Appeal No. UKEAT/0355/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 January 2014
Judgment handed down on 18 February 2014

Before

HIS HONOUR JUDGE PETER CLARK

MR G LEWIS

MRS L S TINSLEY

LONDON UNDERGROUND LTD — APPELLANT

MELANIE O'SULLIVAN (AS PERSONAL REPRESENTATIVE OF MR M O'SULLIVAN (DECEASED)) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS REBECCA THOMAS (of Counsel) Instructed by: Eversheds LLP Kett House Station Road Cambridge CB1 2JY
For the Respondent	MR KEVIN HARRIS (of Counsel) Instructed by Hanne & Co Solicitors St John's Chambers 1c St John's Hill London SW11 1TN

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

UNFAIR DISMISSAL – Reasonableness of dismissal

Employment Tribunal finding of capability unfair dismissal upheld. However, reasonable adjustment question remitted to same ET for reconsideration. EAT decisions in **Romec**, **Ashton** and **Foster** (not cited below) considered.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (Central) Employment Tribunal. The parties are Ms O'Sullivan, personal representative and widow of Mr M O'Sullivan, deceased, and London Underground Ltd, Respondent. This is the full hearing of an appeal by the Respondent against the Judgment of an Employment Tribunal chaired by Employment Judge Ms A Stewart, promulgated with Reasons on 10 May 2013, upholding the claims of a failure to make a reasonable adjustment contrary to the **Disability Discrimination Act 1995**, as amended and unfair dismissal.

The facts

2. The deceased was a long-standing loyal and committed employee during his 23 years of service. At the relevant time he was a station supervisor. Due to a number of life events he became clinically depressed. His role involved 80 percent safety critical duties. He commenced a period of sick absence for depression on 30 December 2008. He was prescribed medication for his condition. Occupational Health (OH) were involved. Assessments on 12 February and 25 May 2009 led to advice that he was not fit to perform safety critical work. Further assessments took place on 7 July and 19 September 2009 and 17 March and 7 April 2010.

3. In August 2009 Mrs Ani took over as his line manager. She met with the deceased and his union representative for the first time on 21 September and again on 22 October. Whilst he was anxious to get back to work he remained on medication.

4. On 1 December 2009 he was referred to the Respondent's redeployment unit to assist in looking for another suitable position. The normal time spent in the unit was 13 weeks. On

19 November he had been told that if he was not fit to resume full duties Mrs Ani would need to consider medical termination of employment. She did not meet with him whilst he was in the unit.

5. Following a further occupational health report dated 7 April 2010, which confirmed that safety critical restrictions would continue to apply, a case conference meeting was held with Mrs Ani on 16 April. The deceased was then accompanied by a trade union representative, Mr Gerrard. That meeting was adjourned until 26 April. Mrs Ani contacted Occupational Health about a possible CSA role for the deceased. The reply was that there was no reason why he should not do so provided he was accompanied and observed.

6. On about 20 April the deceased went to his GP and pressed for a 30 percent reduction in his medication because he feared losing his job. The doctor agreed.

7. On 26 April the resumed case conference meeting took place. During that meeting Mr Gerrard suggested that the deceased shadow a CSA for four weeks. Mrs Ani responded:

> **"You have been accommodated already, I have accommodated you as long as possible: I will medically terminate you with effect from 1 May 2010."**

Mr Gerrard asserted that the key factor in the deceased's recovery was "work hardening", whereas he had been placed in the redeployment unit straightaway. Mrs Ani maintained her position and proceeded to dismiss the deceased.

8. Against that decision he appealed. The appeal was heard by Mr Kirwan on 10 May. He dismissed the appeal.

The Employment Tribunal decision

9. The Employment Tribunal set out their self-direction as to the applicable law at paragraph 29. As to the duty to make reasonable adjustments they referred themselves appropriately to sections 4(2), 3A(2), 4A, 18B(1) and (2) and 17A of the **Disability Discrimination Act 1995**, as amended. The dismissal took place before the **Equality Act 2010** came into force. They considered the following authorities; **Salford NHS Trust v Smith** (UKEAT/0507/10, 26 August 2011, HHJ Serota QC and members), **Archibald v Fife Council** [2004] ICR 954 (HL) and **Environment Agency v Rowan** [2008] ICR 218.

