Appeal No. UKEAT/0322/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 February 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR P UNWIN — APPELLANT

(1) OLTEC GROUP TRADING LTD
(2) MARTIN McCOLLS LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA ROBINSON (of Counsel) Instructed by: Backhouse Solicitors Carlton House 101 New London Road Chelmsford Essex CM2 0PP
For the First Respondent	MS ABAH PANDYA (of Counsel) Instructed by: Qdos Consulting Limited Qdos Court Rossendale Road Earl Shilton Leicestershire LE9 7LY
For the Second Respondent	MR CRAIG BENNISON (of Counsel) Empire HR Ltd Empire House 117 Grandholm Drive Bridge of Don Aberdeen AB22 8AE

SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

DISABILITY DISCRIMINATION - Burden of proof

The Employment Tribunal had concluded that a contract of employment which stated that the Claimant was employed to work a minimum of 48 hours in fact meant a maximum of 48 hours. That finding was perverse: no one had contended for it and there was no evidence to support it and all indications were that the Claimant worked more than 48 hours a week.

The Claimant was disabled because he had been diagnosed with cancer. On being certified fit to work after a period of absence by his GP he was not allowed to return to the site he had been working at and later the principal (the Second Respondent) required a special assessment of his capability to be made. The Employment Tribunal failed entirely to mention or record the terms of section 13, 15, 41 or 136 of the **Equality Act 2010**, all of which were relevant to his claims of disability discrimination against his employer (the First Respondent) and the Second Respondent and it could not be seen from the Judgment that they had in fact applied them or reached findings of fact which inevitably led to the claims being refused.

Appeal allowed on both those points and on a finding that the Claimant had not been dismissed and not had an unlawful deduction of wages or suffered a breach of contract which flowed from the erroneous finding on his contractual terms.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant against a Decision of the East London Employment Tribunal (Employment Judge Jones and members) sent out on 8 January 2014 following a hearing from 26-28 June 2013. All parties agree that the Decision is the not the best of its kind, and it is certainly the case that findings of fact are in parts muddled, both because they are not chronological and because they appear sometimes inconsistent. It may be that this is a consequence of delays for which the Employment Tribunal are not responsible, as explained in paragraph 2 of the Judgment.

The Facts

2. Insofar as it can be ascertained, the factual background is as follows. The Claimant was born in 1949, so he was in his early 60s at the time of the relevant events. There was a claim for age discrimination, which failed and is not the subject of an appeal. In 1997 the Claimant started work as a security guard with a company called Hanningfields. He had a contract of employment, which I have not seen but which is described at paragraph 6 of the Judgment. The contract stated that he was employed to work a minimum of 48 hours over a seven-day period. The Tribunal found in the next sentence that that statement was an error and that what was meant was that he would be employed for a *maximum* of 48 hours.

3. In 2001 the Claimant was assigned by Hanningfields to be a security guard at McColls' Head Office at Brentwood in Essex, which is near to his home. McColls are the Second Respondents to this claim.

4. Two guards worked at McColls' Head Office, and the Claimant usually worked for 69 hours per week. In 2002 the Claimant signed a **Working Time Regulations** opt-out form, which enabled him to work for more than the 48 hours which are required by the **Working Time Regulations**. Those Regulations have come into force on 1 October 1998, so some time after he started his employment.

5. In October 2007 the Claimant's employment was transferred from Hanningfields to a company called Oltec Group Trading Ltd, which is the First Respondent to his claim.

6. By summer 2011 the Claimant was aware that he had prostate cancer. By virtue of that he was disabled for the purposes of the **Equality Act 2010**. In November 2011 he told his employer, Oltec, that he had the condition and that he was going to have some treatment for his cancer. Initially he used leave that was still due to him and untaken.

7. By 16 December 2011 he believed that he was fit to return to work and appeared at work, but was sent away in order to obtain a "fit note" from his GP. Unfortunately, on 17 December 2011, the very next day, the Claimant suffered an injury and broke his ankle. He was then off sick for some months and in receipt of statutory sick pay. During those months it appears that either he and/or his wife visited the McColls site, which as I said was very close by, and it seems clear that he and/or his wife were friendly with people who worked there. The Tribunal found that his wife spoke to someone called Denise, who was the receptionist at his workplace, about his health and his progress with his treatment and his recovery from his broken ankle. The Tribunal found that, from that conversation, Denise and indeed McColls as a whole got the impression that he had problems with breathlessness on climbing stairs because of his ankle. That is paragraph 17 of the Judgment.

