Appeal No. UKEAT/0286/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 December 2013
Judgment handed down on 28 February 2014

Before

HIS HONOUR JUDGE BIRTLES

MRS M V McARTHUR FCIPD

MS G MILLS CBE

MS H SINCLAIR APPELLANT

COVENTRY & WARWICKSHIRE PARTNERSHIP NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS SALLY ROBERTSON (of Counsel) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU
For the Respondent	MR NICHOLAS COOKSEY (of Counsel) Instructed by: Browne Jacobson LLP Victoria Square House Victoria Square Birmingham B2 4BU

SUMMARY

UNFAIR DISMISSAL

Grounds of appeal that (a) **Environment Agency v Rowan** [2008] IRLR 20 not followed (b) a subjective test applied and (c) misdirection on constructive knowledge in a disability discrimination test failed on the facts.

Appeal dismissed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal by Ms H Sinclair from the Judgment and Reasons of an Employment Tribunal sitting in Birmingham in May and July 2012. Judgment was reserved, and the written Reasons, running to 32 pages, were sent to the parties on 11 July 2012.

2. The unanimous judgement of the Tribunal was that the Claimant's complaints of discrimination, because of the protected characteristic of disability and of being subject to a detriment that she had made a protected public interest disclosure, failed and were dismissed.

3. At a rule 3(10) hearing before HHJ David Richardson on 29 May 2013, he permitted three grounds in the Amended Grounds of Appeal to go forward to a full hearing. We heard that appeal on 6 December 2013 and reserved judgment.

4. The Appellant is represented by Ms Sally Robertson of counsel. The Respondent is represented by Mr Nick Cooksey of counsel. We are grateful to both counsel for their written and oral submissions.

The factual background

5. The Employment Tribunal made extensive findings of fact in paragraphs 12-86 of its Reasons. We accept those findings of fact and will refer to the relevant parts of them when we consider each of the three grounds of appeal. Suffice it to say that Ms Sinclair was employed by the Respondent from 13 June 2004 as a Community Psychiatric Nurse. In March 2006 Ms Sinclair saw her GP, who identified issues arising from sexual abuse, suffered by her in childhood. She received treatment from the Respondent's Psychology Department, which she alleges went wrong and she had made a clinical negligence claim against the Respondent. She

suffers from depression, which she says is a result of the failed treatment. On 21 March 2008 Ms Sinclair was in a road traffic accident and developed post-operative progressive degenerative arthritis affecting (among other things) her right arm and wrist.

6. Ms Sinclair's caseload included persons with sexual abuse issues and initially she had no objection to doing that. Subsequently her attitude changed. Ms Sinclair was away from work. She brought a grievance, which went through the appropriate procedure. There was extensive consideration of alternative posts. There was consideration of Ms Sinclair's physical disability and amongst other actions taken by the Respondent were a VDU work station assessment on 15 September 2010, a risk assessment on 26 October 2010 and a number of communications to and from the Respondent's Occupational Health Department. There were various meetings involving Ms Sinclair and management. There were further communications to and from the Respondent's Occupational Health Department. There were complaints by Ms Sinclair against work colleagues and vice versa. These matters were investigated by management. On 20 June 2011 Ms Sinclair lodged a further grievance with appendices. The grievance was investigated. There was a meeting on 11 January 2012 to investigate the grievance. The grievance was not upheld. Prior to that, Ms Sinclair had been suspended on 13 June 2011 because of the allegations of bullying and harassment made by work colleagues against her.

The Employment Tribunal references to the relevant law

7. At paragraph 87 of its Reasons the Employment Tribunal set out the relevant statutory provisions relating to disability discrimination applicable to this case and referred to **Igen Ltd & Ors v Wong & Ors** [2005] IRLR 258. The Tribunal had the benefit of a skeleton argument prepared by counsel for Ms Sinclair (not Ms Sally Robertson) running to some 21 pages, which made extensive references to case-law. It also had the benefit of the Respondent's

written closing submissions running to 21 pages prepared by Mr Cooksey. It also made reference to case-law.

The Employment Tribunal conclusions

8. The Employment Tribunal reached a number of conclusions in paragraphs 90-101 of its Reasons. Most of those have no application to this appeal and we will refer to the relevant conclusions when we consider each of the three grounds of appeal.

