Appeal No. UKEAT/0567/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 December 2013
Judgment handed down on 15 May 2014

Before

HIS HONOUR JUDGE BIRTLES

MRS R CHAPMAN

MR M CLANCY

MR NEIL MORGAN — APPELLANT

ARMADILLO MANAGED SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAKE DUTTON (Solicitor-Advocate) Messrs Waldegraves Flat 3 124 Fleet Road London NW3 2QX
For the Respondent	MR DANIEL TATTON-BROWN (Counsel) Instructed by: IBB Solicitors Capital Court 30 Windsor Street Uxbridge UB8 1AB

SUMMARY

DISABILITY DISCRIMINATION – Disability related discrimination

Section 13(1) of the **Equality Act 2010** requires actual or constructive knowledge to permit a claimant to succeed in a claim for direct disability discrimination: **Gallop v Newport City Council** [2013] EWCA Civ 1583 followed. The Appellant was not permitted to resile from a concession to that effect before the Employment Tribunal. Appeal dismissed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the judgment and Reasons of an Employment Tribunal sitting at Watford on 18-21 June 2012. The reserved judgment and Reasons were sent to the parties on 14 August 2012. The Employment Tribunal made a number of findings, but this appeal is only concerned with the issue of disability and the Respondent's knowledge of it. The Employment Tribunal held (a) that the Claimant had by 12 May 2011 become a disabled person: judgment, paragraph 5; (b) the Respondent did not know and could not reasonably have been expected to know by 12 May 2011 or by 19 August 2011 that the Claimant was disabled: judgment, paragraph 6.

2. The significance of the date of 12 May 2011 is that on that date the Claimant's manager wrote to him, saying that he wanted to discuss certain events involving the Claimant in Gibraltar on 14 and 15 April 2011. The significance of 19 August 2011 is that was the day when the Claimant's line manager informed him that he would not be paid commission for May-July 2011.

3. The Appellant was represented by Mr Jake Dutton, who is a solicitor-advocate. The Respondent was represented by Mr Daniel Tatton-Brown of counsel. I am grateful to both advocates for their written and oral submissions.

4. The hearing took place on 13 December 2013. At the conclusion of the hearing I reserved judgment.

The material facts

5. The judgment and Reasons are substantial and the findings of fact are contained at paragraph 19.1-19.65. It is not necessary to set them out in great detail because, apart from the disability discrimination claim, there was a claim for breach of contract, commission, and constructive unfair dismissal.

6. Suffice it to say that the Appellant is the supplier of integrated information technology systems. At the time of the Response it had 18 employees. Mr Mark Newns was the chief executive officer of the company. Mr Khan was the technical director and Mr Asif Yacoub was a member of the sales staff.

7. On 12 May 2010 the Appellant became an employee of the Respondent. For the purposes of this appeal the terms and conditions of his contract of employment do not matter.

8. On 14 April 2011 the Respondent travelled to Gibraltar for the second time that week for a business meeting with a client called Victor Chandler. There was a dinner in the evening. Following the dinner, the Claimant was attacked on his way into a bar, and a business colleague spent some of the night with him at the hospital. The following morning the Claimant did not attend the meeting at Victor Chandler. He had been badly injured.

9. The Appellant was not fit to work the following week. On 19 April 2011 the Respondent was at Northwick Park Hospital receiving treatment for his injuries. There was an exchange of text messages between Mr Newns and him during which the Appellant kept Mr Newns informed of his medical situation. Mr Newns expressed sympathy.

10. On probably 26 April 2011 the Respondent was signed off sick for a period of two weeks. He was signed off sick for a further period of two weeks from 10 May 2011. Mr Newns received the sick certificate from the Appellant on 11 May 2011 and wrote to Dr Bhargava, the author of the certificate, noting that the certificate included the word "diplopia", which he understood meant double vision, but he could not read the first two words on the certificate before the word "diplopia". These words read "post assault".

