employer's decision fell within the band of reasonable responses.

Held, the Employment Tribunal had not erred as alleged. It had decided for itself on all the evidence before it whether the Respondent had or had not failed to make reasonable adjustments. However, the nature of the obligation is one to do what is reasonable, not necessarily to accept what the Claimant contends is reasonable.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is an appeal from the decision of the Employment Tribunal at London (Central) by which the Claimant's claims of unfair dismissal, disability discrimination and unlawful deductions from her wages were dismissed. The Employment Tribunal comprised an Employment Judge sitting with two lay members. This appeal concerns only that part of the Judgment which dismissed the claim that there had been a breach of the duty to make reasonable adjustments on the ground of the Claimant's disability.

Factual Background

2. The Respondent runs a chain of hotels with 5,000 staff in the United Kingdom, 2,000 of whom are in London. The Claimant was employed from 3 September 2003 at one of two small hotels as a Food and Beverage Supervisor. On 1 March 2012 she began a period of sickness absence. In February she had had an episode of acute breathlessness. The Claimant returned to the Czech Republic until the end of August 2012 to undergo treatment. The shortness of breath was found to be a symptom of psychological stress, but X-rays also disclosed that the Claimant had an incipient degenerative condition of the spine: that is, spondylosis deformans. The Claimant sent sick notes from her Czech doctor, providing her own translations. She continued to be paid for six months, as provided in her contract of employment.

3. From 9 September 2012 the Claimant was no longer entitled to sickness pay. She took three weeks' paid holiday for recuperative purposes. On 1 October 2012 she had a welfare meeting with the Respondent's Human Resources business partner, a Ms Kelly McCarthy.

From 1 October 2012 to 11 March 2013 the Claimant made 15 applications for alternative employment in the areas of finance or sales elsewhere in the Respondent's business.

4. On 2 January 2013 the Claimant was examined by Dr Philippa Beatson-Hird, who prepared a report dated 4 January on the Claimant's suitability for employment. That report described the onset of ill-health as a "nervous collapse" from which the Claimant was considerably better. The report also said that degenerative areas in the spine gave rise to intermittent pain if she carried heavy items, which the Claimant stated could be items of more than 3kg in weight. The Claimant was not currently taking medication, but her depression had responded to anti-depressants. Her doctor in the Czech Republic had recommended a change in employment, at least on a temporary basis until her back pain improved. On examination she was said to be well, with some tenderness in the mid-spine. Dr Beatson-Hird's opinion was expressed as follows:

> **"It is my opinion that she is likely to struggle with a return to her substantive role due to the requirement for prolonged standing and carrying what are described as heavy items.**
>
> **She may be able to manage to stand for an hour at a time followed by a short period of rest but she would struggle with standing for an entire shift."**

I will return to that report and the medical evidence more generally later in this Judgment.

5. As the Employment Tribunal noted at paragraph 23 of its Judgment, in the meantime the Claimant went on applying for vacancies. It observed that there were one or two positions for Switchboard Operators and a cluster of vacancies for Receptionists. However, it observed that the Claimant applied only for finance and for sales. She did not apply for a Switchboard Operator job and explained that she was over-qualified for that role. She had recently obtained a degree in Business Management and Commercial Law from the University of Westminster. The Employment Tribunal in the same paragraph observed that there were a number of

vacancies for Receptionists but the Claimant had not applied for them. However, at the very end of her employment the Claimant asked if she could undertake a job of Receptionist, but only at the hotel where she worked. There was no current vacancy there.

6. Finally, in this context the Employment Tribunal observed that although in large part a Receptionist stands up, the Claimant thought that she could do this job if she had a chair.

7. On 25 January 2013 the Claimant had a meeting with the General Manager responsible for the two hotels where she worked, Mr Richard O'Riordan. On 7 February 2013 the Claimant lodged the first of two claims with the Employment Tribunal. She complained of disability discrimination. On 14 February 2013 the Claimant had a workplace assessment. This was discussed by the Employment Tribunal at paragraph 26 of its Judgment. As it said there, the assessment took place followed by the Finance Assistant interview. Ms McCarthy conducted it with the line manager, Mr Molledo, noting the Occupational Health report that the Claimant could carry items weighing up to 3kg and would need to rest after one hour. The Claimant was offered a break every hour, to reduce the lifting and, a phased return to work over a period of four weeks. There was discussion of alternative work. She was interested in finance appointments. She continued to be sent lists of vacancies in the Respondent's business.

