Appeal No. UKEAT/0273/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 January 2015

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

HERITAGE HOMECARE LIMITED — APPELLANT

MS A L MASON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR ABOU KAMARA (Representative) Free Representation Unit

SUMMARY

DISABILITY DISCRIMINATION

Disability related discrimination

Direct disability discrimination

Compensation

Direct Disability Discrimination and Discrimination arising from Disability

After considering the judgment and the Respondent's acceptance that there appeared to be errors as to the findings that both direct disability discrimination and discrimination arising from disability and after considering paragraph 18.3 of the **Practice Direction (Employment Appeal Tribunal - Procedure) 2013** ("the PD"), which deals with the disposal of appeals by consent, the appeal was allowed and the case remitted. The Employment Tribunal had made no findings as to knowledge of disability and there was no basis for analysing the judgment as containing a finding of constructive knowledge and so the conclusion on discrimination arising from disability was questionable. Nor was it clear what the evidential basis was for the conclusion that the Appellant had directly discriminated against the Respondent because of her disability and no clear basis for differentiating that from the finding of discrimination arising from disability.

Compensation

The Employment Tribunal's findings of fact and reasoning do not appear to support the decision made as to loss of earnings.

Disposal

The case was remitted for a complete re-hearing before a differently constituted Employment Tribunal.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal by the employer, who was the Respondent below, and who I shall refer to in the course of this Judgment as the Appellant, against the Judgment of an Employment Tribunal comprising Employment Judge Cook, Mrs Byrne and Mrs Titherington, sitting at Manchester over two days in February 2014. The Written Reasons were sent to the parties on 28 February 2014 and by them the Employment Tribunal concluded that the claims of the employee, who I shall call the Respondent, of direct disability discrimination, discrimination arising from disability, described by the Employment Tribunal at paragraph 1 of the Judgment as "disability-related discrimination" and an unlawful deduction from her wages all succeeded.

2. The Appellant complains about the findings of direct disability discrimination and discrimination arising from disability and also about the loss of earnings compensation of £1,701 awarded by the Employment Tribunal. There is no appeal against the complaint of unlawful deduction from wages and no appeal from any other aspect of the computation of compensation. On this appeal the Appellant has been represented by Mr Rees of Peninsula Business Services and the Respondent has been represented by Mr Kamara under the auspices of the Free Representation Unit. Neither appeared below; the Respondent appeared in person, and the Appellant was represented by Mr Ward of Peninsula Business Services Ltd at the hearing before Employment Judge Cook's Tribunal.

The Notice of Appeal

3. The Notice of Appeal raises three points. Firstly, the Appellant complains that the Employment Tribunal has concluded the Appellant discriminated directly against the

Respondent whereas, on any proper analysis of the factual matrix, the only adverse conclusion which could have been reached by the Employment Tribunal was that the Appellant had discriminated against the Respondent for a reason arising from her disability contrary to section 15 of the **Equality Act 2010**. Consequently the finding of direct discrimination must be erroneous and cannot stand.

4. Secondly, if, and insofar as, the Employment Tribunal considered discrimination arsing from disability pursuant to section 15 of the **Equality Act**, it failed to consider section 15(1)(b) (justification) or section 15(2) (actual or constructive knowledge of disability). In fact, the former does not matter because, for reasons which I will explain in a moment, the justification issue no longer arises on the appeal.

5. But so far as knowledge is concerned, the Appellant contends that this Judgment cannot be patched together and salvaged by concluding that there has only been found to be discrimination arising from disability. Such a finding should have involved consideration of actual or constructive knowledge of disability because that was an issue raised before the Employment Tribunal, something to which I will also return in a moment.

6. Thirdly, the Notice of Appeal complained about the award of £1,701.00 in respect of loss of earnings. This is said to be erroneous because the Respondent had been employed under a fixed-term contract, which, although it had been extended, expired by the end of the second week of March, and so there was no basis for calculating her loss of earnings by reference to her normal net pay, which is the basis of the calculation of the award of £1,701.00. Other complaints are made about the computation of this aspect of compensation, something else to which I will need to return later in this Judgment.