11. On 12 May Mr Newns wrote to the Appellant by e-mail to say that he would want to discuss with him the events that occurred in Gibraltar on 14 and 15 April 2011 and he said that the feedback he had received was that his behaviour in front of the client was unacceptable. He said he would send him a letter inviting him to a disciplinary hearing on 24 May. His pay would now be only at the rate of statutory sick pay until he returned to work. The Appellant disputed that the disciplinary process was the right thing to do. An investigation of what had happened in Gibraltar in respect of the Appellant's drinking took place but no investigation as to the assault. At no time has the Respondent disputed that the Appellant was assaulted in Gibraltar in circumstances which had nothing to do with his work there.

12. On 20 May the Appellant sent an e-mail to Mr Newns to tell him that he had been unable to attend the disciplinary hearing because of medical reasons. He raised a grievance regarding sick pay. The disciplinary hearing was postponed and never took place. There was correspondence between the two men. The grievance was dismissed. A further grievance was submitted on 6 July 2011. Mr Newns responded by letter dated 12 July saying he expected the Appellant to return to work on 18 July and he proposed to deal with the Appellant's outstanding disciplinary proceedings at that time. There was no further evidence before the Tribunal of any authorisation for the Appellant to remain off sick, but the Tribunal inferred that that was the case because he did not return to work.

13. On 17 August 2011 the Appellant requested details of his sales figures so that he could calculate his team performance-based commission payment due to be paid on 26 August 2011 in accordance with the contract. By e-mail dated 19 August 2011 Mr Newns replied and stated that payment of commission was not payable given that the company was using its discretion not to pay the Respondent's salary at that time.

14. On 24 August 2011 Mr Newns sent an e-mail to the Respondent saying that it seemed it was unlikely that the Appellant would be able to return to work for a further period and that the company should therefore seek independent medical advice as to how long he was likely to remain off work and whether there was anything the company should be doing to assist his return.

15. By a letter dated 1 September 2011 the Appellant resigned from his employment with the Respondent.

The Employment Tribunal's conclusions on disability discrimination

16. The Tribunal said this:

> **"46. We now turn to disability discrimination. The question of disability was conceded. There was evidence presented to us of the Claimant's disabling illnesses. There was a medical report by Dr Avie Luthra, a consultant psychiatrist [527-543]. Dr Luthra conceded that the claimant has a reactive depression disorder, not post-traumatic stress disorder, and that that condition began in April 2011. The tribunal referred to Dr Luthra's conclusions at paragraph 5.1.1 [530] and 5.1.4 [531], although we read the whole report. The claimant also suffers from diplopia and a report in that connection was provided by Mr Matthew Starr of the London Eye Clinic [544-577]. Mr Starr diagnosed the claimant as suffering from psychogenic monocular diplopia, which we interpret to mean double vision in one eye caused by psychological rather than physical effects. Mr Starr was clear that the condition resulted from the assault on the claimant in April 2011. Both of these conditions, we are satisfied, are long-term conditions and that the claimant is therefore disabled by them.**
>
> **47. The parties were agreed that, for the claimant to succeed with his disability discrimination complaints, it was necessary that the respondent knew that the claimant was disabled. We are satisfied that the information available to the respondent in May 2011 was not sufficient to enable Mr Newns or anyone else at the respondent to conclude that the claimant was then disabled. Mr Newns had available a medical certificate which referred to diplopia. This**

might have suggested for the first time to Mr Newns that the claimant was likely to be off sick for some time, but there is no reason for it to make him think that the claimant's condition was likely to last 12 months. Indeed we are sure that Mr Newns did not know nor can he be criticised for not knowing that the claimant was then disabled. It would require medical evidence in the form that was presented to us to be available at the time for it to be said that it was likely that those conditions were going to affect the claimant for more than 12 months and that evidence was simply not available to Mr Newns at that time.

