Appeal No. UKEAT/0386/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 September 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

SINGAPORE AIRLINES LTD — APPELLANT

MISS S CASADO-GUIJARRO — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS HOLLY STOUT (of Counsel) Instructed by: Clifford Chance LLP 10 Upper Bank Street London E14 5JJ
For the Respondent	MR JOSEPH SULLIVAN (of Counsel) Instructed by: Laytons Solicitors LLP 2 More London Riverside London SE1 2AP

SUMMARY

UNFAIR DISMISSAL

The Employment Judge erred in law in having regard to subsequent events when reaching her decision that the Claimant was already a disabled person by December 2011 – **Richmond Adult Community College v McDougall** [2008] ICR 431 applied. Appeal therefore allowed. The Employment Judge was, however, not bound to conclude in the Respondent's favour that the Claimant was not a disabled person. Issue therefore remitted for reconsideration.

Comment upon the importance of case managing – especially where a claimant is in person – the evidence to be adduced on the question whether a claimant is a disabled person.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Singapore Airlines Ltd ("the Respondent") against part of a judgment of Employment Judge Davidson dated 2 July 2013. By her judgment the Employment Judge held that Mrs Silvia Casado-Guijarro ("the Claimant") was a disabled person with effect from December 2011. The appeal has been listed urgently because a five-day hearing is due to take place at the end of September.

Background

2. The Claimant was employed by the Respondent with effect from 9 September 2002 as a sales officer. She continues to be an employee of the Respondent to this day, although she has now been off work for more than a year.

3. Until December 2011 the Claimant did not have a significant medical history of anxiety or depression. On 20 December 2011 she was signed off work with what her general practitioner described as an acute stress reaction. The GP's note said:

> **"Acute stress reaction NOS for two years that came to a head yesterday, and the last straw crying at work yesterday."**

She was prescribed medication. She had a course of counselling arranged by the Respondent. She was certified unfit to work on various occasions until 16 March 2012.

4. A fit note from her doctor dated 12 March 2012 said that the Claimant "may be fit for work" from 16 March 2012. The modern standard form of fit note enables the doctor to say that assessment of fitness to work may take into account advice given as to adjustments, a

phased return to work, altered hours, amended duties or workplace adaptations. None of these were ticked. There is space also for the doctor to add comments; no comments were added.

5. On 16 March 2012 the Claimant returned to work. The return was phased in over the first four weeks. There were occasions during the three months when she became upset at work: instances took place on 11 April, 8 June and 13 June. On 13 June the Claimant was again signed off work with "stress/depression"; she has not returned to work since that time. It is common ground that she was a disabled person by August 2012. An occupational health report by Dr Ian Chait dated 20 August 2012 confirmed this to be the case.

The hearing and reasons

6. The Employment Judge had before her a bundle containing the Claimant's medical notes and a number of letters and reports. These were: the report of Dr Chait, to which I have already referred; a report by Dr Nehru, the Claimant's treating psychiatrist after October 2012, dated 11 April 2013 with an addendum dated 8 May 2013; and a report dated 26 April 2013 by Ms Khalid, a psychotherapist who treated the Claimant between July 2012 and November 2012. The same bundle contained contemporaneous notes of conversations with the Claimant during the period from 22 December to 21 March. In addition, the Employment Judge had before her the Claimant's witness statement. This witness statement gave some account of the Claimant's symptoms and their effect upon her at different times. The Claimant gave evidence.

7. The issue for the Employment Judge was the date at which the Claimant became a disabled person for the purposes of the **Equality Act 2010** (EqA). The Claimant's case was that she had been a disabled person since at least July 2010. The Respondent's case was that she became a disabled person in or about August 2012.

8. The Employment Judge faced what is in my experience a familiar problem when there is an issue as to whether a claimant is a disabled person. The tests for establishing whether a person was or was not disabled at a particular date are sophisticated; yet little if any of the material before the Employment Judge focussed upon the issue she had to decide. The closest to doing so was the addendum of Dr Nehru dated 8 May 2013, but this was fundamentally flawed because he was under the impression that the Claimant had first been seen by the GP in January 2011, whereas the correct date was December 2011.

9. After a brief summary of the background facts - somewhat briefer than the summary I have already set out - the Employment Judge gave her reasons in the following paragraphs:

> **"The definition of disability under the Equality Act requires there to be a physical or mental impairment which has a substantial effect on the ability of the Claimant to carry out normal day-to-day activities and that effect is to be long term, which means it has lasted or is likely to last for 12 months. The issue here is not whether the Claimant now has a disability but when it began.**
>
> **4. I find that the Claimant had a disability from December 2011 when she had her breakdown. In respect of the period prior to that, I find that the Claimant has not discharged the burden of showing that her ability to carry out day-to-day functions was substantially affected. I accept the Respondent's submission that the Claimant has confused cause and effect.**
>
> **5. In relation to the period from December 2011 (the first absence), it is clear that the Claimant's condition is serious and I find that at the time, it could well have lasted 12 months or more. The Claimant had a long period off work and she was not back at work very long, before the symptoms recurred ultimately ending in her long term absence. To the extent that the Respondent considers the Claimant over-reacted to issues, I find that this was a symptom of her disability and evidence that the condition was serious, had an impact on her ability to carry out day-to-day tasks and could last for 12 months or more. Although the average period of depression may be less than 12 months, it frequently is more and I find that in this case, the Claimant has discharged her burden in this regard."**

10. Before I turn to the grounds of appeal, there is one further point to make clear. The Employment Judge was not asked to make and did not make any finding as to the date of the Respondent's actual or constructive knowledge of the Claimant's disability for the purposes of, for example, section 15(2) of the EqA or Schedule 8, paragraph 20. The Employment Judge was concerned only with the date at which the Claimant became a disabled person.

