Appeal No. UKEAT/0302/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 January 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

METROLINE TRAVEL LIMITED APPELLANT

MR J STOUTE (DEBARRED) RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR ADAM SOLOMON (of Counsel) Instructed by: Metroline Travel Limited Human Resources Department ComfortDelGro House 329 Edgware Road Cricklewood London NW2 6JP
For the Respondent	Respondent debarred from taking part in this appeal

SUMMARY

DISABILITY DISCRIMINATION

The Claimant was a bus driver who suffered from Type 2 diabetes which he controlled largely by avoiding sugary drinks.

The Employment Tribunal held that he was disabled within the meaning of the **Equality Act 2010**.

The Employment Appeal Tribunal allowed the appeal on the basis that the Employment Tribunal had misapprehended the concept of disability under the Act; the statutory guidance made clear that a condition controlled by a minor alteration of a diet was not a long term condition restricting the ability of the Claimant to carry out ordinary day-to-day tasks.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent (whom I shall refer to as the Appellant) from a Decision of 24 March 2014 at a Preliminary Hearing in the Employment Tribunal at Watford, heard by Employment Judge Smail sitting alone. The decision of the Employment Tribunal was that the Claimant, who suffers from Type 2 diabetes, was disabled within the meaning of the **Equality Act 2010**. The Claimant has been debarred from participating in the appeal. I therefore approach the case solely on the basis of the material that is currently before me, the Claimant of course not being present.

2. It is right to note that on 30 May that another division of the Employment Tribunal sitting in Watford dismissed the Claimant's substantive complaints. It found there was no duty to make reasonable adjustments. The Claimant's dismissal did not constitute unfavourable treatment by reason of his disability. His claims for unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments were all dismissed. The reason I mention this is because an obvious thought for any Judge looking at this is to say, well what's the point of this appeal? I did make clear to Mr Adam Solomon that I would not require a great deal of persuasion to deal with the point, although my initial view was that it was academic, but nonetheless I have been persuaded by Mr Solomon that there is some modicum of justification for my dealing with the matter.

The Factual Background

3. The factual background I take from the Employment Tribunal's decision related to disability. The Claimant was employed by the Respondent as a bus driver from 24 February

1992 to 11 March 2013 when he was dismissed for gross misconduct. The Claimant, it should be noted, had a somewhat chequered employment history including, I note, diverting his bus so he could go and buy some chicken kebabs. Be that as it may, on the day in question, the Claimant arrived late claiming to have been suffering from diarrhoea and with an urgent need to use the WC. I do not think I need to trouble too much about that. So far as I am aware no appeal has yet been made in relation to the decision of the Employment Tribunal of 30 May, and the Claimant is well outside the time for lodging a Notice of Appeal and the Employment Appeal Tribunal is notorious for the strict way in which it approaches applications for an extension of the time for making an appeal. I would regard the prospects of any appeal as being highly unlikely.

4. I should point out that the appeal was referred to a Full Hearing by Mr Recorder Luba QC on 9 September 2014. I record that Mr Recorder Luba, somewhat moderately, suggested that there was a real prospect of showing that the Employment Judge had decided that anyone with Type 2 diabetes had in consequence of that fact alone met the statutory definition of disability in the **Equality Act 2010**. The medical evidence does not appear to travel clearly that far. In his usual trenchant and succinct way Mr Recorder Luba has, in my opinion, accurately summarised this particular appeal.

The Employment Tribunal Decision

5. Let me say now something about the Judgment of the Employment Tribunal. The decision was taken at a case management Preliminary Hearing. The Employment Tribunal referred to the medical report obtained from a Dr Darzy, noted that there were two periods when the Claimant was not taking medication which reduces blood sugar levels, and the Claimant had informed Dr Darzy that he had followed a diabetic diet by avoiding, for example,

sugary drinks. I am sure that a diabetic diet involves trying to avoid foods with a significant sugar content including sweets, chocolates, fruit juices and what have you.

6. It is the case that someone suffering from Type 2 diabetes who does not properly manage his blood sugar levels might be at risk of suffering a hypoglycaemic attack. The Employment Judge referred to the guidance on the definition of disability, published by HM Government Office for Disability Issues, **Equality Act 2010** Guidance at paragraph B12, which provided that an impairment the subject of treatment or correction was to be treated as having a substantial adverse effect if but for the treatment or correction the impairment was likely to have that effect. "Likely" is interpreted as meaning "could well happen" rather than "more likely than not to happen". It is difficult, in my opinion, to see how a perfectly normal abstention from sugary drinks could be regarded as a medical treatment, and I have not seen anything that suggests there has been any substantial interference with normal day-to-day activities unless one considers abstention from Coca-Cola and fruit juice to be an impairment in ordinary day-to-day activities. I do not regard it as such.

7. I have disclosed, as it is I think my obligation to do so by reason of the importance of transparency, that I myself suffer from Type 2 diabetes. I control it by diet and I also take gliptins, but I am well aware of the effects of suffering Type 2 diabetes, largely if not entirely controlled by diet. It has in my case not only had no substantial adverse effect on my ability to carry out day-to-day activities; but I would suggest other than the fact that I need to watch what I eat or drink, none at all.

