Appeal No. UKEAT/0445/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 October 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MS V OLALEYE APPELLANT

(1) LIBERATA UK LTD & OTHERS
(2) LONDON BOROUGH OF SOUTHWARK & OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS V OLALEYE (The Appellant in Person)
For the Respondents	MR E WILLIAMS (of Counsel) Instructed by: Pinsent Masons LLP Solicitors 1 Park Row Leeds LS1 5AB

SUMMARY

PRACTICE AND PROCEDURE

Application/claim

Amendment

The Claimant made claims in respect of disability. In her forms ET1 she stated that she suffered from stress incontinence following a prolapse. She stated that the consequence of the incontinence was that she could not control her bodily functions which gave rise to comment from her colleagues and made it difficult for her to work in an open-plan office. She claimed that she became anxious and stressed and suffered from insomnia. At a Pre-Hearing Review to determine whether or not she was disabled it became apparent that the Respondents expected evidence to be led on her physical condition only. She sought to amend to include stress and anxiety and insomnia. The Employment Judge allowed her amendment to the extent of including insomnia only. She appealed. Held that the case should be remitted to the Employment Tribunal for a PHR on all of the Claimant's claims including that she suffered from stress and anxiety as a result of the underlying condition of stress incontinence.

THE HONOURABLE LADY STACEY

1. This is an appeal against a refusal to review a decision. The case is about disability. I shall refer to the parties as the Claimant and the Respondents. This is an appeal by the Claimant against a Judgment of Employment Judge Downs sitting alone and considering a request for a review of a decision made by him at a Pre-Hearing Review, or PHR, at London South, his review decision being sent with Reasons on 23 October 2012. The Claimant has explained this morning that she thought that a review would be by a different Judge, and I may assist if I tell her that that is a misunderstanding and that a review is a procedure whereby a Judge who has made a decision can be asked to reconsider it and, if appropriate, to correct any errors that may be in it. Therefore, it will go back to the same Judge who made the decision.

2. The Employment Judge decided that the application for a review of his Judgment should be refused on the grounds that it had no reasonable prospect of success. The Claimant appeals against that Judgment, and her appeal has been allowed to come to a full hearing on essentially the question of: what disability has she referred to in her forms ET1? There are two of them, because she has transferred in her employment from the First Respondent to the Second Respondent. Directions sending this appeal to the full hearing that has taken place this morning were given at a hearing under rule 3(10), and it is instructive to consider what was said in that 3(10) decision as follows.

3. "Although this is a review appeal only, the issue of substance is that arguably Employment Judge Downs misread the first ET1 in refusing permission to amend to add stress and anxiety to the conditions identified at the Employment Judge MacInnes case management

discussion. When the point was raised on the review application, he mis-stated the ET1 again ("Review Rule 34(3)(e), interests of justice?")."

4. The background to this matter is that the Claimant lodged forms ET1 and in the first one she stated that she suffered from a medical condition that began in 1999 when she suffered a prolapse resulting in stress incontinence, which meant that she could not control her bladder and bowels. A colleague commented on it in 2009, which led her to feel that her dignity was violated. She had an operation to correct the prolapse in December 2009. She returned to work in February 2010. She stated that in April 2010 after comments from colleagues she became aware that she could not manage her condition. She stated in the form that she was embarrassed and stressed and was off sick for the rest of the week. She returned on 26 April and stated that she was then the subject of cruel jokes and was depressed and anxious that she might lose control again. She had a lot of anxiety working in an open-plan office, and she stated that in August 2010 she was off sick because she could not manage her anxiety working in the office.

5. In her second ET1 the Claimant stated that she suffers from stress incontinence, which affects her mentally when working in an open-plan office. She has insomnia, and she has difficulty in concentrating, by reason of the required multiple trips to the toilet and members of staff's awareness of her medical condition.

6. The decision of Employment Judge Downs to refuse to allow amendment to include stress and anxiety is what HHJ Peter Clark referred to in his decision made under rule 3(10). That original decision by Employment Judge Downs was not appealed in time, but HHJ Peter Clark suggested that the interests of justice may require the refusal to review it to be

the subject of a full hearing. It has therefore been necessary in this full hearing to look at that original decision. The refusal was based on the finding that there was no mention of stress other than the mention of "stress incontinence". Judge Downs did, however, find that insomnia had been mentioned, and therefore he made a ruling that the Claimant was allowed to amend to include that condition. The Claimant's argument has been that she did mention stress and anxiety, and her adjusted grounds of appeal, which were successful at the 3(10) hearing, make that point. They are in the following terms. Judge Downs' refusal was perverse, in that:

(1) He held that:

> **"By relying on surrounding and collateral material she is implicitly conceding that her originating applications did not include complaints that she had a disability by way of stress and anxiety."**

This was a finding that no reasonable Tribunal could have reached on a proper appreciation of the available evidence since: (a) the first originating application dated 14 January 2011 stated, inter alia, (i) "I was deeply embarrassed and stressed", (ii) "I experienced difficulty in sleeping due to anxiety", (iii) attending work became a source of stress and (iv) "In August 2010 I was on sick leave because I could not manage my anxiety"; (b) the second originating application, dated 20 April 2012, stated, inter alia, (i) "I suffer from stress incontinence", and (ii) "It affects me mentally"; and (c) the Claimant had specifically drawn these references to Employment Judge Downs' attention in her application for a review dated 2 October 2012 and explicitly stated that her originating applications did include complaints that she had a disability by way of stress and anxiety (see paragraphs 4.2, 4.3, 4.7, 5.4, 5.5 and 6.11).