10. We are told by counsel, both of whom appeared below, that the Employment Tribunal was not referred to the following EAT decisions, **Romec Limited v Rudham** (UKEAT/0069/07, 13 July 2007, a case on which I sat with members); **Leeds Teaching Hospital NHS Trust v Foster** (UKEAT/0552/10/JOJ, 14 June 2011, Keith J and members) and **Royal Bank of Scotland v Ashton** (UKEAT/0542/09, 0306/10/LA, 16 December 2010, Langstaff J and members). These cases have been put before us on appeal. We shall return to the principles emerging from those cases later.

11. Nothing turns on the Employment Tribunal's self-direction as to unfair dismissal set out at paragraph 29(a)-(d).

12. The Employment Tribunal was asked to consider four potential adjustments. They rejected three of those (paragraph 32(i)-(iii)); however, they upheld a further adjustment as being reasonable, namely delaying the dismissal so as to put into effect Mr Gerrard's late suggestion of a four-week period shadowing a CSA, at paragraph 32(iv), where they said this:

> **"(iv) However, as to the first reasonable adjustment proposed; the delaying of dismissal, this must reasonably be construed so as to cover the suggestion made by Mr Gerrard that the**

Claimant be given the opportunity of four weeks shadowing work of an existing CSA. It appeared to the Tribunal that Mrs Ani at the final case conference on 26 April 2010 was not listening to Mr Gerrard's suggestion. He had been speaking of reasonable adjustments and the need to get the Claimant back to the workplace at the previous meeting on 16 April. Mrs Ani told the Tribunal that she did not consider the four-week trial and had gone with the occupational health doctor saying that there was no time frame. She did accept that it could have been done, but did not consider that at the time and she also stated that she did not know if such a trial period would have been successful. The Tribunal concluded that it would have been reasonable for Mrs Ani to have listened to this new proposal, albeit made late in the day, and to have given it proper and genuine consideration and genuinely explore the possibility. The cost would only have been a further four weeks' salary for the Claimant, which, in the light of his length of service and the Respondent's previous attempts to deploy him, would not have been unreasonable or disproportionate in all the circumstances."

13. At paragraph 33 the Tribunal reminded itself of "the Salford and other cases" (unspecified) which state that any proposed reasonable adjustments must be judged against the criterion that it must prevent the PCP from placing the Claimant (sic) at the substantial disadvantage in issue.

14. The Employment Tribunal went on to make its findings on the "prevention" issue at paragraphs 34 to 37 in this way.

"34. The Tribunal, after careful consideration, concluded unanimously on a balance of probabilities on all the evidence before it, that the proposed shadowing would in practical terms have constituted the decisive step in effecting the prevention of the PCP from placing the Claimant, as a disabled person, as the substantial disadvantage of the termination of his employment, and that evidence was as follows;

Mrs O'Sullivan's evidence of the big improvement in her husband's condition when the prospect of the role of CSA was raised, even though it was lower than his previous station supervisor role; her evidence of the Claimant's passionate and primary aim of getting back to work and that the railway was his life and that his termination had been devastating; the occupational health opinion that 'work hardening' may be the key factor in his recovery; Mr Gerrard's evidence, that the Claimant needed to get back to the operational workplace together with his previous experience of the successful outcome of similar types of case.

35. The Tribunal unanimously concluded that the 4 week shadowing period, had it been granted, would have so markedly improved the Claimant's condition as to have been a very clear indicator that this was the proper course of action towards his rehabilitation to the workplace. The reasonable adjustments contended for in the *Salford* case; light duties or unproductive work and/or a career break, which were held by the court not to have been reasonable adjustments, are not the same as those in this case. There was no indication in that case of a reasonable time period nor apparently evidence of how this might exist. It is not be noted that in the *Rowan* case, which is cited in the *Salford* case and involves some of the same judges, the court did not rule out that a period of home working, for example, might be a reasonable adjustment in an appropriate case and that an employer which failed to investigate the possibility of that may find itself in difficulty in relation to whether or not it was making reasonable adjustments.