8. The options for the future were discussed. Those options included that, if there was no new role available for the Claimant by 28 February and she did not want to return to her previous job with the reasonable adjustments offered by the Respondent, then dismissal on the grounds of capability might have to be considered. This was confirmed to the Claimant in a letter dated 18 February. The Claimant responded by a letter dated 26 February with her

concerns. The Claimant said that she would not attend a meeting with Mr O'Riordan on 28 February.

9. On 11 March 2013 there was a meeting with Mr O'Riordan. He concluded that the Claimant should be dismissed. She was to be paid her outstanding holiday pay at nine weeks' notice and travel expenses. Her contract was terminated on the ground of capability. This was confirmed in a letter to the Claimant dated 18 March. Although the Claimant had a right of appeal, she did not in fact appeal. On 11 June 2013 the Claimant lodged the second of her claims with the Employment Tribunal. She alleged unfair dismissal, disability discrimination, and unlawful deductions from her wages.

The Employment Tribunal's Judgment

10. The Employment Tribunal heard the case on 3 and 4 September 2013. It sent its Judgment to the parties on 9 September. The Reasons for the Judgment were requested and were sent to the parties on 18 October 2013. After setting out its findings of fact between paragraphs 5 and 35, the Tribunal set out its understanding of the relevant law and its discussion of it from paragraph 36 onwards.

11. It dealt with the separate aspects of the claim before it in turn. It considered the claim for unfair dismissal from paragraphs 40 to 43, the disability discrimination claim from paragraphs 44 to 49, the issue of reasonable adjustments from paragraphs 50 to 56, alleged unfavourable treatment for a condition arising from disability at paragraphs 57 to 67, and finally the issue of unlawful deductions at paragraph 68.

12. Since the issue on this appeal concerns only the alleged breach of the duty to make reasonable adjustments, I will focus on that part of the Employment Tribunal's Judgment, at paragraphs 50 to 56. At paragraph 50 the Tribunal observed that the provision, criterion or practice for the purposes of section 20(3) of the **Equality Act 2010** was the requirement of staff in Food and Beverages to be on their feet for most of an eight-hour shift, serving customers, meeting and greeting them, checking that supplies were adequate, and in the case of a supervisor, covering absent staff.

13. At paragraph 51 the Tribunal addressed the question what steps did the Respondent take to avoid the disadvantage? It then summarised its understanding of the evidence on that. In particular it mentioned the workplace assessment on 14 February and the conclusion by the Respondent that the Claimant could have a break of up to 15 minutes after one hour, that she would not have to carry loads and that she would have a phased return over three weeks. However, as the Tribunal noted, the Claimant thought this was unrealistic in a busy restaurant and that in reality there would not be cover for the breaks. The Tribunal said it could understand her concerns. The Respondent attempted to reassure her that the management would make it happen and they added that the busy time is breakfast when there are extra staff in any event.

14. At paragraph 52 the Employment Tribunal conceded that the plan for breaks might not have worked in practice, but they had to note that the Claimant never tried it. In fact "she was determined not to go back to this job from 1 October onward." The Tribunal expressed its concern that, if the Claimant had tried out the adjustments proposed, there could have been an ongoing period of adjusting to see that they worked and, if they did not, then there could be a review of what else needed to be done.

15. At paragraph 53 the Tribunal addressed what action the Respondent had taken in respect of alternative roles. The Tribunal was of the view that the Respondent had not been proactive save to provide the Claimant with a list of vacancies and left her to apply for her own. Towards the end of that paragraph the Tribunal observed that the Claimant had never applied for any receptionist posts and only raised that at the very last minute. It also noted the Claimant's reasons for not applying for Switchboard Operator, which seemed to the Tribunal entirely unrelated to her disability and related to her desire to pursue a career in finance.

16. The Employment Tribunal was referred, as it noted at paragraph 54, to the **Code of Practice** by the Equality and Human Rights Commission in 2011. It was also referred, as it noted at paragraph 55 of its Judgment, to the decision of the House of Lords in **Archibald v Fife Council** [2004] ICR 954. It distinguished that case on the basis that there was "at any rate a possibility on the medical evidence of the Claimant being able to do her old role with suitable adjustments". I will return to the **Code of Practice** and that decision later.