8. On 16 April 2012 the Claimant's GP cleared him as fit to return to work, as far and his ankle and his prostate were concerned. By that stage he had been off work for six months. That is recorded at paragraph 15 of the Judgment. He immediately contacted his employer, but there was no proper response and he was not provided with any work. The Tribunal do not really explain why that was, at least in the early period, save to say that by this stage the employer had arranged that three guards should deal with the McColls contract and that there were three new people filling the role of those three guards.

9. On 3 May 2012 there was apparently a meeting between Oltec and McColls, at the McColls site, at which the Claimant's position was discussed. Mr Johnson of McColls apparently stated, as recorded in the Judgment at paragraph 29, that he, Mr Johnson, was not prepared to have the Claimant back at the McColls site with his current state of health or what he, Mr Johnson, thought the Claimant's current state of health was and that he was only prepared him back on the Sunday daytime shift. That finding is at paragraph 29 of the Judgment.

10. There is also a finding at paragraph 34 relating to McColls' attitude, though it is not clear exactly when paragraph 34 relates to. At that paragraph the Tribunal say:

> **"We find that the 2nd Respondent was happy with the status quo. They had the three man guarding system in place, which was working well. The lead and copper theft had stopped. There was no reason to change the arrangement. Also, Mr Johnson wanted the 1st Respondent [the employer] to conduct a risk assessment to have it confirmed that the Claimant was able to carry out his full duties before he would even contemplate allowing him to return to work at their site. In the absence of the risk assessment, he would only consider having him back to do the Sunday daytime shift. …"**

It is not clear to me, as I have already indicated, how the findings at paragraph 34 exactly relate to the finding at paragraph 29 that I have already mentioned.

11. On 11 May 2012, some days after 3 May, there was a telephone conversation between the Claimant and a woman called Lisa Knowles, who was the group HR manager for his employer. The content of that telephone conversation is dealt with by the Tribunal at paragraphs 23 to 25 of the Judgment, which I will read into this Decision, at least in part:

> **"23. The Claimant was becoming quite frustrated, as he was anxious to return to work. He telephoned both Respondents. By 11 May the Claimant spoke to Lisa Knowles Group HR manager for the 1st Respondent. The Claimant indicated that he was worried that he would have difficulty finding work due to his age. He asked whether there was anything that could be done. He expressed a desire to continue working [Ms Pandya, on behalf of the First Respondent, says that that clearly means working at the McColls site] and stated that he was worried about his finances. Ms Knowles told him that there was nothing that the Respondent could do for him at present. She advised that she would be able to offer a zero hours contract. This meant that he would not be guaranteed any particular number of hours. [Ms Pandya pointed out that a zero hours contract would not only mean that no hours had to be offered to him by the First Respondent, but that he would not have been obliged to take up any work offered to him.]**
>
> **24. During that conversation the Claimant was offered work at House of Fraser, Lakeside but he was not offered 69 hours there. However, what was said to him as evidenced from the transcript of the conversations between him and Ms Knowles that day, was that the Respondent wanted to avoid terminating his contract and wanted to offer him what work they had. They offered him the contract at House of Fraser, Lakeside and ad hoc work in addition to those hours to makeup to 48 hours. Ms Knowles said to him that he was more reliable as an experienced guard than some of the younger security guards and they would wish to retain him, if they could. She confirmed that they had lost some contracts with Boots and House of Fraser and so there was less work to go around. She also told him that if he accepted the contract [I assume this is a reference to the zero hours contract] he would be well placed for another more desirable position should one come up with the new contracts that they were pursuing.**
>
> **25. We find that the Claimant orally accepted the zero hours contract on the telephone and she agreed to send it to him for approval and signing. We find that during this conversation the situation was set out to him in detail. The Claimant's response was that he just wanted to earn some money, even if its only part-time hours. …"**

12. The "zero hours" contract was sent to the Claimant, and he signed it and sent it back. However, on 14 May, he wrote to his employers and said he had second thoughts and wanted to rescind his acceptance. On 18 May they wrote back, accepting his withdrawal and offering him a meeting with a view to finding him alternative work. They apparently advised him that if they could not find any more work they would have to terminate his employment for "some other substantial reason".