36. There is no definition or limitation in principle on what may or may not constitute a reasonable adjustment in any given case; it is always fact sensitive. Section 18B of the Disability Discrimination Act offers examples of reasonable adjustments and these include:

> **'The giving or arranging of training or mentoring and the providing of supervision or other support'. In this case, the proposed shadowing falls within the parameters of what would constitute a reasonable adjustment, in the Tribunal's view.**
>
> **37. The Respondent failed to comply with its duty to make reasonable adjustments to the extent that it failed to permit it and the Claimant's disability discrimination complaint accordingly succeeds on this ground."**

15. As to unfair dismissal, the Employment Tribunal found that the reason for dismissal related to the deceased's capability, a potentially fair reason. However they found that dismissal for that reason was unfair (ERA s.98(4)) for the following reasons: a reasonable employer would have extended the deceased's employment by a period of four weeks in order to allow him to shadow an existing CSA because, in light of his 23 years plus service, of the fact that his previous periods of depression had been discrete periods which were specific major life event triggered; otherwise his attendance was good. That medical termination was, under the Respondent's own policies, a last resort. Mrs Ani had made up her mind to dismiss him on 26 April and admitted that she did not consider Mr Gerrard's shadowing suggestion (paragraph 38). The cost of the shadowing option was simply the deceased's salary for four weeks; they drew a distinction with the earlier suggestion that he be accompanied by a CSA (see paragraph 390). The appeal to Mr Kirwan did not save the day; he would not contemplate the suggestion that Mrs Ani had prejudged the issue, thus demonstrating "abject bias" (paragraph 40).

16. Dismissal at the time fell outside the range of reasonable responses (paragraph 41).

The appeal

17. It is convenient to deal first with the Respondent's challenge to the finding of unfair dismissal and then to the reasonable adjustment question.

Unfair dismissal

18. Ms Thomas submits that, if the Employment Tribunal's finding on reasonable adjustment cannot be sustained, then that error fatally infects the finding of unfair dismissal and so neither can stand. We disagree. Assuming that Ms Thomas is right on the reasonable adjustment issue to any extent we are satisfied, as Mr Harris submits, that the finding of unfairness is not solely dependant on the reasonable adjustment finding. Even if the four-week shadowing proposal did not amount to a necessary adjustment under the DDA, the Employment Tribunal's finding at paragraph 38 is sustainable. Further, the criticism both of Mrs Ani's prejudgment and Mr Kirwan's "abject bias" is sufficient to amount to a finding of procedural unfairness. For these reasons the finding of unfair dismissal will stand. The real question is one for remedy and the application of the **Polkey** principle. We are told that no remedy hearing has yet taken place pending the outcome of this appeal.

Reasonable adjustment

19. In our judgment the critical question is whether the Employment Tribunal correctly directed itself as to the proper application of s.4A DDA and in particular the question as to whether the proposed adjustment, four weeks shadowing a CSA, would have prevented the PCP in this case placing the deceased at a substantial disadvantage in comparison with non-disabled employees.

20. The Employment Tribunal found the PCP to be this: that if the deceased was unfit to do the job that he was employed to do he was liable to be dismissed or was at the very least at risk of dismissal. Clearly that placed him at a substantial disadvantage. An able-bodied employee would not be at risk (see paragraph 30).

21. Even if the delaying of dismissal by four weeks was capable of amounting to a reasonable adjustment, it will only be so if it would prevent the disadvantage.

22. Whilst the Employment Tribunal state the test at paragraph 33, by reference to **Salford** and the other (unspecified) cases, the meaning of prevention in this context has been the subject of judicial consideration to which the Employment Tribunal was not referred.

