Appeal No. UKEAT/0610/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 July 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR B BEYNON

MR I EZEKIEL

NEWHAM SIXTH FORM COLLEGE — APPELLANT

MISS NATALIE SANDERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MATHEW GULLICK (of Counsel) Instructed by: Berry Smith LLP 1 Northumberland Avenue Trafalgar Square London WC2N 5BW
For the Respondent	DEBARRED

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

The Employment Tribunal did not apply the structured approach in **Rowan** and **Ashton** to the Claimant's claim for reasonable adjustments, or show that it considered s.4A(1) or (3) **Disability Discrimination Act 1995**, and did not answer a crucial question in its list of issues. The judgment and the consequential remedy judgment were set aside. Case remitted to a different Employment Tribunal.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the duty to make reasonable adjustments for a disabled person. It is the Judgment of the court to which all members appointed by statute in their diverse specialist experience have contributed. We will refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Respondent in those proceedings against the Judgment of an Employment Tribunal sitting at East London Hearing Centre under the chairmanship of Employment Judge John Warren over four days and a day in private, sent with reasons on 11 September 2012. The Claimant represented herself. The Respondent was represented by Mr Mathew Gullick of counsel.

3. The Claimant claimed that she had been discriminated against in the failure by the Respondent to make reasonable adjustments for her disability, which was depression; that she had been dismissed for a reason related to her disability. The Respondent denied those points and took issue on certain jurisdiction points. The Tribunal found in favour of the Claimant on her reasonable adjustments claims but dismissed her disability-related claim. The Respondent appeals against the Judgment adverse to it.

4. This case betrays a very long adjectival history. The event took place in the latter half of 2007. There was a substantial number of procedural stages, two of which were findings against the Respondent on procedural issues. There was a long delay in setting the case up because a medical report was being sought. Roughly five years on from the relevant date the Tribunal delivered its Judgment. It then went on to order a remedy hearing and after two days and a further day in private in March and April 2013 it delivered its reserved Judgment on

19 June 2013, making an award to the Claimant of £216,108.92. No appeal has been made against that Judgment for reasons which we will explain later.

5. As to the current proceedings, the Claimant is debarred for she failed to comply with orders of the EAT. On the sift of this matter, HHJ Birtles sent the case to a full hearing because, in his opinion, the Tribunal had failed to deal properly or at all with the two leading authorities to which we will turn.

The issues

6. The issues as presented by the Employment Tribunal so far as are now relevant on appeal are these:

> **"3. […]**
>
> **(ii) Did the Respondents fail to make reasonable adjustments? The PCPs which allegedly placed the Claimant at a substantial disadvantage are:**
>
> **(a) the requirement to attend work regularly at 8.45am and**
>
> **(b) the requirement to follow the Respondent's absence/lateness reporting procedures, namely to telephone the Respondent in the event of potential lateness or absence.**
>
> **4. […]**
>
> **(b) as to the Respondent's knowledge, actual or constructive as to the Claimant's condition and of any substantial disadvantage suffered by the Claimant by the PCP and**
>
> **(c) the Tribunal will have to consider the reasonableness of the claimed adjustments."**

The Respondent conceded the Claimant was disabled during the course of the hearing.

The legislation

7. The legislation is not in dispute, although the particular provisions were not cited by the Employment Tribunal and so we will:

> **"4A. - (1) Where -**

(a) a provision, criterion or practice applied by or on behalf of the employer, or

[…]

places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.

[…]

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know […]

(b) in any case, that that person has a disability and likely top be affected in the way mentioned in subsection (1).”

8. The Tribunal was asked to consider the issues set out above. The Tribunal cited the **Disability Discrimination Act 1995** but did not cite s.4A, which, as we will show, put it at particular risk in this case in applying the statutory tests. As will also be seen, the Tribunal did not answer the issue as to knowledge in respect of s.4A(3)(b), which task it had set itself to do.

The facts

9. The treatment of the facts in this case will be somewhat limited, given that we have decided to accept Mr Gullick’s submissions, overturn this Judgment and send it to a freshly constituted Employment Tribunal. The Claimant was about 25 when she joined the Respondent, which is a sixth form college with over 350 staff and some 3,000 students, as an A-level tutor, a new role in the college. Her career there was short-lived. She did not get past her probationary period, which was for six months. So, she was employed on 2 July 2007 until 28 February 2008. She was dismissed on 17 December 2007 and not required to carry out duties during her notice period. She was, it is conceded, disabled by reason of mental impairment, that is a depressive illness from which she had suffered since 2005.

