Appeal No. UKEAT/0319/13/DA
UKEAT/0321/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 February 2014

Before

HIS HONOUR JUDGE SHANKS

MS K BILGAN

MR J MALLENDER

CRIME REDUCTION INITIATIVES (CRI) APPELLANT

MS C LAWRENCE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JULIAN MILFORD (of Counsel) Instructed by: DMH Stallard LLP Gainsborough House Pegler Way Crawley West Sussex RH11 7FZ
For the Respondent	MS ANNA MACEY (of Counsel) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU

SUMMARY

DISABILITY DISCRIMINATION – Disability related discrimination

The Claimant was dismissed on health grounds based on depression which was a disability. The Employment Tribunal found that the dismissal was unfair because the letter inviting her to a meeting to discuss capability was, because of an HR error, expressed to be an invitation to a *disciplinary* meeting, which the majority of the ET found was intimidating and put her off attending the meeting. The ET found unanimously that even if the Claimant had attended the meeting the employer would have dismissed her fairly.

In the light of those findings, the ET awarded the Claimant a basic award for unfair dismissal but no compensatory award. The majority also found that the employer was liable for disability discrimination under section 15 of the **Equality Act 2010** and awarded her £750 for injury to feelings arising from the dismissal.

The employer appealed on the basis that the majority were wrong to say that the dismissal was not a "proportionate means of achieving a legitimate aim" in considering section 15. On the facts, it was clear that the dismissal was justified: the fact that the process by which the employer had reached that decision was flawed was irrelevant. The finding of disability discrimination and the award of £750 set aside.

The Claimant's cross-appeal that the finding that even if she had attended the meeting it would have made no difference was an appeal on fact and hopeless. Her cross-appeal against the award of only £750 fell away.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Crime Reduction Initiative ("CRI"), who were the Respondents below, against liability and remedies judgments of the Employment Tribunal, sitting in London (South). The Reasons in relation to both those parts of the hearing were sent out on 18 April 2013. There is also a cross-appeal by the Claimant below, Ms Lawrence.

The facts

2. Ms Lawrence was employed by CRI as a Team Leader in November 2006. There was a history of work-related stress and depression and time off work in 2010, but the Employment Tribunal found that CRI were not aware at that stage that she was suffering from any disability. On 11 April 2011 she phoned in sick and she remained off sick until her dismissal in November 2011. Occupational Health saw her in July 2011, and they reported that she was suffering from post-natal depression, that it was a long-term disability and that she was not then fit to return to her post or even undertake interim duties.

3. On 22 November 2011 a form of capability procedure was started by CRI. Unfortunately the letter inviting her to a meeting was couched in terms of a disciplinary procedure and made numerous references to "disciplinary meeting" and such things. On 28 November the Claimant sent an e-mail to CRI, saying this:

> **"Hi Victoria**
>
> **Thank you for your e-mails. I did have every intention of attending the hearing** [that is a reference to the capability/disciplinary hearing]**, although think I will find it very upsetting to go through all the information again in such a formal setting. I feel you have all the relevant information as it was given in much detail during my occupational health consultation and I feel OH report is a good reflection of the events. You also have the additional report from my GP. Therefore I do not feel it will be necessary to attend and am happy for it to proceed without me. ..."**

4. The meeting did indeed proceed without her, and a decision was made to dismiss her on the grounds of ill-health.

The Employment Tribunal decisions

5. The Claimant claimed unfair dismissal and disability discrimination. The Employment Tribunal found by a majority that her dismissal was indeed unfair. The basis for that finding is set out at paragraph 58 of the judgment, which says as follows:

> **"...the Tribunal was divided about whether or not the Claimant herself had been properly consulted before the decision to dismiss was taken.. The majority of the Tribunal (the lay members) considered that she was not. They consider that the letter sent to the Claimant advising her of the meeting...discouraged the Claimant from attending and deprived her of her right to say what she needed to say. The majority accept the Claimant's evidence that she was intimidated by the tone and content of the letter** [and that must be a reference to the disciplinary nature of the hearing that was to take place] **and that it was because of the tone and content of the letter, causing her further unnecessary distress, that she did not wish to attend the hearing."**

That finding is not challenged by the Respondents on this appeal.

6. As to the disability discrimination claim, there was no doubt that her dismissal arose out her disability, and so the Respondents were potentially liable for disability discrimination under section 15 of the **Equality Act 2010**. But section 15 provides a defence if it is shown that the treatment complained of was "a proportionate means of achieving a legitimate aim." The issue for the Tribunal, at least as it directed itself, was therefore that set out in paragraph 65 of the decision, namely was the dismissal a proportionate means of achieving a legitimate aim. In paragraph 64 the Tribunal had already accepted that dismissal of the Claimant was a legitimate aim given CRI's need, as they put it, to properly manage its workforce so as to effectively deliver the service it was contractually obliged to provide. So the question was whether dismissal was a proportionate means of achieving that legitimate aim and, surprisingly, given that the only way to achieve the legitimate aim of dismissing is to dismiss, the lay members of

the Tribunal, by a majority, found, as it is put in paragraph 65, that the dismissal was not justified because, they said:

> **"In sending the Claimant a letter which suggested that she was being invited to a disciplinary hearing the Claimant was deprived of her opportunity to be consulted."**

7. The Employment Judge disagreed. She said that she considered that the Claimant had an opportunity to be consulted and chose not to use it. She considered that the dismissal was a proportionate means of achieving a legitimate aim as, at the time that the Claimant was dismissed, there was no material before the Respondent which would lead them to believe that the Claimant was likely to return to work in the near future. Accordingly she found that there was no disability discrimination.