(2) He held (paragraph 12) that it was not responsible and reasonable for the Claimant to seek to amend her claim to add new disabilities once directions had been made by

Employment Judge MacInnes. This was despite previously holding at the PHR on 17 August 2012 that it was reasonable for her to add insomnia on the basis that it was referred to in her ET1. Insomnia is mentioned fewer times in the ET1 than stress and anxiety. These two different findings are contradictory and illogical.

7. Today before me Mr Williams, who appears for the Respondents, helpfully set out his argument, and essentially the Claimant responded to it. Mr Williams had already in the papers lodged stated that while no skeleton was lodged he did wish to rely on his written answers, and in those written answers the point is made that this is an appeal against a review and not an appeal against the main decision. Nevertheless, the written answers also point out that there is no error of law in the decision that is complained of because the conditions that the Claimant sought to add were not capable of amounting to disabilities in law and she did not at any stage say that she had any complaints of discrimination related to stress and anxiety. Thus at paragraph 24 on page 15 of the bundle the Respondents state in writing that she seeks to enlarge her scope of disability but not to make any necessary corresponding application to enlarge the scope of the acts said to amount to discrimination.

8. In his oral argument before me this morning Mr Williams has submitted that the high test of perversity has not been met in this case. He has helpfully explained that the PHR at which Employment Judge Downs made the decision was a hearing at which the question of whether or not the Claimant is disabled was to be decided with evidence being led. He points out that a report had been sought on her medical condition. It became apparent at the hearing that there was a misunderstanding between parties as to what evidence could be led, as the Claimant thought that she could lead evidence about stress and anxiety whereas the Respondent did not. The Claimant sought leave to amend; that was refused, and that is the subject of the appeal.

9. Mr Williams submitted that the decision made by EJ Downs to refuse leave to amend was not illogical, far less perverse, because there was, according to Mr Williams' argument, a basis for his making that decision in the terms of the forms ET1 that had been lodged, which make it plain that the Claimant states that her difficulties are caused by stress incontinence.

10. Before me this morning the Claimant, in response to Mr Williams' argument, has stated that she did not understand that the hearing before EJ Downs had been ordered by Employment Judge MacInnes on the basis that she would not be able to refer to stress and anxiety. She argues that she has always referred to these things in her forms ET1 and that she thought that she would be able to give, as she has put it, the full position at the hearing, but she discovered that in fact she could only speak about part of the position. That is why she sought to amend, and that application to amend was refused.

11. It is instructive in this case to note the view expressed by Mitting J when he considered the papers for this appeal. At page 73 of the bundle he noted that the Notice of Appeal did not disclose reasonable grounds of appeal and went on to say:

> **"The orders which Judge Downs made at the pre-hearing review and at the review of that decision were orders which he was entitled to make for the reasons which he gave. They will permit the appellant's claims to be determined justly and proportionately. He was entitled to refuse to allow her to add anxiety and stress as free-standing disabilities. Her case is that they are the product of the underlying physical condition – stress incontinence and flatulence – from which she suffers. Judge Downs's orders do not prohibit her from advancing that case."**

12. It seems to me, with respect, that Mitting J has got to the heart of the matter. The Claimant does not and cannot on her pleadings assert that she suffers from stress and anxiety and indeed insomnia except as a result of her underlying condition. I understand her today to accept that the information that she seeks to put before an Employment Tribunal that decides

her case on the merits is that she suffers from stress, anxiety and insomnia as a result of suffering from the underlying condition and as a result of the effect that that underlying condition has on her in her particular workplace, which is an open-plan office, and as a result of the attitude that some of her colleagues have taken. It may be that part of the difficulty in this case has been caused by the use of words. The word "stress" has been used in different ways in this case, and it frequently is in other cases. An illustration is given in the case of **Hatton v Sutherland** [2002] EWCA Civ 76 at page 619, where there is a quotation from a health education report which notes that stress is used to describe both physical and mental conditions and is said to be a catch-all phrase. In the case before me today, "stress incontinence" has a meaning that is physical, leading to loss of control of bladder or bowels or both caused by physical actions such as sneezing or laughing, but it is plain, in my opinion, from the forms ET1 that the Claimant has also stated that the physical condition just described has given rise to mental consequences for her that include embarrassment, anxiety and insomnia.

13. My decision therefore is that the appeal is allowed in that the Claimant may lead evidence at the hearing or hearings to follow to show, if she can, that she has suffered stress, anxiety and insomnia as a result of the underlying condition from which she claims to suffer, and the effect that that underlying condition had on her in the way in which her colleagues treated her and in the particular way in which her office was organised. I am conscious that there has been no determination by any Employment Judge of whether any of these things have been proved, and that matter of course remains open; I am not in a position to say anything about that today. So, it will be for a further hearing in this case to decide if the Claimant can show that she is disabled as defined in the legislation and indeed for that full hearing to decide if there has been any discrimination.

14. As I have said in discussion with the parties, this case is unusual, and I wish to make sure that my decision is clear. I am prepared to allow this appeal on the basis I have outlined, which is that the evidence that this Claimant will be entitled to lead at a hearing on the merits will encompass, if she wishes to lead it, evidence about her suffering mental consequences that have arisen as a result of the underlying physical condition of stress incontinence that she claims to suffer from. She will not be entitled to lead any evidence about suffering from stress or anxiety caused by any other matter. So, the case remains a case about stress incontinence following a prolapse and about the things that follow from that condition. While Mitting J said that the case should not go to appeal and HHJ Peter Clark disagreed with him and allowed this to come to a full hearing, I am taking the view that Mitting J was correct to say that on the pleadings the Claimant is entitled to lead evidence of stress and anxiety as a result of that underlying condition, and the way for me to do that is to allow the appeal and for the case to be sent for a hearing as appropriate by an Employment Tribunal. It will be for the parties to decide whether that should be a full hearing or another Pre-Hearing Review to deal only with the question of whether the disability, as I have now defined what is to be allowed, is proved.