17. The fundamental reason why the Employment Tribunal rejected this aspect of the claim was that the Claimant would not attempt the course which the Respondent offered, namely a return to her existing role with adjustments which the Respondent regarded as reasonable. The Tribunal concluded on this aspect of the case at paragraph 56 as follows:

> **"… we found that by February and March 2013, there was no particular duty on the employer to be more interventionist in getting permanent alternative employment when the Claimant had not tried to return to her current post with adjustments."**

Material Legislation

18. It is common ground that in the present case the Claimant was a disabled person within the meaning of section 6 of the **Equality Act 2010**. It is also common ground that the duty to make reasonable adjustments was imposed on the Respondent. Section 20 of the Act sets out

the meaning of the concept of "reasonable adjustments" and sets out the three requirements which a person (referred to as A) must comply with when the duty to make reasonable adjustments is imposed by the Act. Subsection (3) relates to the first of those three requirements and provides that:

> **"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."**

19. The word "substantial" means "more than minor or trivial". See section 212(1) of the Act. A failure to comply with a duty to make reasonable adjustments constitutes discrimination against a disabled person (see section 21(1) and (2) of the Act).

The Claimant's Appeal

20. After a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, as amended, before HHJ Richardson on 30 July 2014, this appeal was permitted to proceed to a Full Hearing on the Amended Grounds of Appeal only. In the Amended Grounds of Appeal one ground of appeal was advanced, although on analysis it may be thought in fact to fall into two parts. That ground is as follows. It was alleged that it was an error of law to conclude that the duty to actively support the Claimant finding a new role was extinguished by virtue of her choosing not to return to a role which she reasonably believed, subjectively and objectively, was not realistic in view of her disability. The second part of the ground, as it seems to me, is as follows. It was alleged that the Employment Tribunal ought to have considered whether the steps proposed by the employer "would" have been effective in preventing the substantial disadvantage, reliance being placed on paragraph 6.28 of the **EHRC Code of Practice on Employment**.

21. On behalf of the Claimant Mr Grant, who acts pro bono, submits that the fundamental question in this appeal is how the Employment Tribunal should deal with two competing, potentially reasonable adjustments. He submits that there were two equally reasonable adjustments which were feasible in the light of the medical report by Dr Beatson-Hird. He submits that the Tribunal did not consider the reasonableness of alternative employment in any detail because it found that the Respondent's duty was extinguished simply because the Claimant would not try its suggested reasonable adjustments.

22. He further submits in this context that there were indications in the Tribunal's reasoning that the Respondent had in its view fell short of compliance with a duty to make reasonable adjustments, if it arose, in respect of those alternative jobs. For example, towards the end of paragraph 54 of its Judgment, the Tribunal stated:

> **"… We had some concern that the Respondent had been dilatory in their feedback on interviews, and the Human Resources department could have been more interventionist with recruiting managers. If so it is possible the Claimant may have been placed, if not in finance, then in a reception or sales role."**

23. Mr Grant submits that where a Tribunal is faced with two competing reasonable adjustments what is required in order to fulfil the policy which lies behind section 20(3) of the **Equality Act** is that both of those potentially reasonable adjustments need to be considered in order to determine which better fulfils the aims of the legislation and is the more reasonable in all the circumstances. He submits that the Respondent's view as to which adjustment is reasonable cannot simply be accepted so that the Claimant must comply with this before further adjustments are considered.

24. In support of his submissions Mr Grant cites the **EHRC Code of Practice** to which I have made reference. In particular he cites paragraph 6.23, which states that the duty is to take

such steps as it is reasonable to have to take in all of the circumstances of the case in order to make the adjustments. Specifically the Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case. Mr Grant also cites paragraph 6.24 of the Code, which states that there is no onus on the disabled worker to suggest what adjustments should be made. However, where a disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. It does not say that they can be ignored where the employer considers other adjustments are preferable to them.

25. Finally, in this context, Mr Grant cites paragraph 6.28 of the Code, which provides as follows:

> **"The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> - **whether taking any particular steps would be effective in preventing the substantial disadvantage;**
> - **the practicability of the step;**
> - **the financial and other costs of making the adjustment and the extent of any disruption caused;**
> - **the extent of the employer's financial or other resources;**
> - **the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
> - **the type and size of the employer."**

26. Mr Grant also relies upon authority, in particular the decision of the House of Lords in **Archibald v Fife Council**. On the facts of that case the applicant had worked as a road sweeper for the Respondent Council. Following a complication during surgery she became virtually unable to walk and was thus no longer able to carry out that work. In the result the House of Lords decided that the Tribunal at first instance in that case had failed to consider

possible alternatives in relation to the duty to make reasonable adjustments which was then in the **Disability Discrimination Act 1995**. As Lord Hope of Craighead put it at paragraph 15:

> **"The duty which rested on the council under section 6(1) is described in the side-note to section 6 as a duty to make adjustments. But it is not simply a duty to make adjustments. The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies."**

