Appeal No. UKEAT/0149/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 January 2015
Judgment handed down on 12 February 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

LAND REGISTRY — APPELLANT

MS E HOUGHTON AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS MARINA WHEELER (of Counsel) Instructed by: Flint Bishop Solicitors St Michaels Court St Michaels Lane Derby Derbyshire DE1 3HQ
For the Respondents	MR STUART BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors Agincourt House 14-18 Newport Road CF24 0SW

SUMMARY

DISABILITY DISCRIMINATION

Disability related discrimination

Justification

Disability related discrimination. **Equality Act 2010** section 15. Non-payment of bonus due to the Claimants having received a warning for disability related sick absence.

Prima facie discrimination causatively made out. The Employment Tribunal were entitled to reject the Respondent's justification defence.

HIS HONOUR JUDGE PETER CLARK

1. This appeal, brought by the Respondent before the Bristol Employment Tribunal, The Land Registry, concerns the reach and application of section 15 of the **Equality Act 2010** to the facts of these claims brought by Ms Houghton and others, Claimants. Each Claimant was at all relevant times disabled and employed by the Respondent. Their claims under section 15 were upheld by an Employment Tribunal chaired by Employment Judge Olga Harper sitting on 7-9 October 2013. The Employment Tribunal's Reserved Judgment and Reasons was promulgated on 27 November 2013 and varied by consent by a Reconsideration Judgment dated 24 January 2014.

Section 15

2. Section 15 of the **Equality Act** provides:

> **"(1) A person (A) discriminates against a disabled person (B) if -**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

3. Section 15 of the **Equality Act** is the successor to, but different from, section 3A(1) **Disability Discrimination Act 1995** ("DDA") which provided:

> **"(1) … a person discriminates against a disabled person if -**
>
> **(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and**
>
> **(b) he cannot show that the treatment in question is justified [as defined in subsection (3)]."**

4. It will be immediately apparent that whereas section 3A(1)(a) of the **DDA** provided for a traditional comparison, section 15 does not. Further, the wording of section 15(1)(a) is new. That is quite intentional, as the Explanatory Note to section 15 makes clear at paragraph 70. The interpretation of section 3A(1) by the Court of Appeal in **Clark v Novacold** [1999] IRLR 318 was overruled by the House of Lords in the landlord and tenant case of **Lewisham v Malcolm** [2008] IRLR 700, with the result, so the Court of Appeal opined in **JP Morgan v Chweidan** [2011] IRLR 673, that a claim of disability related discrimination under section 3A(1) of the **DDA** added nothing to a claim of direct discrimination. Section 15 of the **Equality Act** was intended by Parliament to depart from the effect of **Malcolm**.

5. Having removed the need for a comparator, which requirement under the **DDA** had led the House of Lords to neutralise the protection granted by section 3A(1), it seems to me that Parliament has loosened the causative link between the disability and the unfavourable treatment complained of by the use of the deliciously vague formulation, "because of something arising in consequence of the [Claimant's] disability", bearing in mind that, in the context of discrimination law, "causation is a slippery word". See **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, paragraph 29, per Lord Nicholls.

6. In **IPC Media Ltd v Millar** [2013] IRLR 707, paragraph 17, Underhill J, as he then was, said of section 15:

> **"We cannot see any difficulties about its meaning and effect."**

The careful and sustained arguments of Counsel in the present case may suggest otherwise.

7. Insofar as any assistance may be derived from the **2011 Statutory Code of Practice** issued by the Equality and Human Rights Commission, at paragraph 5.9 it is said:

> **"The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. …"**

The example given is of a woman disciplined for losing her temper at work, such behaviour being out of character and a result of severe pain caused by cancer of which the employer is aware (I shall return to the question of knowledge when considering the arguments in this appeal). In that example, it is said, there is a connection between the "something" (i.e. the loss of temper) that led to the treatment (the disciplinary sanction) and her disability (cancer). She therefore passes stage 1 of the section 15 test and it will then be for the employer to justify the decision to discipline her.

8. As to justification, it is common ground between Counsel that at paragraph 26 this Employment Tribunal correctly directed themselves as to the classic test propounded by Balcombe LJ in **Hampson v DES** [1989] ICR 179 at 191E:

> **"… "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. …"**

9. His Lordship then went on to consider the effect of the European Court of Justice decision in **Bilka-Kaufhaus GmbH v Weber von Hartz** [1987] ICR 110, referred to by the Employment Tribunal at paragraph 25. I was also taken to the statement of principle in relation to proportionality set out by Pill LJ in **Hardy and Hansons Plc v Lax** [2005] IRLR 726, paragraphs 32 to 33; see also **Homer v Chief Constable of West Yorkshire Police** [2012] ICR 704, paragraphs 19 to 23, per Baroness Hale.