Statutory background

11. The following are the key statutory provisions:

> **"6 Disability**
>
> **(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial or long-term adverse effect on P's ability to carry out normal day-to-day activities.**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability. […]**
>
> **(6) Schedule 1 (disability: supplementary provision) has effect.**
>
> **Schedule 1 Part 1: Determination of Disability […]**
>
> **Long-term effects**
>
> **2 (1) The effect of an impairment is long-term if—**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.**
>
> **5. Effect of medical treatment**
>
> **(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—**
>
> **(a) measures are being taken to treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect.**
>
> **(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."**

Submissions

12. On behalf of the Respondent Ms Holly Stout firstly submits that the Employment Judge erred in law by reasoning from what happened subsequently in reaching her conclusion that the Claimant was a disabled person beginning in December 2011. She relied on the terms of the Tribunal's Reasons and upon **Richmond Adult Community College v McDougall** [2008] ICR 431. Mr Sullivan, on behalf of the Claimant, accepts that it would be an error to reason in such

a way, but he argues that the Employment Judge did not fall into this error. He argues that the Employment Judge's reasoning is to be found primarily in the last two sentences of paragraph 5 and that the earlier part of paragraph 5 is concerned only to address the period from December 2011 onwards.

13. Ms Stout secondly submits that the Employment Judge was perverse in reaching the conclusion that the Claimant's condition was serious in the period between March and June. She submitted that this conclusion could not stand with the fit note of the GP that cleared her for work without advising that any adjustment was necessary. Mr Sullivan draws attention to the high bar applicable to the test of perversity. He submits it was not perverse to hold that the Claimant's condition was serious during this period; he points to evidence that the GP was against the Claimant returning to work and that she was "less than 50% of her normal self overall" (Dr Chait, letter dated 20 August, paragraph 2) at that time.

14. Ms Stout further submits that if the Employment Judge applied the correct test, there was in reality no basis in the evidence to the holding that the Claimant was a disabled person by December 2011. The correct test was, she said, derived from **SCA Packaging v Boyle** [2009] ICR 1056. "Likely" meant "could well happen". There was, she submitted, no basis for a finding that as at December 2011 it could well happen that the effects of the depression would last for at least 12 months. The Employment Judge must have applied a "possibility" test rather than a "could well happen" test. Mr Sullivan, again, argues that perversity is not established. He took me to references in the medical reports suggesting that the Claimant, although she returned to work in March, had for some time been suffering from symptoms of depression and continued to do so.

15. I should mention that the Notice of Appeal originally contained a fourth ground, relating to the sufficiency of the Employment Judge's reasoning. This ground was not allowed through to a full hearing when the case was sifted by HHJ McMullen QC; I am therefore not concerned with a "sufficiency of reasons" ground in this appeal.

Discussion and conclusions

16. It was established by the Court of Appeal in **McDougall** that the question of whether the adverse effect of a person's impairment was "likely to recur" was to be judged on the basis of evidence available at the relevant time without regard to subsequent events (see Pill LJ at paragraph 24 and Rimer LJ at paragraph 33). It will suffice to cite a passage from the judgment of Rimer LJ within paragraph 33:

> **"Paragraph 2(2) is unambiguous in its language and is plainly focusing on the likelihood of recurrence as at the relevant time, a point not in dispute before us. It therefore requires a focus to be placed exclusively on evidence relating to the then likelihood of recurrence; and it provides no support for the suggestion that it is legitimate to answer the inquiry by taking subsequent events into account. There is, moreover, no justification for the suggestion that, in the context of that inquiry, reference can usefully be made to such events. The evidence relating to the relevant time either will, or will not, prove the likelihood of recurrence. If it does prove it, evidence of subsequent events is unnecessary and irrelevant. If it does not prove it, evidence of those events cannot fill the gap. That is because it is fallacious to assume that the occurrence of an event in month six proves that, viewing the matter exclusively as at month one, that occurrence was likely. It does not. It merely proves that the event happened, but by itself leaves unanswered whether, looking at the matter six months earlier, it was likely to happen, a question which has to be answered exclusively by reference to the evidence then available. Whilst I agree with the appeal tribunal that employment tribunals have to take a practical approach to the assessment of disability, that does not entitle them to take account of irrelevant evidence; and the suggestion that in practice they will be unable to ignore the evidence of what has happened since the relevant time is unfounded. Tribunals often have to put out of consideration evidence that is irrelevant to their inquiry; it is the chairman's job to ensure that they do. If they answer the paragraph 2(2) question by reference to the evidence of subsequent events, they will be doing so by reference to irrelevant material; and unless only they would reach the same answer by considering only the evidence as at the relevant time, they will (contrary to the first sentence of the quoted paragraph) retrospectively be visiting the employer with a liability for disability discrimination for which he should not be held liable at all."**

17. That decision was concerned with what is now paragraph 2(2) of Schedule 1, but its reasoning seems to me equally applicable to the use of the word "likely" in paragraph 2(1), and the contrary has not been argued before me.