27. As Lord Hope went on to state at paragraph 19 the performance of this duty may require the employer to treat a disabled person who is in this position more favourably in order to remove the disadvantage which is attributable to the disability. A disabled person can lawfully be transferred to a post which he is physically able to do without being at risk of dismissal due to her disability providing the taking of this step is a reasonable thing for the employer to do in all the circumstances. However, on the facts of that case, the Tribunal had simply not considered whether the policy requirement ought to have been adjusted in the applicant's case to remove the disadvantage she faced because she was no longer able to do her job as a road sweeper (see paragraph 20). There are similar statements of principle in the opinions of the other members of the Appellate Committee. My attention was particularly drawn to the opinion of Lord Rodger of Earlsferry at paragraph 43 and also the opinion of Baroness Hale of Richmond at paragraph 65.

28. Mr Grant also submits that the question of whether an adjustment is reasonable in all the circumstances is an objective one for the Tribunal itself to decide (see the decision of the Court of Appeal in **Smith v Churchill Stairlifts plc** [2006] ICR 524 at paragraph 44 in the Judgment of Maurice Kay LJ). He submits that for the Employment Tribunal to adopt the employer's proposed adjustments without consideration of the reasonableness of the Claimant's suggested alternatives was more akin to applying a range of reasonable responses test, which is the test used in the law of unfair dismissal rather than an objective test for determination by the

Tribunal itself. He submits that taking the approach the Employment Tribunal erred as a matter of law.

29. Further, Mr Grant submits that it was an error of law by the Tribunal to consider that the duty to redeploy or provide additional training or explore other alternative forms of employment was extinguished in circumstances where it was merely "possible" that the Claimant could have returned to her old role with adjustments. In that regard he has in mind, in particular, paragraph 55 of the Employment Tribunal's Judgment where it stated that:

> **"… We thought that this case could be distinguished, in that while in *Archibald* the job was clearly not adjustable, in this case there was at any rate a possibility on the medical evidence of the Claimant being able to do her old role with suitable adjustments, and the reason why this did not go forward was that the claimant would not attempt them."**

30. Mr Grant submits that what needed to be considered by the Tribunal was the extent to which the adjustment "would" alleviate the substantial disadvantage. At the very least, he submits, the ordinary civil standard of proof, namely a balance of probabilities, would be required. A mere possibility will not suffice.

31. Mr Grant submitted in the course of his oral submissions that there were at least five specific ways in which the Respondent failed in its duty to make reasonable adjustments in this case. First, he submits that it failed to be more interventionist in respect of the possibility of recruitment for alternative posts. Secondly, he submits that it failed by not going to recruitment managers and asking them if they had any suitable work that was sedentary. Thirdly, he submits that it failed in not considering whether training was possible for the Claimant, for example to perform a financial role. Fourthly, he submits that it failed in not giving the Claimant prompt feedback so she could have applied, for example, for a job as a receptionist. Fifthly, he submits that it failed in not making the ultimate decision to redeploy the Claimant to

a role such as finance, sales or receptionist. He submits that the Employment Tribunal erred as a matter of law in failing to give consideration to this aspect of the case. It simply stopped at the point where it concluded that the Claimant had decided that she did not wish to stay in the current role even with adjustments. In those circumstances he submits that, if this Appeal Tribunal concludes that the Employment Tribunal did err in law, the appropriate course would be for this Tribunal to remit the matter for reconsideration.

The Respondent's Submissions

32. On behalf of the Respondent Mr Peacock submits that there was no error of law by the Employment Tribunal in the way suggested. He submits that the reference to a possibility in paragraph 55 of the Employment Tribunal's Judgment must be read in context. It was distinguishing the decision in **Archibald**. He submits that it was correct to do so. He submits that **Archibald** holds that, where it is impossible for a person to do his or her existing job (as was plainly the case on the facts of **Archibald** itself), then there may be circumstances in which a reasonable adjustment has to be made, if necessary to redeploy the employee concerned to another job, possibly even without holding a competition for it. However, he submits that those were not the facts of the present case and that accordingly the Employment Tribunal was justified in distinguishing **Archibald** as it did.

33. He further submits that it is for the Employment Tribunal to determine the question of the reasonableness of adjustments as an objective matter. It is certainly not a matter for the subjective wishes of a particular employee. He submits that the Employment Tribunal was entirely justified, on the evidence before it, in particular the medical evidence, to which I will return later, in reaching the conclusion that the Respondent had discharged its duty to make reasonable adjustments pursuant to section 20(3) of the **Equality Act**.