48. However we looked at the position again, as at the date of the decision to stop the claimant's commission payments, since the complaints of disability discrimination are the respondent's failure to pay to the claimant in full whilst he was off sick and the failure to pay him his commission. We have criticised the respondent for not taking steps earlier than they did so in August to obtain information about the claimant's condition. The position remains in our view that Mr Newns did not know in August that the claimant was disabled by either of the conditions or both of them. More difficult is the question whether or not he ought to known. On balance we think that that is expecting too much of Mr Newns at that stage. The difficulty is that the medical evidence is presented to us on the basis of examinations of the claimant in May 2012. It is, it seems to us, speculative to say whether or not Mr Newns ought to have obtained reports of that quality prior to making his decision in August 2011. We do not think that it can reasonably be said that Mr Newns ought to have known that in August 2011 that the claimant was disabled by either condition. We make that decision on the balance of probabilities.

49. It follows that the complaints of disability discrimination must fail. They were put in the alternative as complaints of direct discrimination or discrimination arising from disability. It is clear that knowledge of a disability is required for the purposes of a complaint of discrimination arising from disability; see section 15(2) Equality Act 2010. The parties agreed that knowledge was required for the purpose of a direct discrimination claim and reference was made to *London Borough of Lewisham v Malcolm*.

50. In case we are wrong about the question of constructive knowledge in August we briefly considered whether or not it could be said that the decision to deny the claimant his commission was a decision made because of something arising in consequence of the claimant's disability. We think that this claim would fail on that basis. We think that commission was denied to him because the claimant was not working and he was not working because of the consequences of the accident. The claimant was not off work because of the consequences of his disability."

The grounds of appeal

17. At a preliminary hearing on 8 May 2013 before a full panel of the EAT, it was ordered that grounds 1 and 3 of the Amended Notice of Appeal be set down for a full hearing and all other grounds were dismissed. There are therefore only two grounds of appeal before us. We take each in turn.

Ground 1: *Is knowledge required for a claim for disability discrimination under section 13(1) of the* ***Equality Act 2010***?

18. This question has two parts in this case. The first relates to the concession made by the Respondent's solicitor, a Mr A Berk, who appeared for him before the Employment Tribunal. As the Tribunal record at paragraph 49 of their judgment:

> **"The parties agreed that knowledge was required for the purpose of a direct discrimination claim and reference was made to *London Borough of Lewisham v Malcolm*."**

19. Mr Dutton asks us to permit the Appellant to resile from that concession made by his legal representative. The law relating to the circumstances in which the EAT will permit a party to resile from a concession in the Employment Tribunal has been the subject of a number of reported cases. It is sufficient to refer to **Kumchyk v Derby City Council** [1978] ICR 116; **Jones v Governing Body of Burdett Coutts School** [1998] IRLR 521 at pages 44B-F per Robert Walker LJ; **Glennie v Independent Magazines UK Ltd** [1999] EWCA Civ 1611 at paragraphs 10-16 per Brooke LJ and Laws LJ at paragraph 18.

20. The authorities have been usefully distilled by HHJ McMullen QC in **Secretary of State for Health & Anr v Rance & Ors** [2007] IRLR 665.

21. Mr Dutton made submissions on why the concession should be permitted to be withdrawn in this case.

22. Mr Dutton relies upon what HHJ McMullen QC said in **Rance** at paragraph 50(6). In particular he relies upon sub-paragraphs (6)(c), 6(e) and 6(g). We take each in turn.

23. Sub-paragraph 6(c) is that the new point enables the EAT plainly to say from existing material that the Employment Tribunal judgment was a nullity, for that is a consideration of overwhelming strength. For the reasons we give later in this judgment, we do not think that the Employment Tribunal judgment was a nullity. We think the Employment Tribunal was correct in law in accepting the agreed position of the parties, that knowledge, actual or constructive,

was necessary for a Claimant to succeed in a claim for direct disability discrimination under section 13(1) of the **Equality Act 2010**.