7. Mr Kamara accepts the correctness of the complaint made by Ground 1 of the Notice of Appeal. Also he accepts that, after the Respondent became too ill to work, to calculate loss of earnings by reference to her normal net pay appears unjustifiable at least on the basis of the factual findings made by the Employment Tribunal. He and Mr Rees, however, differ as to the disposal of the appeal.

The Law

8. As to these two points, paragraph 18 of the **Practice Direction (Employment Appeal Tribunal - Procedure) 2013** ("the PD") deals with the disposal of appeals by consent. It does not deal explicitly with the situation to which this appeal gives rise, namely that a significant part of the appeal is in effect not opposed. Nevertheless it seems to me that the terms of paragraph 18.3 of the **PD**, which reads:

> **"If the parties reach an agreement that the appeal should be allowed by consent, and that an order made by the Employment Tribunal should be reversed or varied or the matter remitted to the Employment Tribunal on the ground that the decision contains an error of law, it is usually necessary for the matter to be heard by the EAT to determine whether there is a good reason for making the proposed order. …",**

apply to this situation. Accordingly I invited the representatives to make submissions on all grounds relating to the appeal in order to evaluate not only the merits of the points made by Mr Rees but also the Respondent's position in accepting those points made by him which she did accept.

The Facts

9. The Respondent was employed as an Office Co-ordinator from May 2012 to November 2012 on a fixed-term contract. In October 2012 the contract was extended until 8 February 2013 and on 14 January 2013 it was further extended. On 13 February 2013 the Respondent was given one month's written notice of termination, which expired on 11 March 2013.

10. At a Preliminary Hearing on 18 November 2013 before Employment Judge Jones in Manchester, the Employment Tribunal concluded that the Respondent was a disabled person. Consequently that was not an issue which the later Employment Tribunal, presided over by Employment Judge Cook, needed to address. However the Respondent's absence through illness was something which needed to be considered by the Employment Tribunal presided over by Employment Judge Cook. At paragraph 8 of the Judgment there is a reference to the sick notes which the Respondent had submitted in January and February 2013 (see pages 72 to 75 of the appeal bundle). There were four of them and they covered the period 14 January 2013 to 11 March 2013. Each had an identical diagnosis: anxiety with depression.

11. On 13 February 2013 Mr Randall, the Regional Manager of the Appellant, wrote to the Respondent giving her one month's notice of termination of employment, ending on 11 March 2013 (see pages 67 and 68 of the appeal bundle). This led the Employment Tribunal to reach the following conclusions set out at paragraphs 9, 10 and 11 of the Judgment:

> **"9. The claimant was dismissed by the respondent in February after her sick notes had been received by the respondent. We are satisfied that the reason for dismissal was the claimant's sick notes and in particular that she was away from work with "anxiety with depression" and that the claimant had been away for over one month with this condition when the respondent decided to dismiss her on 13 February. This was after the extension of her fixed term contract, which had already been extended from November to 8 February, had expired. …**
>
> **10. The Tribunal is satisfied that the claimant was dismissed because of her absences on ill health grounds suffering from "anxiety with depression". We note that the Preliminary Hearing in November 2013 found that the claimant was a disabled person by virtue of suffering from disabilities. The notes of the Preliminary Hearing are not in the bundle.**
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> **11. So far as the complaint of direct discrimination is concerned, we are satisfied that this complaint is made out, although the respondent says that they did not have knowledge of it until the Preliminary Hearing. We have already said that we are satisfied that the reason for dismissal was her sick notes and that this in turn means that she was dismissed for her disability. We also accept that the complaint of less favourable treatment also succeeds."**

