

Appeal No. UKEAT/0353/13/SM

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

At the Tribunal
On 30 January 2014

Before

THE HONOURABLE MRS JUSTICE COX DBE

(SITTING ALONE)

MR PAUL LILLER

APPELLANT

NETWORK RAIL INFRASTRUCTURE LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ANDREW MacPHAIL
(of Counsel)
Instructed by:
Langridge Employment Law
Milburn House
Dean Street
Newcastle upon Tyne
NE1 1LE

For the Respondent

MR MICHAEL SALTER
(of Counsel)
Instructed by:
Eversheds LLP
Bridgewater Place
Water Lane
Leeds
LS11 5DR

SUMMARY

DISABILITY DISCRIMINATION – Section 15

The only point on appeal was whether the Tribunal had failed to give a reasoned decision on the Claimant's disability discrimination claim, in respect of his dismissal, under section 15 **Equality Act 2010**. The Respondent sought to argue that a decision was to be implied from other paragraphs in the judgment, but the appeal was upheld. There was no express finding in relation to a discrete claim, which was identified in advance of the hearing and addressed in the evidence and closing submissions.

The appeal was therefore allowed and the matter remitted for determination by the same Tribunal.

THE HONOURABLE MRS JUSTICE COX DBE

1. This is an appeal by the Claimant from the judgment of the London (Central) Employment Tribunal, sent to the parties on 11 December 2012, dismissing his various claims against the Respondent. The short point arising from the Amended Grounds of Appeal is whether the Tribunal erred in failing to provide a decision on one of those claims, namely his claim under section 15 of the **Equality Act 2010** that he was dismissed because of something arising in consequence of his disability.

2. The facts can be shortly stated. The Claimant commenced employment with the Respondent as an IT Solution Architect on 18 August 2008. In 2010 he was formally diagnosed with anxiety disorder and clinical depression. In February 2011 he commenced a lengthy period of sickness absence. During this period, on 27 July 2011, the Claimant had a telephone conversation with a counsellor at Care First, an organisation which provides counselling services for the Respondent's employees. It was subsequently alleged that during that telephone conversation the Claimant had made serious threats of violence against the Respondent's senior managers.

3. There was then an investigation, which led to disciplinary proceedings. During this process the Claimant provided the Respondent with a medical report from Ms Gray, which was critical of the way the matter had been handled by Care First.

4. The Claimant was summarily dismissed for gross misconduct on 6 February 2012, and his appeal against that decision was unsuccessful. He presented his ET1 on 4 May 2012. Drafted by the Claimant himself, it contained a large number of complaints relating to his

dismissal and the process leading up to it. He identified his claims as claims of unfair dismissal and disability discrimination. A CMD took place on 26 July 2012.

5. One of the claims pursued by the Claimant was that he was dismissed because of something arising in consequence of his disability. This claim was confirmed at the CMD, at which counsel for the Claimant provided the Tribunal and the Respondent with a proposed list of issues. There was no dispute that the Claimant was disabled within the meaning of the legislation, and the Tribunal confirmed at this CMD that the section 15 claim for dismissal was to be considered as one of the issues for determination.

6. The Tribunal's written order of 27 July 2012 confirmed that dismissal was one of the acts of less favourable treatment alleged, and that the Tribunal were to consider, in relation to all the alleged acts, the claims of direct discrimination under section 13, discrimination arising from disability (section 15), indirect discrimination (section 19), and failure to make reasonable adjustments (section 20).

7. At the hearing, which took place in October 2012, Mr MacPhail represented the Claimant, as he does today. He submits, and I accept, that he gave considerable focus in his written and oral closing submissions to the section 15 claim for dismissal. In addition, he points out that the Tribunal were provided with an extract from the *EHRC Statutory Code of Practice: Employment Part 1* and were referred in particular to an example of unfavourable treatment because of something arising in consequence of disability, at paragraph 5.9 of the Code.

8. It is clear that, at the conclusion of all the evidence, the Claimant maintained the section 15 claim in respect of his dismissal.

9. The Tribunal's reserved judgment runs to some 25 pages. The issues are identified at paragraph 2. Paragraph 2.1 lists the alleged acts of less favourable treatment, and they include at paragraph (n), "treating the remarks as gross misconduct and dismissing the Claimant for them." The issues arising under the section 15 claim were set out at paragraph 2.3.