The Facts

10. The Respondent operated a discretionary bonus scheme, which was operated in 2012. All eligible employees received a bonus of £900 (pro rated for part-time employees such as

these Claimants) declared on 25 May. Under the terms of the scheme an employee who received a formal warning in respect of sickness absence during the relevant financial year was ineligible to receive the bonus.

11. It was conceded that each of the five Claimants were disabled in the respects set out at paragraph 8 of the Employment Tribunal's Reasons. Each had a number of sick absences, in every instance attributable to their disability. It is plain that the Respondent made reasonable adjustments, both to assist the Claimants in overcoming their disabilities and in adjusting the usual trigger points at which the warning procedure became engaged. Despite that, each Claimant received a warning. The Employment Tribunal found that there was an anomaly in the bonus scheme. Whereas managers had a discretion, having issued a warning for a conduct related matter, to determine that such warning would not effect entitlement to the bonus, if awarded, no such discretion existed in relation to a sick absence warning. As the letter to the Claimant, Ms Ward, dated 24 May 2011 made clear:

> **"… Such warning will render you ineligible to receive a corporate bonus if one becomes payable …"**

The Employment Tribunal Decision

12. Having found (paragraph 9) that in relation to each Claimant, the absences which resulted in them receiving the warning were disability related, the Employment Tribunal rejected the Respondent's submission that the link between each Claimant's disability in the non-payment of bonus was too remote (paragraph 18) and concluded (paragraph 19) that the connection was clear because each Claimant received a formal warning for disability related absence and that warning automatically excluded each Claimant from the bonus scheme. Thus non-payment of bonus was the consequence, result, effect or outcome of each Claimant's disability. In these

circumstances the Employment Tribunal, without hesitation, found that stage 1 (section 15(1)(a)) had been passed by the Claimants.

13. As to justification, it was common ground that the Respondent had a legitimate aim, in operating the bonus scheme, of acknowledging employees' contributions towards corporate achievements and specifically to encourage and reward good performance and attendance. The question for the Employment Tribunal was whether the Respondent had shown that the scheme itself was a proportionate means to achieve that aim, balancing the discriminatory effect of the condition (non-payment to an employee with a sick absence warning) on the Claimants.

14. In finding in favour of the Claimants on the issue of justification, the Employment Tribunal took into account (1) that three of the Claimants had improved their absence record after receiving the warning, something which could not be taken into account under the scheme (paragraph 28) and (2) the anomaly whereby managers had no discretion to declare that a sick absence warning would not affect their eligibility for the bonus, but did have that discretion where the bonus related to conduct (paragraph 29).

15. Further, they held (paragraphs 30 to 33) that, in carrying out the balancing exercise, the non-payment to these Claimants was disproportionate for the reasons there given.

16. As to compensation, in addition to awards for injury to feelings, not in issue in the appeal, the Employment Tribunal awarded each Claimant (save for Mr Johnson, who had been compensated for his loss of bonus in unconnected personal injury proceedings arising out of a road traffic accident) the full bonus, pro-rated following reconsideration as I indicated earlier; see paragraph 34.

The Appeal

17. In this appeal the Respondent challenges the Employment Tribunal's findings as to (1) the "causation" question under section 15(1)(a); (2) justification under section 15(1)(b) and (3) compensation. I shall consider each in turn.

Causation

18. Ms Wheeler repeats the submission, considered by the Employment Tribunal and rejected below, that the connection between the Claimants' disability and non-payment of the bonus was too remote. The reason for non-payment was the earlier warning for sick absence and that was a discretionary act by the manager issuing the warning. Such a warning may be given to a non-disabled person. Further, the complaint here lay against the manager issuing the warning; however that complaint under section 15 would be out of time. Yet further, the administrative act by a member of the HR staff disallowing the bonus because of the warning, was done without knowledge of the Claimant's disability. Thus disability did not act on the mind of the putative discriminator: see **IPC Media**, paragraph 17 and the redundancy selection case of **Espie v Balfour Beatty Engineering Services Ltd** (UKEAT 0321/12/DM), 30 November 2012, Wilkie J presiding.

