Appeal No. UKEAT/0158/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2013

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MR M C HICKFORD — APPELLANT

COMMISSIONERS FOR HM CUSTOMS AND REVENUE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MS LISA HATCH (of Counsel) Instructed by: HM Revenue & Customs Solicitor's Office Commercial & Employment Team Rm 2C/23 100 Parliament Street London SW1A 2BQ

SUMMARY

UNFAIR DISMISSAL

DISABILITY DISCRIMINATION - Disability

The Appellant raised the issue of disability to explain his dismissal for gross misconduct. The Employment Judge was correct to find on the evidence before him that the Appellant was not disabled.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment and Reasons of Employment Judge A M Snelson, sitting at London Central on 16 March 2013. The Judgment and Reasons were sent to the parties on 8 June 2013. The hearing was a Pre-Hearing Review. Employment Judge Snelson decided that Mr Hickford was not disabled at the material time. Mr Hickford appealed that Judgment and Reasons himself. The matter came on before HHJ Jeffrey Burke QC on 6 March 2013 for a rule 3(10) hearing. At that hearing Mr Hickford was represented by Mr Anderson of counsel under the ELAAS Scheme and he in fact provided an Amended Grounds of Appeal, which Judge Burke QC put forward to the full hearing, which is today.

2. This morning Mr Hickford does not appear, and there is no representation for him. The Respondent is represented by Ms Lisa Hatch of counsel. The Employment Appeal Tribunal at 18:21 yesterday, 4 December 2013, received an email from Mr Hickford, following I think at least two emails from the EAT office, asking him whether he was intending to pursue the appeal. The reasons for those emails were, first, that Mr Hickford had not filed a bundle and, second, he had not filed a skeleton argument. The material parts of the email dated yesterday say this:

> **"Regrettably I shall be unable to attend the hearing tomorrow. I have just started a new job, only a week ago, and my employers not unreasonably have not allowed me the time off."**

Mr Hickford then makes various comments about the fact that the appeal has not gone the way he had hoped it would and that circumstances have conspired to deny him the opportunity to make his case, which he still believes to have merit. He says, in closing, that he stands by all

recent communication on the matter. I take that to mean that Mr Hickford wishes to pursue his appeal but is not able to be here personally here to present it.

3. What I do have, apart from the bundle prepared by the Respondent, is a skeleton argument prepared by Mr Hickford personally and dated 25 February 2013, which was prepared by him for the rule 3(10) hearing, which I have referred to. In addition, I have the skeleton argument of Ms Hatch. In the circumstances, having read the papers and the skeleton arguments, it is not necessary for me this morning to call on Ms Hatch to make submissions to me.

The factual background

4. Mr Hickford commenced employment with the Civil Service on 6 April 1987 and by 2011 was employed as an Employment Status Inspector (Higher Officer). He was dismissed on 26 August 2011 for gross misconduct. The alleged misconduct was (a) that on various occasions between 17 January 2011 and 6 May 2011 he misused the department's electronic communications system in that he accessed inappropriate internet sites, some featuring sexually explicit material; (b) that he spent nearly 60 hours accessing non-work related internet sites during working hours.

5. The factual background to the conduct complaints was never in issue as Mr Hickford admitted those allegations at (a) an investigation meeting on 10 May 2011 with a Mr Dennis Brout, a senior officer in Local Compliance (b) an interview with Mr Dennis Pendlebury in Internal Governance; and (c) a meeting with a Mr John Davies, the dismissing officer on 10 August 2011.

6. In the course of his appeal against dismissal, Mr Hickford suggested amongst other things that he was suffering from a mental impairment which led to flights of escapism and therefore to use these internet sites. There was a case management discussion, held on 4 February 2012, which resulted in a PHR being listed for Friday, 16 March 2012. The issues that were ordered to be decided at the PHR were (a) whether all or any of the disability discrimination claim should be struck out as disclosing no reasonable prospect of success; (b) whether a deposit should be ordered as a condition of proceeding with all or any of the disability discrimination claims, because they disclosed little reasonable prospect of success; and (c) whether the Tribunal had jurisdiction to hear all or any of the disability discrimination claims if they were out of time. In other words had there been conduct extending over a period, would it be just and equitable to allow the Claimant to proceed, having regard to the balance of prejudice between the parties?

7. The Judge at the case management discussion on 4 February did not explicitly order that the issue of disability was to be determined at the PHR. However, both parties came to the PHR on 16 March 2012 prepared to argue the point as a preliminary issue as well as the other issues. Employment Judge Snelson records at paragraph 6 of his Reasons that both parties agreed that they were willing and ready to proceed to determine the issue of disability. The Employment Judge offered Mr Hickford an opportunity to adjourn to obtain further medical evidence, but he declined to accept that invitation, and the PHR proceeded on the basis of the material before Employment Judge Snelson.