My Assessment

34. In my judgment Mr Peacock is correct to submit that the Employment Tribunal did not err in law at paragraph 55 of its Judgment in the way suggested on behalf of the Claimant. I agree with Mr Peacock that the decision in **Archibald** can be distinguished, as it was by the Employment Tribunal in this case, on the basis that, on the facts of that case, the applicant was simply unable any longer to perform the job which she had performed previously. Furthermore I accept the submission by Mr Peacock that, on the facts of this case, the Employment Tribunal was entitled to come to the conclusions which it did. This is particularly so having regard to the medical evidence which was before the Tribunal.

35. As I have mentioned, while the Claimant was in the Czech Republic she submitted a number of sickness notes which she herself translated. One of those appears at page 130 of the appeal bundle. A question was asked at no. 2:

> **"Why [the Claimant] is not able to return to her position of F&B Shift Leader?"**

The answer in the translation was:

> **"Due to great psychological stress is not suitable her recent working placement, but after changing the regime and longer time stabilisation of psychological state will be possible to return her to her recent role."**

I would emphasise that, at least as things stood at that time, the medical advice was therefore envisaging that it would be possible for the Claimant to return to her recent role.

36. The other main piece of evidence which the Tribunal had before it in this context was the report of Dr Beatson-Hird dated 4 January 2013, which appears from page 132 of the bundle. In particular, it is important to quote more fully from it at this juncture.

> **"It is my opinion that she is likely to struggle with a return to her substantive role due to the requirement for prolonged standing and carrying what are described as heavy items.**

She may be able to manage to stand for an hour at a time followed by a short period of rest but she would struggle with standing for an entire shift.

In terms of alternative roles, if you are able to redeploy her, Ms Makuchova would be suitable for any sedentary or lighter role that would not require prolonged standing or lifting/carrying. If you are able to find her a desk based role then she would need a workstation assessment, in order to ensure that this was optimised ergonomically. It is my opinion that she would be fit to return to such a role in the near future.

Turning to the specific information requested under section 4 of your referral:-

The likely date of her return to work is dependent on whether you are able to put adjustments in place such as frequent breaks from standing and limited carrying, or whether you are able to find her an alternative role. If this was the case she would be fit to return to work as from now. It is likely that prolonged standing and repetitive lifting have contributed to the onset of her back symptoms, although the underlying degenerative condition will have been present for some time.

Provided that you are able to find a suitable role, or put adjustments in place, I see no reason why she should not attend work reliably in the future although she may have further flare ups of back pain. Evidently it is a management decision on what adjustments are operationally feasible but redeployment could be considered an adjustment."

37. In my judgment it is clear from that passage that, when Dr Beatson-Hird was referring to the option of the Claimant's return to her existing role, the adjustments which were being envisaged by the Respondent led her to express the medical opinion that the Claimant would be fit to return to work. That was certainly a view which was reasonably open to the Tribunal on the basis of the evidence it had before it. Furthermore it must be recalled, as Mr Peacock has submitted before me, that the Respondent was faced with a situation where the Claimant had been absent from work for nearly a year by the time of the workplace assessment, which took place on 14 February 2014. It offered reasonable adjustments to the Claimant and was willing to give assurances that they would be adhered to. I have already outlined what they were and will not repeat them now. They are mentioned in the Employment Tribunal Judgment at paragraph 26.

38. It is also pertinent to bear in mind, as the Employment Tribunal clearly found as a matter of fact, that the Claimant wilfully refused even to contemplate return to her previous role even with adjustments and the assurances that were being given (see, for example, paragraph 14 and paragraph 43 of the Employment Tribunal's Judgment).

39. Finally, in this context, I accept Mr Peacock's submission that some assistance can be derived from a later part of the Employment Tribunal's Judgment. Although set out under the heading which concerned the alleged breach of section 15 of the **Equality Act**, the passage which began at paragraph 57 of its Judgment, at paragraph 65 of its Judgment the Employment Tribunal stated that:

> **"… The Claimant was in our view not capable of Finance Assistant unless provided with training, and we do not consider that there was a duty on the employer to provide training when there were other jobs available, including her own if adjusted, which she could have undertaken without training. …"**

40. It is clear, in my view, reading that passage and the Judgment of the Employment Tribunal as a whole, that it was satisfied that, given the adjustments which the Respondent was prepared to make, the Claimant would be able to do her previous job. In those circumstances, in my judgment, the Employment Tribunal did not err as a matter of law in its approach. Furthermore, in my judgment, the Employment Tribunal came to a conclusion which was reasonably open to it on the evidence before it.

Conclusion

41. For the reasons I have given this appeal is dismissed.