The Grounds of Appeal

Ground 1: Failing to go through the substance of the process identified in ***Environment Agency v Rowan*** *[2008] IRLR 20 (at paragraph 27) and in consequence failing to make sufficient findings of fact or give adequate reasons for its decisions in relations to issues 5 and 6*

9. The reference to issues 5 and 6 is a reference to the issues agreed by counsel for the parties and the Tribunal, set out at paragraph 11 of the Reasons. There is no longer an appeal in respect of Issue 5(a): failure to carry out a risk assessment with regard to Ms Sinclair's depression. The other issues are as follows:

- Failure to make adjustments of allowing Ms Sinclair regular breaks due to her arthritis (agreed issue 5(b)). The Tribunal's finding on this is contained in paragraph 94.1-94.5. The Tribunal found there was no PCP which put Ms Sinclair at a substantial disadvantage as compared with non-disabled colleagues, and there was no failure to comply with any duty.

- Failure to make an adjustment of moving Ms Sinclair to a private office or to another workplace where there were few staff due to background noise (agreed issue 5(c)). The Tribunal dealt with this in paragraph 95.1-95.3 of its Reasons and found that there was no PCP which put Ms Sinclair at a substantial disadvantage as compared with non-disabled colleagues and there was no failure to comply with any duty.

- Failure to make an adjustment of providing Ms Sinclair with additional training to reduce her stress (agreed issue 5(d)). The Tribunal dealt with this at paragraph 96.1-96.5 of its Reasons. The Tribunal found there was no PCP which put Ms Sinclair at a substantial disadvantage as compared with non-disabled colleagues and there was no failure to comply with any duty.

- Failure to provide an auxiliary aid, namely a different headset (agreed issue 6). The Tribunal dealt with this at paragraph 97.1-97.4 of its Reasons. The Tribunal found Ms Sinclair was provided with a headset and the suggestion that she should have been provided with a "Dragon" - voice-recognition software - was not pleaded and therefore not before the Tribunal.

10. As we have indicated the Employment Tribunal constructed an agreed list of the issues to be determined at the hearing: Reasons, paragraph 11. Paragraph 5 of the list of issues identified those reasonable adjustment complaints based upon the application of a PCP. Paragraph 5 records the PCP, as articulated by the Claimant, namely that having no redeployment policy it required the Claimant to fulfil her role in the same way as other members of the Single Point of Entry Team. Ms Sinclair was a member of that Team when she was suspended on 13 June 2011. The Claimant did not identify this as the PCP she relied upon until

4 July 2012 when the hearing was part-heard. At that point the Claimant was now represented by counsel: see Reasons paragraphs 8-9 and 92.

11. The Employment Tribunal found that the Respondent had no written redeployment policy at the time: Reasons paragraph 25. The Claimant's complaint failed on the basis of the PCP she relied upon: Reasons paragraph 92. Paragraph 6 of the issues list identifies the sole adjustment complaint based upon the third requirement, namely the provision of an auxiliary aid (an alternative headset). In our judgment paragraph 92 of the Reasons shows that the Employment Tribunal was fully aware and applied the proper approach under **Rowan**. The Tribunal said this:

> **"The tribunal finds it impossible to identify any step that would have been required of C & W by a reasonable redeployment policy that was not in fact taken. Ms Sinclair put her case on the basis that a better role for her would have been one in training, involving no patient contact at all. C& W looked for such a post but none was found. The non-legal members of this Tribunal have between them over 50 years of industrial experience. Neither they nor the Employment Judge have ever seen a redeployment policy that requires the employer to oust an existing employee in order to vacate a post, or to create a new post not justified by its business needs. The Tribunal does not understand how the lack of a redeployment policy can be said to have put Ms Sinclair at a substantial disadvantage in relation to a relevant matter in comparison with employees who were not disabled. "**

12. The Employment Tribunal uses the same or similar language when assessing the Claimant's other reasonable adjustment complaints: Reasons paragraphs 93.5, 94.5, 95.3, 96.5, and 97.4. The Employment Tribunal went on to consider alternative formulations of the PCP which had been advanced in the Respondent's written submissions: Reasons paragraph 92.

13. In our judgment there was no error in the Employment Tribunal's approach to identification of the applicable PCP or auxiliary aid said to be required to prevent substantial disadvantage in comparison with non-disabled persons.