13. On 18 May 2012 the Claimant, without telling anyone, started work at another site with his original employers, Hanningfields. That is recorded in the Judgment at paragraph 48, some

time later in the chronology. On 6 June 2012 it appears that McColls were persuaded to allow the Claimant to return to work at their site as one of the three security guards. This followed a grievance which was in fact brought by the Claimant on 31 May, and the Tribunal record at paragraph 40 that:

> **"… on 6 June Mr Johnson had been persuaded to allow the Claimant to return to site. It would have been on the 3-man guarding arrangement as this is the way the contract was now organised. This was the main difference between what was being offered now and what the Claimant had done before his surgery. There was no promise of 69 hours work but there was an offer to return to the McColls site. …"**

The Claimant refused that offer, as confirmed in a letter dated 20 June 2012. Although there is no finding in relation to that, it seems to me that it is almost inevitable that that must have amounted to some kind of resignation by the Claimant.

The appeal

Ground 1

14. So much for the facts. I turn to the Grounds of Appeal. The first ground to deal with logically is that relating to the finding I have mentioned at paragraph 6 of the Judgment, that the contract was wrong when it said that the Claimant was employed to work a minimum of 48 hours and that it should have said he was employed to work a maximum of 48 hours. Very unfortunately, neither the Claimant nor the First Respondent have seen fit to produce the contract itself for this hearing. But the Claimant says that I can deal with this ground of appeal simply by looking at the Judgment itself and deciding that the finding I have mentioned is a perverse one.

15. Fully conscious of the high hurdle that an Appellant must climb in order to establish perversity and of how unusual such a finding is, in this case (very unusually), I am quite satisfied that the finding is indeed a perverse one for the following reasons: (1) the contract, that

is the written contract, said that the Claimant was employed for a *minimum* of 48 hours over a seven-day period. In those circumstances there had to be some reasonably solid basis for saying that the written contract was wrong. (2) As I understand it, the First Respondent did not actually put forward any positive case that it was wrong in providing that it was a minimum 48 hour employment. (3) There was no evidence that it was wrong from Hanningfield's, the people who had put forward the contract originally. (4) The Employment Tribunal found that the Claimant usually worked 69 hours per week in practice: i.e. well in excess of 48 hours. (5) As I have already recited, the Claimant was asked to sign a **Working Time Regulations** opt-out. If his maximum contractual hours were 48 hours, there would have been no need to opt out of the **Working Time Regulations**. I am afraid I simply do not understand the Employment Tribunal's reasoning that the requirement to sign the opt-out indicated that the 48 hours in the contract was a maximum. (6) The findings in paragraphs 23 and 24, which I have already set out in full, which refer to the zero hours contract not guaranteeing any particular number of hours and the offer made by the First Respondents that he would be provided with ad hoc work to make up to 48 hours, make no sense at all unless there was some obligation on the part of the First Respondent to provide 48 hours work. (7) The high point, and really the only basis for the finding, was the Claimant's own answers to questions which are recorded at paragraphs 12 and 121 of the Judgment.

16. At paragraph 12 the Tribunal said that the Claimant had confirmed in the hearing that he knew that part of the arrangement was that, if there was no work available, he would not get paid and at paragraph 121, dealing with a different matter, deduction of wages, the Tribunal said:

> **"… This confirmed that he [i.e. the Claimant] knew that there was no minimum level guaranteed hours."**

Assuming the Claimant did accept that if he worked no hours he would get no pay, that is his subjective understanding of the contract, which is of course not strictly relevant. But in any event, in answer to questions I put today, no-one has suggested that the Claimant was ever in fact not provided with at least 48 hours work at McColls until 16 April 2012. Taking all those matters into account, I am, as I say, quite satisfied that the finding at paragraph 6 is a perverse one and I set it aside. Having set that aside, what is left is the written contract.