8. The other matter that arose out of the case management discussion on 4 February 2012 was that Mr Hickford was ordered to provide further particulars of his case of disability by 17 February 2012. He was ordered to set out (a) the names of comparators and a short note of their circumstances, showing how they were comparable to him; (b) a list of each episode of

less favourable treatment, giving the date, a short description of what happened and why the treatment was because of his disability; (c) a list of unfavourable treatment received for a reason arising out of his disability, with details; and (d) what was the PCP imposed by the Respondent which put him as a disabled person at a disadvantage compared to those who were not disabled. Mr Hickford provided a 16-page statement dated 28 February 2012, which was in answer to that order. It went beyond the issues defined in the case management discussion order of 5 February 2012.

9. This case turns on the evidence of disability before Employment Judge Snelson. I therefore turn to that, the evidence of disability.

The lay evidence

10. At the case management discussion, Mr Hickford was also ordered to produce a witness statement by 9 March 2012 (a) describing the impact of his disability on his ability to carry out normal day-to-day activities and (b) stating any facts he wished the Tribunal to take into account as to why the claim was not brought in time and why it would be just and equitable to extend time.

11. On 13 March 2012 Mr Hickford served a witness statement dealing with those matters. I have read that witness statement. Much of it, I am afraid, consists of Mr Hickford's anecdotal account or retrospective self-diagnosis. There are contradictions between what Mr Hickford says in that second witness statement and some of the medical evidence.

The medical evidence

12. The medical evidence before Employment Judge Snelson at the PHR was limited and consisted of the following documents:

(a) the GP records from 21 October 1993 to 23 February 2012. Employment Judge Snelson referred to these records at paragraphs 12-16 and 18 of his Reasons.

(b) an occupational health report by a Dr Caddis of Capita, dated 28 November 2007. Employment Judge Snelson referred to that at paragraph 15 of his Reasons.

(c) a letter from the Claimant's GP, Dr Wilden (a "To whom it may concern" letter) in relation to the Claimant's disciplinary hearing dated 5 August 2011. Employment Judge Snelson referred to that at paragraph 17 of his Reasons.

(d) a letter from the Claimant's GP, Dr Wilden, dated 7 February 2012. Employment Judge Snelson referred to that at paragraph 18 of his Reasons. I have already indicated that at the beginning of the PHR hearing Employment Judge Snelson offered Mr Hickford the opportunity to adjourn the hearing to obtain further medical evidence, but he declined to do so.

The Employment Judge's Reasons

13. In his Reasons, the Employment Judge first referred to the statutory framework at paragraphs 8-9. Second, he set out the facts at paragraphs 10-18 of his Reasons. Third, he analysed the evidence at paragraphs 19-24 of his Reasons. I do not propose to set those out in this Judgment. They are plain on the face of the Reasons.

The Amended Grounds of Appeal

14. As I said, these were approved by HHJ Jeffrey Burke QC at the rule 3(10) hearing. Together, they set out four grounds of appeal. I take each in turn.

Failure to properly consider the risk of recurrence

15. The first was a failure to properly consider the risk of recurrence. In my judgment, there is no force in this ground of appeal. The available medical evidence, which I have set out

above, did not expressly identify the risk of recurrence of the Claimant's symptoms. Mr Hickford's evidence was that he had suffered with depression intermittently for almost 20 years, but that was not supported by the medical evidence before Employment Judge Snelson. Mr Hickford, as I say, was given the opportunity to adjourn the hearing on the disability case and obtain further medical evidence but declined to do so. The Employment Judge properly directed himself to consider the statutory Guidance on recurring or fluctuating effects, which is found at paragraph C6 of the Guidance (see paragraph 23 of the Reasons). Finally, in the absence of any medical evidence on the risk of recurrence, the Judge did not find and could not have found that the Claimant had a condition which was likely to recur and therefore had a substantial adverse effect on his ability to carry out normal day-to-day activities.

Ground 2 – failure to have regard to the medical evidence before the Tribunal

16. I accept Ms Hatch's submission that the Judge clearly considered the limited medical evidence. That is clear from the references which I have already referred to. Again, the point about the failure to take up the offer to adjourn to obtain additional medical evidence is valid under Ground 2. I can see no error in the Judge's reasoning.

Ground 3 – failure to have regard to or misapply the Equality Act 2010: guidance to be taken into account in determining questions relating to the definition of disability (that is the statutory Guidance)

17. The Judge clearly did consider the statutory Guidance. I have made a reference to paragraph 23 of the Judgment where he considers recurrence or fluctuating effects, and there are references to paragraph C3 and the meaning of "likely" at paragraph C6 on recurring or fluctuating effects. The Judge clearly did have regard to the statutory Guidance

Ground 4 – failure to have regard to related case-law

18. The Judgment and Reasons do not state that Mr Hickford referred the Employment Judge to any particular case-law. In an annex to his skeleton argument, Mr Hickford summarises a number of cases, but there is nothing before me which suggests that any of those authorities were cited to the Employment Judge by Mr Hickford. If that is right, then that point falls away, and in any event it is a new point before the EAT, which is effectively prohibited (see **Kumchyk v Derby County Council** [1978] ICR 1116).

Conclusion

19. For those reasons, the appeal is dismissed.