Appeal No. UKEAT/0292/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 January 2015
Judgment handed down on 13 February 2015

Before

HIS HONOUR JUDGE PETER CLARK

MR D J JENKINS OBE

MR M WORTHINGTON

CHIEF CONSTABLE OF WEST YORKSHIRE APPELLANT

MRS L FARRAND RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS OLIVIA CHECA-DOVER (of Counsel) Instructed by: Legal Services West Yorkshire Police HQ PO Box 9 Laburnum Road Wakefield WF1 3QP
For the Respondent	MR NICHOLAS FLANAGAN (of Counsel) Instructed by: Rebian Solicitors 12 Park Square Leeds LS1 2LF

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

The disabled Claimant transferred to a role (A) for which, after delay, reasonable adjustments were made. Following mediation the Respondent ordered her transfer to role (B) which she never took up prior to medical retirement.

The Employment Tribunal held transfer to (B) represented a breach of section 21 **Equality Act 2010**.

Respondent's appeal allowed. Case remitted to a fresh Employment Tribunal to determine whether role (B) would have represented a reasonable adjustment and (on the Claimant's cross-appeal) whether the transfer to (B) amounted to disability related discrimination contrary to section 15.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Leeds Employment Tribunal. The parties are Mrs Farrand, Claimant, and Chief Constable of West Yorkshire Police, Respondent. By a reserved Judgment with Reasons dated 7 May 2014 an Employment Tribunal chaired by Employment Judge Burton held that the Respondent had unlawfully discriminated against the Claimant, a disabled employee, by failing to make reasonable adjustment in two respects: (a) delay in making adjustments so as to overcome difficulties in operating a computer at work (the delay point) and (b) in transferring her from a properly adjusted NIT role to a supernumerary role (the transfer point). On the transfer point only the Respondent appeals. The Claimant raises a conditional cross-appeal on the basis that the Employment Tribunal did not determine her separate claim that the transfer was disability-related discrimination contrary to section 15 of the **Equality Act 2010** (EqA).

Background

2. The Claimant commenced her service as a Police Constable in the West Yorkshire Force on 14 August 1989. She was a dedicated officer whose service was exemplary and distinguished. She was awarded the Queen's Police Medal in 2002.

3. On 23 November 2007, in the course of arresting a violent individual, she sustained a fracture of her right index finger. Although left handed it was apparent to Dr Shinn, the Force medical officer, on 29 February 2008 that she would never recover sufficiently to be fit to return to the full duties of a front-line police officer.

4. She returned to duty with the Huddersfield South Neighbourhood Policing Team (NPT) and remained in that role until September 2012.

5. By December 2010 she was experiencing chronic pain in her right index finger and thumb. An operation to fuse the distal joint of her right index finger on 16 September 2008 had left her with permanent reduction of mobility in that digit. As a result she was excluded from dealing with public order incidents.

6. On 4 May 2011 Dr Shinn recommended adjustments to assist with computer work including a left-handed mouse, telephone headset and voice activated software.

7. Adjustments were made 'on the ground' by her senior officers to allow her to continue working. Much of her work was advisory. Within the NPT was a team of three officers more office based known as NIT. The Claimant was so designated.

8. However that involved an increase in computer work. Unhappily Dr Shinn's recommended adjustments going back to May 2011 were not fully put into effect before June 2012. It was that delay which led to the, now unchallenged, finding by the Employment Tribunal on the delay point.

9. Meanwhile, on 21 February 2012 the Claimant presented her first complaint, relating to the computer adjustments recommended by Dr Shinn, to the Employment Tribunal.

10. In an effort to resolve that complaint those proceedings were stayed with a view to alternative dispute resolution. A mediation meeting took place on either 11 or 12 September

2012 (both dates appear in our papers). Following that meeting the ACAS mediator, Caroline Philip, produced a document headed "Agreed Action Plan following joint meeting on Tuesday 11th September 2012". Unusually, by consent, the Employment Tribunal received evidence about the mediation process and its outcome.

11. On the Employment Tribunal's findings there was a misunderstanding between Ms Norma Brown of HR and the Claimant. Ms Brown believed, incorrectly, that the Claimant could not continue in her modified NPT role (by then properly adjusted); that the Claimant had rejected an alternative CEFO position and that the focus had to be on medical retirement. Pending approval of that course, the Claimant was to be redeployed to a supernumerary position. Three days after the mediation meeting the Claimant went off sick with stress, never to take up the supernumerary role before her medical retirement on 25 April 2013. She returned to work on 21 February 2013 at the NPT.