The Appellant's Submissions

Grounds 1 and 3

12. Mr Rees submits that, taken by itself, the phrase in paragraph 10, "… was dismissed because of her absences on ill health grounds suffering from "anxiety with depression" ",

cannot provide a basis for the finding in paragraph 11 that a complaint of direct discrimination was made out. Moreover in paragraph 11 the error is compounded by the second sentence, part of which reads:

> **"… we are satisfied that the reason for dismissal was her sick notes and that this in turn means that she was dismissed for her disability."**

13. Although the reference in the last sentence of paragraph 11 of the Judgment to less favourable treatment suggests that the Employment Tribunal is in this passage considering section 13 of the **Equality Act**, that is to say, direct discrimination, Mr Rees submits that matters are confused by reference in the first sentence to the Appellant's position being that it had no "knowledge of it until the Preliminary Hearing". The "it" is plainly a reference to disability, which had been under discussion in the preceding paragraph, paragraph 10.

14. Remedy is discussed by the Employment Tribunal at paragraphs 16 to 23 of the Judgment. Embedded in paragraph 17, however, is an important postscript on liability, which in the last two sentences of paragraph 17 reads as follows:

> **"After a short break we announced the Tribunal's findings on remedy. These were that the two successful disability discrimination headings - direct discrimination pursuant to section 13 and unfavourable treatment under section 15 of the Equality Act - overlapped so far as remedy was concerned, and therefore could be dealt with by one award as both centred on dismissal."**

Loss of earnings is then dealt with at paragraph 18 of the Judgment:

> **"So far as the Schedule of Loss is concerned, we accept that the claimant's net pay averaged out at £2,044 and that from this should be deducted her sick pay. This left an amount of £1,701. The respondent is ordered to pay this compensatory award to the claimant."**

15. The Schedule of Loss referred to there is to be found at pages 69 to 71 of the appeal bundle. At page 70 of the Schedule the figure of £2,044.00 referred to above is to be found. It is clearly based on loss of earnings in March and April. By deducting sick pay of £343.00, also to be found at page 70, the figure of £1,701.00 is arrived at.

16. Mr Rees makes several complaints about that computation in Ground 3 of the Notice of Appeal and in his oral submissions. Firstly, on the facts, the contract, which was an extended fixed-term contract, would not have been renewed. Indeed, although the Tribunal do not appear to have investigated this in any detail, and, if they did, they have certainly not commented upon it in the Judgment, notice of termination had been given, bringing the employment relationship to an end on 11 March. Therefore, Mr Rees submitted, much of the March and all of the April loss in the Schedule is incomprehensible. Alternatively, unless the Respondent recovered her health after 11 March 2013, then the most that she could have recovered would have been her statutory sick pay even assuming there were to be some factual basis for continuing the computation beyond the termination of her employment.

17. Mr Rees submitted that a temporary employee on a fixed-term contract, taken on for a specific purpose, which appears to have been fulfilled, can have little expectation of remaining in employment. Plausible though that may be, the difficulty is that the Employment Tribunal have made no findings of any kind relating to these matters. Mr Rees also submitted that, even if everything else could be supported, the sum of £2,044.00 relating to two months' loss of earnings must obviously be overstated because the certified absence through ill-health persisted at least until 11 March 2013, the date on the last certificate. So some portion of the period must have been on sick pay and not on normal net pay. Therefore, he submitted, there was quite a lot wrong with the computation.

18. Mr Kamara does not take issue with either Ground 1 or Ground 3 save that he submits that, whilst it may be difficult to understand how the same factual matrix in this case could give rise to both direct discrimination and discrimination arising from disability, there is simply no factual findings that could support my substituting for the finding of direct discrimination made

by the Employment Tribunal a finding that there was no direct discrimination and thus quashing the Employment Tribunal's Judgment. What I must do, submitted Mr Kamara, is remit the matter even though it does not appear to be very fertile ground for a finding of a breach of both sections. Mr Rees maintained his position that I should set aside the finding of direct discrimination.