18. In my judgment the Employment Judge did have regard to subsequent events when reaching her decision that the Claimant was already a disabled person by December 2011. Paragraph 4 of her reasons contains a bare finding of fact with no reasoning at all. I am satisfied that such reasoning as there is relating to the finding is contained within paragraph 5. I cannot dissociate references to the Claimant's "long period off work" from the Employment Judge's reasoning as a whole. Only if I were to hold that there was no real or effective reasoning at all for her decision could I find that it did not contain an error of law. The fact that after December 2011 the Claimant had a long period off work and then a recurrence before long is not evidence that was available at the time in question, i.e. December 2011. The Employment Judge, when deciding whether the effect of the Claimant's impairment as at December 2011 was likely to recur, should have carefully restricted herself to the evidence that was available as at that date. I am satisfied that she did not do so. It follows that the Employment Judge's decision cannot stand.

19. I now turn to the two perversity points. The importance of these points in practical terms is that they impact on the question whether and to what extent remission to the Tribunal for reconsideration is required.

20. I first consider the Employment Judge's conclusion that the Claimant's condition was serious in the period between March and June. I reject Ms Stout's argument that this finding was perverse. The bar is indeed high for perversity (see **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 93-95 and **Bowater v North West London Hospitals** [2011] IRLR 331 at paragraph 19). There was evidence before the Tribunal that the doctor had a reservation about issuing a fit note - from which an Employment Judge might conclude that the doctor was indeed

concerned about the seriousness of the Claimant's condition and the prospect of its recurrence. There was also the Claimant's own evidence of her condition for the Employment Judge to consider.

21. I would say, however, that the Employment Judge's finding about that the Claimant's condition was serious in the March-to-June period was of limited significance in itself. It did not address the statutory test directly, and if it had addressed the statutory test, it might, again, be subject to the criticism that it took hindsight into account.

22. Nor am I prepared to go so far as to say that it would be perverse to hold that the Claimant became a disabled person by December 2011. It was the Claimant's case that she had been suffering for two years up to this point even if she had not sought medical treatment. Plainly her condition took a very substantial turn for the worse in December 2011. She described it as akin to a nervous breakdown and said that she was a "complete wreck". Medication and counselling were required. Against the background of a two-year period of onset, it is possible – I put it no higher – that an Employment Tribunal might take the view that the effect of a dramatic nervous breakdown, once it had occurred in December, could well last for more than 12 months. Judgments of this kind, involving careful consideration of paragraphs 2 and 5 of Schedule 1 to the EqA 2010 are not necessarily straightforward. Parliament has made them the province of the Employment Tribunal, not the province of the Employment Appeal Tribunal. They are fact-specific. In a case of this kind, as Dr Nehru's letters made plain, what is likely will depend on environmental and personal variables. It will depend also, no doubt, on the severity of the episode as the Employment Judge finds it to be.

23. I consider that this is a matter where the Employment Appeal Tribunal cannot properly substitute its own view, and the matter must be remitted.

24. The remaining question is whether it must be remitted to the same or to a different Employment Judge. In my view, it should be remitted to a different Employment Judge. Not only is the Employment Judge's decision brief, but it is impossible to tell from it how she viewed the medical evidence or assessed the evidence of the Claimant. I would regard this as a difficult case that requires careful attention and careful findings of fact and application of the criteria in the EqA. I think it ought to be started afresh.

25. I wish to say a word about case management in disability discrimination cases such as this. There was a case management discussion some months prior to the hearing at which the Claimant represented herself. The case management order made provision for disclosure of medical records and for statements – but in effect it went no further. As Ms Stout says, it is often the case that disability will be conceded once a respondent has seen medical records, and this may have been the hope on all sides. However to my mind it is important that a case management order in a disability discrimination case of significance should go on to manage the case in the event that agreement as to disability is not reached. Otherwise the eventual hearing will face the problem – which in my experience is not unusual – that the evidence is not focussed upon the question to be decided. The case management hearing should consider, and the order should stipulate, what is to be provided in the way of medical evidence for the Tribunal hearing, when it is to be obtained and how it is to be obtained. In a case of significance and importance there will be a great deal to be said for a joint expert report (see **De Keyser Ltd v Wilson** [2001] IRLR 324 at 330). The key point, however, is that the matter

should be fully considered at the case management discussion, all the more so if the Claimant is a litigant in person.