14. Finally, we note that the Employment Tribunal confirmed that it had looked at the totality of the circumstances when considering the Claimant's complaints as required by **<u>Rowan</u>**: Reasons paragraph 10.

15. Furthermore, the Employment Tribunal did consider the question of substantial disadvantage: Reasons paragraph 92.

16. We turn to the specific issues. As for issue 5(a) the Tribunal found that the Claimant was not at a comparative substantial disadvantage: Reasons paragraph 93.5. The Tribunal found that a risk assessment had been completed in the form of Dr Orr's report: Reasons paragraph 93.3. The Claimant did not complain of any adverse effect from having to work with clients with a history of sexual abuse.

17. As far as issue 5(b) is concerned, this was the sole specific complaint raised by the Appellant in her first ground of appeal. The Employment Tribunal did consider the issue of substantial disadvantage in this respect in the following ways:

(a) It noted that the Appellant had made no specific complaint of disadvantage to the Respondent's occupational health department, with whom she regularly met: Reasons paragraph 94.2.

(b) Dr Dawson of the Respondent's Occupational Health Department positively stated that the Claimant was carrying out her duties, including data entry, without significant difficulty: Reasons paragraph 94.2.

(c) The Employment Tribunal found that the Claimant was very ready to complain about her treatment and did not do so in respect of any need of fixed breaks or even breaks generally: Reasons paragraph 94.3.

(d) There was an absence of any evidence, medical or otherwise, that the fixed break contended for amounted to a reasonable adjustment: Reasons paragraph 94.3. The Tribunal specifically considered the Appellant's perception that her colleagues took a negative view of the Claimant's breaks:

   (a) The Claimant did not raise any issue in this respect until during her grievance hearing, at which point she had been suspended.

   (b) During the grievance hearing, the Claimant had confirmed via the Respondent's Occupational Health Department that there was no disadvantage to her in respect of her data entry tasks.

   (c) The Claimant did not articulate any disadvantage in the form of negative staff feedback to her line manger or to the Respondent's Occupational Health Department: Reasons paragraph 94.3.

   (d) The complaint was put on the basis of inability to concentrate at the grievance stage. There was no evidence that the Respondent had any prior knowledge of any such impairment. The Appellant's colleagues knew only of her wrist impairment: Reasons paragraphs 69, 98.4, and 99.2. They also knew of her need to attend appointments in connection with it.

   (e) The Employment Tribunal made no finding that the Claimant was at a substantial disadvantage by reason of her colleagues' reaction to her break. There was simply no evidence before them that would have entitled them to make that finding: Reasons paragraph 94.3. In addition the Employment Tribunal concluded that the Appellant was permitted to take a break whenever she needed one: Reasons paragraph 94.2. She was therefore able to take breaks at fixed intervals rather than as needed due to her wrist condition. It was entirely a matter for her.

18. Issues 5(c), 5(d) and 6 failed due to lack of knowledge of any impairment of memory or concentration: Reasons paragraphs 95.2 and 96.2. The Appellant did not articulate complaints in this respect during the relevant period: Reasons paragraph 91.3. The Employment Tribunal also found a lack of comparative disadvantage because the Appellant had failed to articulate any such concerns at the material time: Reasons paragraphs 95.2, 96.4, 97.2 and 97.4. It was a finding it was entitled to make. We also note that in respect of issue 5(d) the Tribunal records and makes no criticism of the training provided to the Appellant. It notes her rejection of IAPT sessions: Reasons paragraph 96.4. It also notes the very limited scope for training in the newly created role. It was entitled to find there was no failure to comply with any duty to provide training.

19. We also note that the Tribunal found that the adjustment proposed in issue 6 was not reasonable: Reasons paragraph 97.2. It was entitled to do so.

Ground 2: Applying a subjective test rather than the objective test required

20. Ms Robertson referred us to **Royal Bank of Scotland v Ashton** [2011] ICR 632 at paragraphs 2, 13, 15, 19, 22 and 24 and **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 at paragraphs 56-74.

21. Ms Robertson also referred to a substantial number of paragraphs of the Employment Tribunal's Reasons, which she said showed the application of a subjective test rather than the objective test required (see, for example, paragraphs 94.2, 94.3, 95.2, 96.2, 96.4, 97.2, and 100.2). She elaborated this submission in her written and oral submissions.