19. Having considered each of those ways in which the appeal is put by Ms Wheeler I reject each contention. First, the Employment Tribunal found that in each case the absences leading to the warning were disability related. That type of warning automatically disentitled the Claimants to the bonus. That is plainly sufficient to amount to unfavourable treatment (non-payment of the bonus) in consequence of the disability. Without the disability each Claimant would not have run up the level of sick absences leading to the warning. That is why the bonus was not paid. Whether or not the Claimants could have complained about the warning at the

time is nothing to the point. The unfavourable treatment complained of was not the possibility of non-payment in future if a bonus was awarded (it was not always awarded) but the non-payment when it happened. Nor am I impressed by the knowledge argument. On the facts of **IPC Media** the question was whether, in failing to give the Claimant the opportunity to apply for two alternative posts in the course of a redundancy exercise, the relevant manager was aware of the Claimant's disability related absences. In the present case it was the very fact of those absences which led to the warning and thus disentitlement under the terms of the bonus scheme. That goes back to the "two different sorts of 'why' question" discussed by Baroness Hale in the **JFS** case [2010] 2 AC 728, paragraphs 61 to 64. It is the distinction between determining what caused the treatment in question (the relevant question) and the putative discriminator's motive in acting as he did (the irrelevant question). In the present case the bonus was not paid because the Claimants had received a disability related sick absence warning; just as Mr James was refused free admission to the Eastleigh swimming pool because, as a man, he had not reached pensionable age whereas his similarly aged wife, a woman, had reached pensionable age and was entitled to free admission; see **James v Eastleigh BC** [1990] AC 751. In **IPC Media** the question as to Mrs O'Farrell's knowledge as to the Claimant's absences was essential to determining the reason why she was not considered for the two alternative posts. In the present case it was the fact of the Claimants' disability related absences which led to the disqualifying warning. The motives of the HR staff member who carried out the administrative task of linking the warning to the non-payment of bonus was irrelevant to the true "reason why" enquiry in this case.

20. Like the Employment Tribunal I have no hesitation in concluding that, on the facts, the Claimants here satisfied the section 15(1)(a) test.

Justification

21. During the course of discussion I recalled a recent Court of Appeal decision which considered the question of justification in the context of age discrimination. Ms Wheeler reminded me that it was the case of **Lockwood v DWP** [2013] IRLR 941. In that instance an Employment Tribunal had concluded that an age related banding scheme applied within the Department's voluntary severance scheme was objectively justified. On appeal a division on which I sat upheld that finding. So too did the Court of Appeal.

22. Just as the Respondent was able to justify the treatment complained of in **Lockwood**, having properly carried out the necessary balancing exercise, equally I am persuaded by Mr Brittenden that the Harper Employment Tribunal in the present case permissibly reached the opposite conclusion here.

23. Absent any patent misdirection by the Employment Tribunal Ms Wheeler seeks to dismantle the grounds upon which the Employment Tribunal reached its conclusion on justification. Looking at the Amended Grounds of Appeal under this head I am satisfied that the Employment Tribunal did not confuse the unfavourable treatment complained of; it was the non-payment of bonus, not the earlier warning. The legitimate aim of the Respondent was correctly identified; see Reasons, paragraphs 3, 20 and 28 and the list of issues at paragraph 4(a). Nor do I accept that the Employment Tribunal failed to engage with the Respondent's case that reasonable adjustments were applied under the sick absence policy to these Claimants and that managers had a discretion as to whether or not to issue a warning for sick absence and the right to appeal. These factors are recorded in the Reasons. Nor is the clarity of the sickness warning disentitlement to bonus in doubt.

24. However, the reason why the Respondent failed to establish the justification defence was first, because, having decided to issue a warning for sick absence the manager had no discretion to decide that the employee would not be excluded from receiving the bonus, unlike the position with a warning for conduct (paragraph 29). No explanation for that anomaly was forthcoming. Secondly and it followed from that lack of discretion at any stage, no account could be taken of any improvement in performance post-warning (paragraph 28) and in circumstances where the legitimate aim of the bonus scheme was to reward good performance and attendance.

25. Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded. I see no evidence of that having happened. Accordingly I am not persuaded that any error of law is shown such as to cause this Appeal Tribunal to interfere with the justification finding.

Compensation

26. Ms Wheeler submitted that the challenge to the award of the full bonus (pro-rated) followed from the two earlier grounds of appeal. Those grounds having failed I agree with Mr Brittenden that this was an award which was open to the Employment Tribunal. There appears to have been no evidential basis for the proposition that had the discretion identified by the Employment Tribunal been available to managers they would not have exercised it in favour of the Claimants. Ultimately, as the Employment Tribunal held at paragraph 34, had each (leaving aside Mr Johnson) not received a warning for disability related absence they would have received the bonus. Accordingly I reject this final ground of appeal also.

Disposal

27. It follows that this appeal fails and is dismissed.