24. Sub-paragraph 6(e) is that the EAT can see an obvious knock-out point. There is no such obvious knock-out point in this case for the same reason. The Employment Tribunal was correct in accepting the concession made by the parties that knowledge was a requisite to succeed under section 13(1) of the 2010 Act.

25. Sub-paragraph 6(g) is that it is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist Tribunal is required. We accept that no further factual investigation is required. Because the Employment Tribunal were correct in accepting the concession, we ourselves decide the point. This ground does not apply in this case.

26. Our conclusion is that there are no "exceptional circumstances" in this case which justify us permitting the Claimant to resile from the concession made on his behalf before the Employment Tribunal.

27. The second question under ground 1 is whether or not knowledge is required for a Claimant to succeed under section 13(1) of the **Equality Act 2010**. That provision says this:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

28. Mr Dutton relies, in particular, upon various passages in **Lewisham Borough Council v Malcolm** [2008] 1 AC 1399 at paragraphs 25 and 29 per Lord Scott; paragraph 36 per Lord Bingham; and paragraphs 113-114 per Lord Brown. He also relies on

Gallop v Newport City Council [2013] EWCA Civ 1583 at paragraphs 2 and 36 per Rimer LJ. That case concerned the concept of direct discrimination under the **Disability Discrimination Act 1995**.

29. We agree with Mr Tatton-Brown that **Malcolm** is an indirect discrimination case and not a direct discrimination case. In any event we can see nothing in the language of the judgments which precludes the view that knowledge is also required for a direct discrimination case: see the judgments of Lord Bingham at paragraphs 17-18; Lord Scott at paragraph 39; Baroness Hale at paragraph 86-87; Lord Brown at paragraph 113; and Lord Neuberger at paragraphs 161-163.

30. The case of **Gallop**, supra, is a direct discrimination case and, as Rimer LJ stated in paragraph 2 of his judgment, although the questions raised by the appeal concerned the **Disability Discrimination Act 1995**, they are also relevant to the like disability provisions in the **Equality Act 2010**. At paragraph 36 Rimer LJ says this:

> **"I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position."**

Both Sir John Mummery and Longmore LJ agreed with this judgment in its entirety. In his skeleton argument Mr Tatton-Brown referred to **Amnesty International v Ahmed** [2009] ICR 1540 at paragraphs 32-37 per Underhill P.

31. It seems to us that these two cases are determinative of the question we have to decide. In any event, we are bound by the decision of the Court of Appeal in **Gallop**. We accept it as a correct statement of the law. It follows that knowledge is a requirement for a Claimant to prove direct discrimination under section 13(1) of the **Equality Act 2010.**

Ground 2: Was the failure to pay the commission because of something arising in consequence of disability?

32. This ground of appeal relates to what the Tribunal said at paragraph 50 of its Reasons, which we have set out above. The Tribunal's conclusion was:

> **"We think that commission was denied to him because the claimant was not working and he was not working because of the consequences of the accident. The claimant was not off work because of the consequences of his disability."**

33. This claim arises under section 15 of the **Equality Act 2010**. This provision states this:

> **"(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."**

34. Mr Dutton submits that the Appellant was not paid any commission because he was not at work. He was not at work because he was disabled.

35. We prefer the submission by Mr Tatton-Brown. The preliminary hearing did not permit the Appellant to appeal the Employment Tribunal's findings that the Respondent did not know, and could not reasonably be expected to know, that the Claimant was disabled. See Reasons,

paragraph 48. That (unchallenged) finding defeats this claim: see section 15(2) of the **Equality Act 2010**.

36. In the alternative, the finding as to the reason for not paying the commission – that the Appellant was not working – is a finding of fact, as is the finding that that was a consequence of his accident rather than his disability. Mr Dutton does not submit that that finding was perverse. It was not.

Conclusion

37. For these reasons the appeal is dismissed.