Ground 2

17. The second ground of appeal, taking them logically, relates to the finding that the Claimant was not dismissed on 11 May 2012 in the course of the telephone conversation with Ms Knowles, which was the Claimant's case at the hearing before the Employment Tribunal. The Claimant says on the appeal that the Employment Tribunal failed to give adequate reasons for this finding and again reached a perverse conclusion.

18. I have already read paragraphs 23 and 24 relating to the telephone conversation. The Tribunal's findings about dismissal are set out at paragraphs 108 to 110:

> **"108. It is firstly our judgment that the Claimant was not dismissed.**
>
> **109. The Claimant was not dismissed in the conversation with Ms Knowles on 11 May. The Respondent was actually trying to help the Claimant. They offered him a zero hours contract. He had the option of refusing it and retaining his old contract. He initially accepted it. He had the opportunity to read the contract and sign it some days later when it arrived in the post. He was not forced to agree to it then and there on the phone. When he changed his mind some days later, he was allowed to do so. He chose to retain his old contract and the Respondent allowed him to. The Claimant never resigned as a result of this conversation or the offer of the zero hours contract. He continued to advocate for work and the Respondent continued to look for work for him and did offer him jobs, all of which he refused.**
>
> **110. The Claimant found another job and decided to take it up. He never informed the 1st Respondent that he had done so. …"**

19. The Claimant now says that the basis for the suggestion that he was dismissed on 11 May is that, in the course of that conversation, the First Respondent was indicating clearly that they

were not bound by the contract and that that can be, in some circumstances, sufficient to amount to a dismissal even if it does not lead to a resignation.

20. This submission is an unattractive one given that the Claimant appears to have maintained subsequently that he was still employed under his original terms and indeed that he raised a grievance, as I have mentioned. However, in making their findings the Tribunal proceeded on the basis of a finding that the Claimant was not entitled to a minimum 48 hours per week (or I must assume that they proceeded on that basis) and I have found that they were wrong when they made that finding. Furthermore the findings of fact about what happened on the telephone on 11 May are, I think I can fairly say, confused and inconsistent. I am also conscious, as a matter of practicality, of the difficulties which might ensue if I uphold the finding on dismissal but remit a number of other matters for reconsideration. In the circumstances I am going to allow this ground of appeal too.

21. The Employment Tribunal will have to consider again whether the Claimant was dismissed in the course of the telephone conversation on 11 May 2012 and, if he was, what the consequences of that finding might be.

Ground 3

22. The third ground of appeal relates to disability discrimination. There is no dispute that the Claimant was disabled. There is no dispute that he was not allowed to return to his original workplace at McColls when he was fit to work on 16 April 2012 after a period off work which included time off as a consequence of his cancer.

23. There were findings against McColls, which are set out at paragraphs 29 and 34, which I have already read into the Judgment, namely that Mr Johnson of McColls was saying that he would not have the Claimant back on site with his current state of health and that he required a risk assessment before he would have him back on site. As I have already mentioned, I am not sure how those two findings relate to each other.

24. The Claimant says that in all these circumstances there was a *prima facie* case of disability discrimination against both the First Respondent under section 13 of the **Equality Act 2010** and/or section 15 of the **Equality Act** and against the Second Respondent under either or both of those provisions read with section 41 of the **Equality Act** and that, under section 136, the onus was on the Respondents to show that there had in fact not been any contravention of those sections.

25. The Employment Tribunal rejected all claims of disability discrimination but unfortunately they failed entirely to direct themselves as to the law or to remind themselves of the provisions of any of the sections that I have mentioned and indeed, at paragraph 86, they wrongly state that the burden is on the Claimant to prove his case. Those failures, of course, do not mean that an appeal will inevitably succeed if this Tribunal can be confident that the Employment Tribunal has in fact applied the provisions correctly or that, on the basis of proper findings of fact, their conclusions must be right.

26. The Employment Tribunal's reasons for rejecting the disability discrimination claims are set out at paragraphs 91 to 107. There is certainly no analysis in those paragraphs consistent with a clear consideration of the requirements of the sections which I have mentioned. Again, I regret to say that the reasoning in those paragraphs, such at it is, is muddled.