The Employment Tribunal Decision

12. The unchallenged findings on the delay point are set out at paragraphs 13 to 14.

13. As to the transfer point (paragraph 15 to 23) the Employment Tribunal record the Respondent's case that they were not to know that the Claimant wished to continue in the NIT role. The Employment Tribunal found that she did and that it was a properly adjusted role. They concluded that there was no justification for removing her from that role and added (paragraph 23):

> **"… As a consequence we conclude that this limb of the claim is also made out."**

14. We infer that the Employment Tribunal found it unnecessary in those circumstances to determine the disability-related claim in connection with the transfer point.

15. Having upheld those two heads of claim the question of remedy was adjourned and has yet to be heard.

The Appeal

16. The substantive point raised by Miss Checa-Dover in the appeal may be shortly stated. She submits, following the statutory road map, that having identified the relevant PCP as being that a police officer performing the Claimant's role needed to do a full range of duties, including confrontational duties and computer use, they were satisfied that (albeit late) reasonable adjustments had been made in the Claimant's case by June 2012 in the adjusted NIT role. However, the Employment Tribunal fell into error in concluding that transferring the Claimant from that to the supernumerary role (which she never in practice took up) amounted to a breach of section 21 **EqA** without more. The question was whether the supernumerary role would involve a failure to make reasonable adjustments or not. That question, the Respondent contends, was never answered by the Employment Tribunal and consequently their reasoning is inadequate; it is not **Meek** compliant.

17. In response, Mr Flanagan argues that no such finding was necessary. It was enough for the Employment Tribunal to find that the Claimant wished to remain in the adjusted NIT role and that, having been removed from that role the Claimant thought she would be faced once again with an endless battle for the appropriate adjustments to be made to enable her to do the new job (paragraph 8.37). The Employment Tribunal did not consider whether the supernumerary role was or would be a reasonable adjustment because it was unnecessary so to do.

18. In resolving that issue we return to the statutory provisions.

19. Section 20(3) **EqA** sets out three requirements of the duty to make reasonable adjustments (the duty having arisen in this case).

20. The third requirement relates to the provision of auxiliary aids.

21. The necessary computer aids were provided for the Claimant's use in her NIT role by June 2012. Plainly a similar duty arose in relation to the supernumerary role (assuming that the Respondent was entitled to transfer the Claimant to that role). In the circumstances of this case it is clear that the burden of proving that reasonable adjustments would be made in the supernumerary role before the Claimant was required to take it up lies on the Respondent, **EqA** section 136; see **Project Management Institute v Latif** [2007] IRLR 579, paragraphs 45 to 57 (Elias P).

22. The Claimant contends that the necessary aids were not in place for her return to work in the supernumerary role. The Respondent points to the 'Agreed Action Plan' prepared by Ms Philip following the mediation, which includes, at paragraph 7:

> **"There will be a risk assessment conducted prior to [the Claimant] commencing her new role."**

23. In our judgment it was necessary for the Employment Tribunal to resolve that issue in order to determine whether or not the Respondent had discharged the burden of showing that the supernumerary role would be reasonably adjusted before the Claimant took it up. This they failed to do. We cannot accept Mr Flanagan's submission that the transfer from a reasonably adjusted role (NIT) to a different role, without more, involves a breach of section 21 **EqA**. Accordingly we agree with Miss Checa-Dover that the Employment Tribunal's decision on the transfer point cannot stand. It was not enough for the Employment Tribunal simply to find that

it was reasonable for the Respondent to allow the Claimant to remain in the NIT role and then to jump to the conclusion that the transfer necessarily involved a breach of duty under section 20(3) **EqA**.

Cross-Appeal

24. Miss Checa-Dover acknowledges that if her appeal on the transfer point succeeds then that issue must be remitted to the Employment Tribunal (whether then same or a different tribunal we consider below) at which point both the section 21 and section 15 claims will be in play. To that extent the cross-appeal also succeeds.

Disposal

25. We shall allow both the appeal and the cross-appeal. Applying the recent Court of Appeal guidance in **Jafri v Lincoln College** [2014] IRLR 544 we are satisfied that we cannot determine either the section 15 or section 21 claims on the transfer point. Further fact-finding will be necessary. The case must be remitted on those questions to the Employment Tribunal.

26. The leaves the question as to whether the case should return to the Burton tribunal or to a fresh Tribunal. Mr Flanagan contends for the former course; Ms Checa-Dover for the latter. We bear in mind the approach of Burton P in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, paragraph 46. Whilst we do not for a moment doubt the professionalism of the Burton Tribunal on remission we recognise the possible perception of the Respondent that that Tribunal has made up its mind in this case in favour of the Claimant and that it may find it a difficult task to change it. In these circumstances, despite the additional expense and stress involved, that the proper course is to remit these issues to a fresh Tribunal.

27. Finally, there is an outstanding remedy hearing before the Burton Tribunal in relation to the delay point. It will be a matter for the Regional Employment Judge to direct how that matter is to be dealt with. It may be proportionate to assign that task to the fresh Tribunal in any event.