8. The Employment Tribunal agreed with the Claimant's solicitor that a medicated diabetic would regularly be treated as disabled under the Act even if there had been no episode showing

a substantial interference with normal day-to-day activities, but that is not necessarily the answer to a case of disability discrimination. The issue at a Full Merits Hearing will be whether the Claimant was relevantly disabled to the circumstances in question. The relevance of his disability to the events in question is that it is said that the side effects of the Metformin which he took meant that on one or two occasions he was unable timeously to perform work by reason of the side effect of diarrhoea.

9. Mr Solomon points out, although the Employment Tribunal referred to the guidance issued by the Office for Disability Issues, it does not refer to paragraph B7, which Mr Solomon cites in his Skeleton Argument. Paragraph B7 provides that:

> **"Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.**
>
> **For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities." (my underlining)**

Submissions and Conclusions

10. I am, having regard to that, unable to accept that abstention from sugary drinks, as I have already said, constitutes a substantial adverse effect on day-to-day activities caused by the Type 2 diabetes. I am minded to agree with Mr Solomon that the decision of the Employment Tribunal is, in effect, perverse. It would mean that any person suffering from Type 2 diabetes controlled by diet is to be regarded as disabled under the Act. It would also mean that people with other conditions such as nut allergies, intolerance to lactose or what have you would also be regarded as disabled. I agree with Mr Solomon's submission that Type 2 diabetes per se does not amount to a disability. Mr Solomon submits the argument that Type 2 diabetes does

per se amount to a disability within the meaning of the **Equality Act 2010** is obviously wrong and I agree. I also agree that the Employment Tribunal applied paragraph B12 of the statutory guidance but did not have regard to B7, which as he points out cross-refer to one another.

11. In those circumstances I take the view that the decision of the Employment Tribunal was wrong. I also note, as Mr Solomon has pointed out, that while a particular diet may be regarded as something which is to be ignored when considering the adverse effects of a disability, I do not consider that abstaining from sugary drinks is sufficient to amount to a particular diet which therefore does not amount to treatment or correction.

Disposal

12. That leaves the question as to whether or not it is appropriate for me to deal with this appeal on the basis that it is entirely academic now the Claimant has failed in his substantive claim and he has not appealed against that finding.

13. I do not regard it as reasonably likely at all that there will be any appeal against the decision by the Claimant, although I accept that if there were, unless this decision is set aside, it would be binding on the parties. I do, however, accept that the Respondent has a workforce with a number of persons who suffer from Type 2 diabetes and even though, in my view, a decision of an Employment Tribunal is not authoritative, and in my opinion of relatively little persuasive value within the Respondent's operation, bearing in mind it is heavily unionised, it is likely that this particular decision can be prayed in aid by other employees suffering from Type 2 diabetes who wish to have themselves recognised as suffering from a disability.

14. Mr Solomon, somewhat ambitiously, submits that the Judgment is of public importance. I am sure that all of Mr Solomon's cases are of public importance. I think, in the great scheme of things, this particular case will scarcely ruffle the pages of the Willesden Gazette, if there is such a thing, and in those circumstances that is not a ground that I would have regard to. But I accept that there is a legitimate concern on the part of the Respondent in having this matter disposed of, and for those reasons, although I can see the force in the suggestion that this appeal is now academic, having come to a very firm conclusion that the appeal is well-grounded, I will allow the appeal for the reasons that I have given.

Fees

15. Having given Judgment, I have an application from Mr Solomon for the reimbursement by the Claimant of the Respondent's fees incurred in bringing this appeal. I stress "fees incurred" because there is no application for the costs as such. The jurisdiction to make such an order is to be found in Rule 34A(2A) of the current **Employment Appeal Tribunal Rules**. I can make an order if I allow an appeal of an amount no greater than any fees paid by the Appellant. I have satisfied myself, with the assistance of the associate, by reference to the Employment Appeal Tribunal's records that a sum of £1,600 has been paid. Langstaff J in **Look Ahead Housing and Care Ltd v Chetty and Eduah** UKEAT/ 0441/13/MC made some observations on the approach of the Appeal Tribunal in relation to recovery of fees. Langstaff J made clear he would not adopt the approach taken in civil courts where costs orders were made because there is a costs shifting regime in the civil courts where the costs of bringing or defending a claim are generally awarded to a party who substantially succeeds to be paid by the party who fails. That is a very different costs regime from that envisaged by Rule 34A(2A). That rule is dealing with the party's own costs. There is no costs shifting regime in the

Employment Appeal Tribunal. Rule 34A(2A) looks simply at the question of repayment of fees it was necessary to pay to bring the appeal.

16. Langstaff J suggested that, in a case like this where there has been an obvious error by a Tribunal, the focus of the parties ought, in the context of the rule to be assessed as to whether it was necessary for the Appellant to bring the appeal. I have some reservations about necessity. I have been persuaded that I should allow the appeal and determine it and not regard it as being entirely academic, but it is an appeal that has been brought for the benefit of the Respondent, as Mr Solomon himself has conceded. I bear in mind, however, that what one is concerned with here are fees payable to the Tribunal incurred by the Respondent in the only way that it could seek to set aside a finding that Type 2 diabetes necessarily constitutes a disability within the meaning of the **Equality Act**. I know nothing at all about the Claimant's means, although I suspect he is a man of modest means, but in the circumstances it seems to me that the Claimant should be required to reimburse the costs of those fees.

17. I do not see what else could have been done by the Respondent other than appealing to have the effect of that Judgment nullified. In those circumstances I will direct that the Claimant should pay the Respondent's costs limited to the sum of £1600 pursuant to Rule 34(2A) of the **Employment Appeal Tribunal Rules**.