Ground 2

19. The battleground, although the matter has been so short it is perhaps little more than a skirmish, in this case has been Ground 2. Mr Rees accepted, in the course of his submissions, that the issue of justification had not been raised by his colleague at the Employment Tribunal. He also did not wish to address any submissions to me that, even if justification is not raised, the Employment Tribunal must nevertheless consider it. Obviously that was a sensible course, and it may be, given the way in which section 15 is structured, that section 15(1)(b) only arises if the point is actually taken by the party bearing the burden of proof, which the language of section 15(1)(b) would suggest is the employer.

20. Be that as it may, that point, which might have been in issue as a result of the scope of the Grounds of Appeal, has not been pursued. What Mr Rees has concentrated upon is the analysis of the Employment Tribunal in reaching the conclusion that the Respondent had made out a case of direct disability discrimination. He submitted that the reference at paragraph 11 of the Judgment to knowledge is by no means an adequate analysis. Knowledge was quite clearly an issue, he told me. It had been raised by Mr Ward on behalf of the Appellant, and the Employment Tribunal therefore ought to have dealt with it.

21. Although the cases are very different factually, Mr Rees submitted that the Employment Tribunal here had fallen into a similar error to that exposed by the Court of Appeal in the case of **Gallop v Newport City Council** [2014] IRLR 211. He relies upon paragraphs 36 and 41 of the Judgment of the Court of Appeal.

Discussion and Conclusions

22. The Employment Tribunal have really made no factual findings at all on the issue of knowledge. The reference at paragraph 11 to "knowledge" might actually be understood as relating to direct discrimination. After all, that is what paragraph 11 appears to be about, particularly having regard to the use of the expression "less favourable" in the last sentence. One way of looking at the reference to knowledge in paragraph 11 is that the Employment Tribunal thought that it had relevance to the question of direct discrimination and it might be thought that having considered it the Employment Tribunal had then rejected it. If that is a sensible reading of paragraph 11, it begs the question as to why the Employment Tribunal did not then go on to consider the issue of knowledge in the context of section 15(2) of the Act?

23. Mr Kamara submitted that they had done so. He pointed to paragraph 8 of the Judgment where there is a factual record of the sick notes and he submitted that there was, in the reference in paragraph 8 to the sick notes and to the meeting, the obvious implication that there the Employment Tribunal were concluding that the Appellant must have had what can be called constructive knowledge of the disability. The Appellant knew that the Respondent was ill, knew what the diagnosis was, and plainly had failed to investigate the matter further, allowing the possibility of meetings to lapse. He pointed out the decision of this Tribunal in the **Chief Constable of Avon and Somerset Constabulary v Dolan** UKEAT/0522/07/MAA where, in giving the Judgment, HHJ Clark discusses the need for the employer to take an active and

investigative approach to potential disability (see paragraphs 9 to 14). In this passage from **Dolan** there appears a reference to the relevant Code. In his helpful Skeleton Argument at paragraphs 22 to 24 Mr Kamara has set out the provisions of the Code and referred me to **Dolan** as an example of how the Code should be applied. He also relied upon the case of **Gallop** as an example.

24. All of this is a perfectly proper approach to the issue of so called constructive knowledge. But it is directed to me as a way of reading the Employment Tribunal's Judgment. I make no criticism of Mr Kamara. He has done his very best, and this Tribunal is grateful to him for his representation of the Respondent. But he ultimately accepted that it is very difficult to construct any analysis from the Employment Tribunal's Judgment as to the issue of actual or constructive knowledge under section 15(2). The subsection is not referred to. Concepts of actual and constructive knowledge are not referred to. There are no findings of fact. He accepted that, if one cannot imply the exercise of considering constructive knowledge and conclude that the Appellant had it, then this Judgment might be flawed.