10. After recording their detailed findings of fact, section 15(1) of the **Equality Act 2010** was set out expressly at paragraph 38 of the judgment, together with the other, relevant provisions of the Act.

11. The Tribunal addressed direct disability discrimination first. At paragraphs 58-71 they addressed the complaint of discrimination arising from disability, stating as follows at paragraph 58:

"The issue in the claim of discrimination arising from disability is whether the Respondent treated Mr Liller less favourably because of something arising in consequence of his disability. In this connection we again have to consider each of the detriments in turn and then if found consider whether the respondent can show that the treatment concerned was a proportionate means of achieving a legitimate aim."

12. At paragraphs 60-72 they set out their conclusions in respect of the alleged acts of less favourable treatment and detriment, addressing each in turn. After rejecting the other alleged detriments, at paragraphs 71 and 72 they found as follows:

"The final detriment (n) is treating the remarks and gross misconduct and dismissing the Claimant for them. The remarks were remarks which amounted to conduct of Mr Liller. Treating those remarks as gross misconduct was not something that arose in consequence of his disability. It was a judgment reached by Miss Coates as a result of the evidence she had heard based on the conduct of Mr Liller.

72. In the circumstances it is the unanimous judgment of the Tribunal that the claim of discrimination arising from disability fails."

13. Mr MacPhail submits that it is clear from their judgment that the Tribunal failed to make a decision on the section 15 claim for dismissal. He points out that the natural place for the Tribunal to set out their decision on this claim would have been in paragraph 71, or in a paragraph or paragraphs immediately following it. However, no such decision is to be found either there or elsewhere in the judgment. Given the absence of an express decision on this claim, he submits that it is not possible to identify the reasons for any such decision. He therefore contends that the Tribunal erred in failing to provide a reasoned decision in respect of the section 15 claim for dismissal.

14. I accept that submission. On behalf of the Respondent, Mr Salter has sought valiantly to persuade me that the Tribunal made sufficient, relevant findings for their judgment to be upheld. He contends that, even though there was no express finding in relation to section 15 and dismissal, such a finding can be implied from other paragraphs in the judgment, to which he drew my attention. He also submits, correctly, that the Tribunal is under no obligation to address every argument presented to them, relying on **English v Emery Reimbold and Strick** [2003] IRLR 711.

15. There is, however, an obligation to provide a clear decision on a specific claim which has been identified as a claim to be determined, has been addressed in the evidence and has then been addressed in closing submissions. The finding that the Respondent did not act unlawfully, upon analysis of the elements in the other heads of claim relating to disability discrimination, is not, in my judgment, sufficient to imply that they also determined the discrete issues arising under section 15 in relation to this Claimant's dismissal. These issues, as Mr Salter fairly accepts, required a different mental exercise and a careful analysis of an entirely separate claim.

16. I shall say no more about the Claimant's arguments as to the merits of his section 15 dismissal claim. It is unnecessary and inappropriate for me to do so given that, in my judgment and for these reasons, this appeal must be allowed and the case remitted.

17. There is a dispute between the parties as to whether the matter should be remitted to the same Tribunal to be determined, or to a fresh Tribunal. Mr MacPhail, relying on **Sinclair Roche Temperley v Heard** [2004] IRLR 763, submits that there is a real risk, if the matter is determined by the same Tribunal, that the fair-minded and reasonable observer might well suspect that the Tribunal had succumbed to the temptation simply to provide a uniform approach, without properly and impartially considering the claim afresh.

18. I have regard to that factor and I have regard, in addition, to the passage of time and the likely value of this claim. I also bear in mind that, in this case, no criticisms have been made of the way in which the hearing before the Tribunal was conducted, or of any member of the Tribunal. The Tribunal, having heard all the evidence over three days, made detailed findings of fact which, as Mr Salter points out, are not challenged in this appeal.

19. On balance, having regard to all the various factors and to the question of proportionality, I consider that in this case the matter should be remitted for determination by the same Tribunal.

20. Mr Salter suggests, and Mr MacPhail does not dissent, that it would be sensible for the matter first to be listed for a preliminary hearing, when the Tribunal can give appropriate directions. Given the passage of time I agree with that suggestion and no doubt it will now be considered.