23. In **Romec** the claimant, who suffered from CFS, was put into a rehabilitation programme so as to gradually build up his hours of work. He found it too much and reported off sick. The employer dismissed him. An Employment Tribunal found that a reasonable adjustment would have been to extend the rehabilitation programme; failure to do so amounted to a breach of the employer's duty to make reasonable adjustments under the DDA.

24. On appeal we allowed the employer's appeal and remitted the matter back to the same Employment Tribunal. At paragraph 39 we identified the critical question as this:

> **"True it is, as Mr McWilliams submits, that extending the rehabilitation programme would have prevented the Claimant's dismissal in the short term; but that begs the critical question, would extending the programme have enabled the Claimant to return to full duties as an engineer, thus removing the disadvantage he suffered compared with the non-disabled comparator? That does not, in our judgment, require a definitive answer one way or the other. Of course if, as Mr Laddie submits, there was no prospect of a further programme succeeding in that aim, based on the medical evidence and the failure of the first programme, it will not be a reasonable adjustment. Conversely, if, in the judgment of the fact-finding Tribunal based on the evidence before it, there is a real prospect of an extended programme resulting in a full return to work it may be reasonable to expect the employer to take that course."**

25. And at paragraph 40 we added:

> **"We are satisfied that this Tribunal did not embark on that enquiry. Instead, it thought it sufficient that an extended programme would give the Claimant an opportunity to prove himself or otherwise. That is the wrong approach. It was for the Tribunal to ask itself and answer the question, to what extent would an extended rehabilitation programme allow the Claimant to return to full time work as an engineer? Only after that question is answered can the Tribunal go on to answer the principal question, is that a reasonable step to take to remove the disadvantage suffered by the Claimant?"**

26. In **Ashton**, having cited the above passage from **Romec** at paragraph 23, Langstaff J said at paragraph 23:

> **"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 processes 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."**

27. As to the degree of likelihood that the proposed adjustment would prevent the relevant disadvantage to the Claimant, Keith J said this in **Foster**, at paragraph 17:

> **"In fact, there was no need for the Tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the Tribunal to find that there would have been just *a* prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in *Cumbria Probation Board v Collingwood* (UKEAT/0079/08/JOJ) at [50]. That is not inconsistent with what the Employment Appeal Tribunal (Judge Peter Clark presiding) had previously said in *Romec Ltd v Rudham* (UKEAT/0069/07/DA) at [39]. The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one. When those propositions were put to Mr Boyd, he did not disagree with them."**

28. Ms Thomas, we think, puts the point too high when she submits that unless the Employment Tribunal finds that the deceased would have been fit for safety critical duties (also forming part of the CSA role) after the four-week shadowing period then it cannot amount to a reasonable adjustment. However, there must be a real prospect that the proposed shadowing period would have put him sufficiently on the road to recovery to make it reasonable to expect the Respondent to retain him with a view to his returning to work, if not as a station supervisor then as a CSA, a role he was prepared to take.

29. We bear in mind what is said by the Employment Tribunal at paragraph 53 and that each case is fact-sensitive (paragraph 36). However, we are not persuaded by Mr Harris that, having not been referred to the three cases cited above, the Employment Tribunal correctly asked themselves the question: would a four-week CSA shadowing period have given rise to a real prospect of his retaining his employment?

30. It is in these circumstances that we shall allow this part of the Respondent's appeal against the Employment Tribunal's finding of a simple failure to make reasonable adjustments.

Disposal

31. It follows that the appeal is allowed so far as the disability discrimination finding at paragraph (i) of the Employment Tribunal Judgment is concerned and dismissed as to the unfair dismissal finding at paragraph (ii).

32. A remedy hearing will therefore be necessary in this case before Ms Stewart's panel. In our view the disability question should also be remitted to the same Tribunal for reconsideration in the light of our Judgment. On this aspect of the case we accept Mr Harris's submissions. It would be disproportionate to have that issue re-heard before a different Employment Tribunal. The remitted liability issue will be decided on submissions. No further evidence will be necessary.