10. The Claimant contended that the Respondent had applied a PCP in the form set out in paragraph 3 of its Judgment. There are only two. In detailed particulars, she advanced about eight adjustments which the Respondent ought reasonably to have made in order to prevent the

substantial adverse effect upon her of the PCP. The Tribunal went through each of these and found that the Respondent was under a duty to make adjustments in respect of its PCP and that it had failed so to do.

11. Within its Judgment there are two suggested reasonable adjustments that the Tribunal held were to do with the claim for disability-related discrimination (see paragraph 51 of its Judgment), which included not dismissing the Claimant. Since these aspects of the claim were dismissed and not appealed or cross-appealed by the Claimant they form no further part, leaving seven adjustments which the Tribunal dealt with.

12. The start of the Tribunal's analysis of the Respondent's duty was to consider what was in the mind of the Respondent's staff, its principal actors in this drama. There is frequent reference beginning in paragraph 40 to what did or did not enter the minds of the Respondents. There is also frequent reference to tests that would be familiar in an unfair dismissal case. That is: taking steps a good employer should have done (see paragraph 41) and dealing with good practice in what it frequently referred to was the approach of the Respondent, sometimes depicted as rigid and resistant (see paragraph 52). There are also references to what are prudent steps to have been taken (see paragraph 43).

13. The closest the Tribunal gets to citing the statutory test is as follows:

> **"All of these matters, to some extent, and if looked at as a whole, do amount to reasonable adjustments which the Respondents had a duty to make to alleviate the disadvantage caused by the Claimant's depression."**

If that is the sole direction it gave itself as to the statutory test, it can be seen that it is incorrect. The use of the word alleviate might equate to prevent but there is no finding as to what the disadvantage caused to the Claimant by her depression was, nor as to whether it was

substantial. The introduction of the words 'to some extent' also are an interpolation into the statute.

14. The Tribunal in that paragraph cites a portmanteau approach to the reasonable adjustments sought by the Claimant. Giving credit to the Tribunal for taking a broad approach to the two PCPs does not remove from it the duty to make a finding under the statute. Initially the approach taken by the Respondent was to look at each of the adjustments and to see whether each, separately, would have been a reasonable adjustment to make in respect of one or other of the two PCPs.

15. It then went on to look in paragraph 56 at what it describes as some of those matters or a combination of one or more with a view to ameliorating the effects on the Claimant of the PCPs. Mr Gullick does not say that it is wrong for a Tribunal to look at a number of adjustments together, which should be made in a given case, to reduce the substantial disadvantage placed upon a disabled employee by a PCP. However, the language of paragraph 56, he says, and we agree, indicates an imprecise focus by the Employment Tribunal on what should have been the statutory test.

16. The Tribunal in passages dealing with each of these adjustments, makes very substantial criticisms of the approach taken by the Respondent's lead officers: what was in their minds, what they considered. Nowhere is there a consideration of the objective effect of the measures which could have been taken and whether any of them or all together would have prevented any substantial adverse effect on the Claimant. Mr Gullick contends that on those findings the Tribunal went wrong in three material respects and we will deal with them in turn.

The Respondent's case

17. The first contention is that the Tribunal misapplied the law. Conveniently, as one would expect from such a source, Langstaff P has drawn together the relevant law in one Judgment in **Royal Bank of Scotland v Ashton** [2011] ICR 632. Mr Gullick contends that this is the complete statement of the law for the purposes of this appeal and the Tribunal got it wrong. The most succinct summary is contained in paragraph 24:

> **"Thus, so far as reasonable adjustment is concerned, the focus of the Tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought process or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."**

18. That comes at the end of a passage of reasoning, all of which is relevant to the present case. The review of the authorities, including **Tarbuck v Sainsbury's Supermarkets Limited** [2006] IRLR 664, requires an assessment of the effects, and an objective approach rather than a subjective one drawing upon what was in the mind of the relevant managers at any given time. The President says that there must be a close focus on the wording of, here, s.4A. No general approach should be taken but a specific one by reference to this disabled person and to a comparator who does not have that disability. The process by which an employer comes to a conclusion on this hypothesis not to make an adjustment is not relevant. It is the actual decision and its effect objectively.

19. Of particular importance is the endorsement of the principles set out in **Environment Agency v Rowan** [2008] ICR 218 in the following passage:

> **"[…] an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to s.3A(2) of the Act by failing to comply with s.4A duty must identify:**
>
> **(a) the provision, criterion or practice applied by or on behalf of an employer, or**

(b) the physical feature of premises occupied by the employer (that, of course, is not relevant to the present case),

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant."