27. So far as the First Respondent is concerned, reliance is placed in particular on paragraphs 101 and 102. Paragraph 101 says:

> **"101. In respect of the 1st Respondent, they tried at all times to help the Claimant return [to] work. They made no assumptions about this ability or his condition.**
>
> **102. The 1st Respondent did not make any decisions about the Claimant's employment based on his disability."**

Paragraph 101 is not really consistent with all the factual findings, in particular the finding that the First Respondent really did nothing at all to help the Claimant return to work until 11 May 2012, and paragraph 102 is not really to the point, particularly in relation to the allegation of discrimination under section 15 of the **Equality Act**. In those circumstances it seems to me that, regrettably, the appeal in relation to disability discrimination as against the First Respondent also has to be allowed.

28. So far as the Second Respondent is concerned, the particular paragraphs that they rely on are 97 and 99. Paragraph 97 says this:

> **"97. The 2nd Respondent wanted the 1st Respondent to conduct a risk assessment to gauge whether or not the Claimant could perform the functions of the job. In our judgment Mr Johnson never stated that he did not want him to return to the McColls site. [That finding is slightly difficult to reconcile with the finding at paragraph 29 that I have referred to a number of times, which states that Mr Johnson said that he was not prepared to have the Claimant back on site] What he wanted was for the 1st Respondent to be able to reassure him that the Claimant was fit and able to do the job and that he would be alert, ready and able, throughout his shift. As long as they were able to confirm that, the 2nd Respondent was content for the 1st Respondent to post whomever to the site as security staff. That could have included the Claimant. However, until they were able to do so, Mr Johnson preferred if the Claimant only did the Sunday shift, as he knew that the Claimant would not be alone if he became unwell."**

Paragraph 99 says:

> **"99. After the meeting on 3 May … Mr Johnson was content for the Claimant to resume working at the site on the Sunday day shift. From 6 June he agreed that the Claimant could resume his duties on a full-time basis. The Claimant was still a disabled person. The 2nd Respondent was assured that … the Claimant was now fit and able and so they agreed for him to return to work. The Claimant refused to take up the offer mainly because he already had another job. …"**

I should also mention that paragraph 97 may, but it is not clear how, relate back to paragraph 95, which itself refers to the evidence about the Claimant's wife telling the receptionist at McColls that her husband had difficulty breathing when he was climbing steps. Notwithstanding that, it seems to me that the Employment Tribunal has not really grappled with the question why the Second Respondent required special reassurance in the case of the Claimant, which it seems was not required in the case of any other security guard, and whether that arose in consequence of his cancer and whether, if so, it could be somehow justified in any event. Again, regrettably, it seems to me that I have to allow that ground of appeal as against the Second Respondent also.

Ground 4

29. The final ground of appeal relates to a claim for unpaid wages because the Claimant received nothing from the First Respondent even after he was fit to work on 16 April 2012. Given my finding about the contractual provisions, the Claimant would have been entitled to pay for 48 hours work a week during the period 16 April 2012 to 11 May 2012, the putative dismissal date, or 18 May 2012, the date when he made himself unavailable for work by going off and working for someone else. The First Respondent says, and it needs to be recorded because they may want to run the point later, that he was offered work which he refused by the First Respondent, and that obviously could be relevant to the claim for unpaid wages. But the Tribunal rejected the claim because of their finding about the contractual provisions, which I have already said in my view was wrong. So that appeal must be allowed, and that claim must go back again.

Disposal

30. So it will be necessary for the Employment Tribunal to consider the case again and to consider the Claimant's claims for disability discrimination as against the First and Second Respondents, for unfair dismissal and dismissal by reason of disability discrimination as against the First Respondent and for unlawful deduction of wages as against the First Respondent.

31. Given that the Claimant obtained other work on 18 May 2012, it may be that his compensation overall is somewhat limited in amount. Bearing that in mind, I would urge the parties please to consider very carefully the question of settling this unfortunate litigation before further time and expense are incurred in what is now a very stale claim.