25. My conclusion is that this Judgment is flawed in three respects. Firstly, it reaches at paragraph 11 a conclusion on direct discrimination which seems at best to be a conclusion of discrimination arising from disability. Secondly, it does not seem to me to address at all the issue of whether the Appellant had actual or constructive knowledge of the disability. The Employment Tribunal should have done so because that issue was clearly raised, as I accept, of course, from what Mr Rees tells me; Mr Kamara does not dispute it. Indeed it is quite plain that the issue was raised from the terms of paragraph 11 of the Judgment. What the Employment Tribunal have failed to do is to engage with that issue, make factual findings relating to it and reach a reasoned conclusion about it and articulate it in the Judgment. Thirdly, I accept Mr

Rees's arguments, not opposed by Mr Kamara, that the loss of earnings aspect of compensation has inadequate findings relating to it and appears to be contrary to what is actually known about it.

26. Therefore I have come to the conclusion that there has been an error of law in this case in respect of the three matters that I have identified.

Disposal

27. The issue is what should happen? I have considered again the terms of the Judgment of a division of this Tribunal presided by Burton J, the then President, in **Sinclair Roche Temperley v Heard** [2004] IRLR 763. In particular I have considered the six factors that the Employment Appeal Tribunal sets out at paragraph 46 of the Judgment at pages 774 and 775 of the report.

28. Both Mr Rees and Mr Kamara have made reference to, firstly, the overriding objective and secondly to proportionality. This should have been a short and simple case, and it is very tempting for me to take a course that would result in the shortest possible further hearing, conducted on the most economical terms. Obviously if I were to substitute my own judgment for that of the Employment Tribunal in relation to direct disability discrimination, leave in position the finding of discrimination arising from disability, and direct that only that and some aspects of loss of earnings should be further investigated by the same Employment Tribunal, a short and less costly disposal of this case would be arrived at.

29. I have concluded I must resist that temptation. It does not seem to me that I have the necessary factual material for me to say a finding of direct discrimination is totally impossible

in the context of this case and accordingly substitute a finding that direct discrimination is not made out. I am bound to say I think the factual material tends in that direction, but that is not the same thing as being able to reach a clear and confident conclusion about it from the material, which is before me. All that I have done is identified an error of law on the part of the Employment Tribunal by it concluding, as it does at paragraph 17 of its Judgment, by reference to the reasoning at paragraph 11 of the Judgment, that breaches of both section 13 and 15 had been made out.

30. I do not think, on the factual material, given that part of the error is that there has been an inadequate investigation of the factual material and certainly an inadequate deployment of it in the Judgment itself, that I can reach any firm conclusion about the matter. If that is my starting point, then it seems to me that consideration of whether or not this was a totally flawed decision, whether remitting it to the same Tribunal would be a second bite of the cherry and thus would be undesirable or whether that would be counterbalanced by the professionalism of the Tribunal, are the relevant considerations. With a heavy heart and with considerable reluctance, I have come to the conclusion that this matter ought to be remitted to a differently constituted Tribunal for a complete re-hearing, at least as to liability and as to loss of earnings.

31. Obviously the finding as to unlawful deduction and the quantification relating to deduction will remain in place. They are not the subject of the appeal. It is tempting to suggest that the scope of remission could leave in place the finding as to the quantum of injury to feelings, but it seems to me that if disability discrimination, both in terms of section 13 and section 15 are to be remitted for a complete re-hearing, then all issues of compensation relating to that, not just loss of earnings but also injury to feelings, should be remitted as well. The

matter will be remitted for a complete re-hearing to a differently constituted Tribunal to be the subject of further directions by the Regional Employment Judge.

Costs

32. Mr Rees, I will not order the Respondent to pay any part of the costs pursuant to Rule 34A(2A). My reasons are firstly that this case is remitted to the Employment Tribunal for a re-hearing of the matter, although in the end it may be that the concentration of the Employment Tribunal will only be on one small issue. In those circumstances it does not seem to me that I could with confidence think that at the end of the day the Appellant will necessarily succeed. In those circumstances, there being no provision for any kind of conditional order, I am not prepared to make one. Secondly, it does not seem to me just or equitable in a case in which the Respondent has already succeeded to a considerable extent for costs to be ordered in respect of matters that ultimately may not result in your client being successful.