22. We note that the Employment Tribunal made very substantial and detailed findings of fact. It adopted a chronological approach to a lengthy narrative, based upon the evidence it heard. We are impressed by the very detailed fact-finding carried out by this Tribunal.

23. We have seen the Appellant's skeleton argument and the Respondent's written submissions put in before the Employment Tribunal. The Respondent's case was that an objective test should be applied in respect of reasonable adjustments. The Appellant's skeleton argument did not specifically refer to the need for an objective test, although reference is made in several places to **Tarbuck**. The Respondent's written closing submissions make specific reference to **Ashton**: paragraph 18 and **Tarbuck**: paragraphs 10, 19, 21, and 23-24. The Respondent's submission was that the test was an objective one.

24. In our judgment, reading the facts as found by the Tribunal and the very detailed reasoning, we are satisfied that the Employment Tribunal did not err in law in applying a subjective test.

Ground 3: In addressing the Schedule 8 Part 3 paragraph 20(1)(b) defence, failing to refer to it explicitly and failing to consider whether objectively the Respondent at the material times has the requisite constructive knowledge, instead of focussing implicitly on the process and applying a subjective test.

25. In her submissions, Ms Robertson referred us to the Tribunal's Reasons paragraphs 90, 91, 91.1, 91.2, 91.3 and 91.4

26. The relevant law is contained in the **Equality Act 2010**, Schedule 8 Part 3, paragraph 20, **The Secretary of State for the Department of Work and Pensions v Alam** [2010] IRLR 283

at paragraphs 13-18 and 19, also **Wilcox v Birmingham CAB Services Ltd** (2011 UKEAT 0293/10/DM).

27. The Employment Tribunal made a substantial number of rational findings of fact relevant to knowledge and substantial disadvantage in respect of the period up to the Claimant's acceptance of the post with the Single Point of Entry Team. In his skeleton argument at paragraph 55 Mr Cooksey lists 19 examples. We agree with them. Those were all findings of fact which it was open to the Employment Tribunal to make on the evidence before it.

28. Furthermore the Employment Tribunal made further findings of fact relating to the period after the Claimant accepted the post in the Single Point of Entry Team. Mr Cooksey lists 15 examples in paragraph 56 of his skeleton argument. We agree that these are all findings of fact which it was open to the Tribunal to make on the evidence before it.

29. Finally, the Employment Tribunal made further findings of fact. It recorded the Appellant's concession that at no stage prior to her grievance (post-suspension) did she raise any health need for additional training: Reasons paragraph 96.4. As to the question of noise issues (headset/private office adjustments) the Tribunal found that (a) the Claimant complained to her trade union representative against colleagues engaged in chit-chat and lack of training. No health issues were expressed: Reasons paragraph 53; (b) No health/disadvantage issues were raised in team meetings: Reasons paragraph 62; (c) The Claimant took a "pointed approach" to assisting colleagues due to their idle chit-chat: Reasons paragraph 64. (d) At the 19 May team meeting the Claimant raised noise issues such as overhearing people discussing their personal lives and/or having distracting personal conversations. She did not raise any health issue: Reasons paragraph 66; (e) In August 2011 the Appellant complained to her trade union representative that she wanted "quiet space - redesign". She did not give any health reason for

this: Reasons paragraph 78. Effectively the Tribunal found that the Appellant's complaint was that she was being distracted from her work rather than any disability advantage: Reasons paragraph 95.2.

30. In our judgment, there was ample factual material before the Employment Tribunal upon which it could properly conclude that the Respondent had no knowledge (either actual or constructive) of issues regarding concentration, memory, etc or disadvantage said to flow from that, or disadvantage from the Claimant's abusive past while in the Single Point of Entry Team.

31. Finally, we note that the Employment Tribunal considered the "extent of the Respondent's knowledge of disability and substantial disadvantage": Reasons paragraph 91. This is the correct statutory test.

Conclusion

32. For these reasons the appeal is dismissed.

33. We should add for completeness' sake that Ms Robertson referred us to a very recent decision of the Court of Appeal in **Secretary of State for Work and Pensions v MIND & Ors** [2013] EWCA Civ 1565, handed down on 14 December 2013. We have carefully considered that judgment and in particular paragraphs 31-32. We do not find it helpful in the context of this case.