20. That Judgment of HHJ Serota QC does require a structured analysis of each of the steps. We accept Mr Gullick's contention that none of those steps was taken. The summary of the Tribunal's approach to these matters in paragraph 58 pays no attention to the statutory test nor to its interpretation in **Rowan** as applied in **Ashton**. The Tribunal said this:

"We found that the Respondents dealt with the Claimant with a particularly closed mind and they have considered the question of reasonable adjustments for these proceedings with a similarly closed mind. The duty to make a reasonable adjustment expects an employer to view the employee's position in a positive and creative way and with a purposive approach to enable reasonable adjustments to be implemented. The Respondent's approach was negative."

21. We conclude that the Tribunal's approach illustrated there is flawed, for it pays attention to the subjective considerations so eschewed by Langstaff P in **Ashton**. One cannot help noticing in this Judgment the very heavy criticism of the three officers of the Respondent who came before the Tribunal and gave evidence, and the adverse view taken of them during the hearing, as Mr Gullick says, infecting the Tribunal's view of the actions taken in 2007.

22. This is illustrated by Mr Gullick's second point, which is that focusing upon the treatment of the Claimant by way of assertions that the Respondent had a closed mind is, again, a subjective view.

23. Furthermore, the Tribunal was unfaithful to its duty to determine the issues which it had identified for itself. There is no finding as to the Respondent's knowledge, actual or constructive, as to the Claimant's condition, nor of the particular finding which is required to be made once the point is raised under s.4A(3), which is not only that the Claimant has a disability,

but as to the way in which it is likely to be affected by the PCP which she identified. The treatment of this central issue in the case is wholly inadequate:

> **"55. […] The Tribunal find that the Respondents were aware, or should have been aware, that the Claimant was disabled as of 21 August 2007 (or 6 September 2007) at the latest that a duty arose to make reasonable adjustments."**

24. Secondly, the Tribunal has not carried out its duty to determine the issue as to what substantial disadvantage the Claimant suffered, and as to how it would be prevented by any of the eight or so adjustments proffered by the Claimant. So, that central issue to be determined remains undetermined by this Tribunal. In our judgment this Judgment is fatally flawed and cannot stand and we set it aside.

Disposal

25. The nest issue is what steps should now be taken. The height of Mr Gullick's ambition is to have a rehearing before a differently constituted Employment Tribunal. He cites the approach we should take set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, which is to consider all of the factors. We reached the conclusion that this Judgment is fatally flawed. We agree with Mr Gullick that very substantial criticism is made of the three principal witnesses for the Respondent, which would make it unpalatable for the Tribunal to have to approach them with a fresh mind. From the perspective of the Respondents they are bound to feel that they may get the same result. There is always a problem when remitting a case, that the Tribunal may have a second bite at the cherry.

26. This case will be taken up by a fresh Employment Tribunal. It is imposing too much of a human burden on this professional Tribunal for it to have to consider again such firm conclusions as it has already made. There is no utility in preserving the same Tribunal. It is already a year since it adjudicated on this matter. A Tribunal will have to consider matters now

five or six years from the relevant date. The hearing will be the shorter, since there is no appeal against the disability-related claim, and the direction on law which we gave will enable a fresh Tribunal with the assistance of this Judgment to reach a clear conclusion. The Tribunal is to consider most carefully the whole of the Judgment in **Ashton** but in particular paragraphs 2, 12 to 20, 22 and 24. The list of issues remains the same and the list of adjustments remain the same bar the two which on the Tribunal ruled against the Claimant on and which will not form part of any hearing.

27. There then remains the remedy Judgment. Mr Gullick submits that that cannot stand for it is dependent upon the liability Judgment. As a matter of principle, we agree with that, but as a matter of application as well in this case, it is clear that one follows the other. The first Judgment makes express reference to the sequential steps as a result of its Judgment, it gives directions as to the remedy hearing and the remedy Judgment itself notes that the Tribunal is reassembling in order to consider the remedy following the reserved Judgment. There is, at the moment, no outstanding appeal although the time for doing so is not expired.

28. The correct approach, it seems to us, is that the decision on remedy relates to the finding by the Tribunal as to the adjustments, which the Tribunal has upheld. A fresh Tribunal may make a decision on these adjustments in a different way. It may dismiss them, it may uphold one or two, but in any event this remedy Judgment, depending as it does on a Judgment which we have set aside cannot stand and we will set aside this Judgment too.

29. We would very much like to thank Mr Gullick for his help. We have taken more than usually an interventionist approach in this case because the Claimant is debarred, but we are satisfied that these arguments are sound.