8. At the remedies hearing the Employment Tribunal made a unanimous finding of fact that following a fair procedure would have made no difference to the outcome: in other words, that even if the Claimant had attended the meeting, the outcome would have been exactly the same. They made that unanimous finding at paragraph 16 where they say:

> **"The Claimant had already been absent from work for nearly a year and, as Mr Baker says, there must come a time when the Respondent is able to draw a line in the sand. Accordingly we find that had the Claimant attended the capability hearing she would still have been dismissed."**

Given that finding, on the unfair dismissal claim the Claimant was awarded simply her basic award, which came to £2780.

9. Turning then to the disability discrimination compensation, the Tribunal addressed this at paragraphs 17 and following. The Tribunal say, at the beginning of paragraph 17:

> **"The Tribunal also found that the failure to give the Claimant proper notice of the capability hearing amounted to indirect discrimination arising from disability which was not justified. The Claimant gave evidence that her dismissal was a real set back and that she had loved her job."**

Then they comment further on that evidence, and they also make a finding, at paragraph 19, that this was indirect discrimination and it was not intentional: it arose out of clumsy wording from the HR Department. They awarded the Claimant £750 for injury to feelings in respect of her disability discrimination claim.

10. It will be immediately obvious that the way the section 15 discrimination was characterised changed between paragraph 65 of the liability judgment and paragraph 17 of the remedies judgment and that the concept of indirect discrimination was raised for the first time in paragraph 19 of the remedies judgment.

Appeal and cross-appeal

11. CRI appeal against the findings of disability discrimination and the award of £750 in respect thereof. The Claimant cross-appeals: she says the finding that it would have made no difference if she had attended the meeting is perverse and that the award of £750 is inadequate.

12. Looking at the liability judgment, and paragraph 65, where the Tribunal ask themselves the question "We considered whether the dismissal was a proportionate means of achieving a legitimate aim" and come to the conclusion that it was not, because of the wording of the letter, the first question is whether, in fact, the Tribunal were entitled to take into account the wording of the letter, which on any view went to process and procedure and not to the substantive decision to dismiss, the Tribunal having found that the Claimant would have been dismissed in any event.

13. Mr Milford referred us to two relevant authorities on justification. The first is an employment case, **HM Prison Service v Johnson** [2007] IRLR 951, in which Underhill J was dealing with a not dissimilar case involving disability discrimination case and dismissal. It involved the **Disability Discrimination Act**, rather than the **Equality Act**, and the wording of the justification section was rather different, but we accept that the principles are the same. At paragraph 114 of the judgment, Underhill J says this:

> **"It is also in our view irrelevant that the Appellants' consideration of the issue may have been inadequate or procedurally flawed: the question of justification is (at least for these purposes) objective. It may in principle be relevant (as with the questions of reasonable adjustment and unfair dismissal - see para. 97 above) that the Claimant's illness was caused or contributed to by the Appellants' own failings; but in practice that consideration is likely to be operative only in marginal cases, since it cannot be the law that an employer is never justified in dismissing a disabled employee for whose disability he is partly to blame."**

Mr Milford also referred us to a House of Lords case, called **Belfast City Council v Miss Behavin' Ltd** [2007] 1 WLR 1420. He took us to Lord Mance's decision at paragraphs 43 and 44, and showed us a quotation from Lord Bingham, at the end of paragraph 44, rejecting "the new formulism" that the Court of Appeal's approach would have involved, and saying "What matters in any case is the practical outcome, not the quality of the decision-making process that led to it". We take from those two authorities that purely procedural questions are irrelevant to dealing with justification.

14. So, going back to paragraph 65 of the liabilities judgment, it seems to us that that was unsupportable. Once the Tribunal had found that dismissal was a legitimate aim and that it was inevitable, the fact that the letter inviting the Claimant to the meeting was wrongly worded and discouraged her from going to the meeting was not relevant to section 15 discrimination. It was relevant, of course, to unfair dismissal, which is why she was awarded over £2,000 by way of basic award.

15. That deals with the disability discrimination claim as set out in the liability judgment. As already indicated, disability discrimination is put rather differently in the remedies judgment, because at paragraph 17 of the remedies judgment, it says:

> **"The Tribunal also found that the failure to give the Claimant proper notice of the capability hearing amounted to indirect discrimination arising from disability which was not justified."**

That would indicate a different claim, a claim arising from a single act of detriment, in sending the wrong type of letter, leading to the Claimant feeling intimidated and so on. That, as I say, was not the way the Tribunal had put matters in its liability judgment and therefore, it seems to us, that way of reaching the remedy of £750 did not really follow properly from the findings in the liability hearing. We asked ourselves whether, given the apparent finding of liability in paragraph 17, we ought to send the case back to the Tribunal to analyse matters again more fully but, on consideration, we think that Mr Milford is right when he says not only that this way of putting the case not considered in the liability judgment but that it was not even advanced in the ET1. Furthermore, we think he is right when he says that the way the letter was worded had nothing to do with the Claimant's disability but had everything to do with an unfortunate error made by the Employer. On that basis, which is firmly rooted in the facts as found by the Tribunal, we do not think that there was an arguable claim for discrimination based solely on the letter and it would be pointless to send the case back for further analysis.

16. So far as the cross-appeal is concerned, it involves an attack on a finding of fact about what would have happened if the Claimant had attended the meeting. Of course that involves an element of speculation, but it is well within the Tribunal's purview to make such findings of fact. The finding cannot be described as perverse, and therefore the appeal on that is hopeless.

The appeal against the award of £750 falls away given that we have concluded that there was no claim for disability discrimination that would found any award at all, whether £750 or more.

Conclusion

17. We allow the appeal: we set aside the finding of disability discrimination and the award of £750. And we dismiss the cross-appeal.