Appeal No. UKEAT/0075/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 August 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MRS C BAELZ

PROFESSOR K C MOHANTY JP

MR D PEREGRINE (DECEASED) APPELLANT

AMAZON.CO.UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MRS ANN PEREGRINE DAVIES (Representative)
For the Respondent	MS MELANIE TETHER (of Counsel) Instructed by: Cozens-Hardy LLP Opie Street Norwich Norfolk NR1 3DP

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

The Claimant had surgery for parotid cancer in 1998 and so was disabled under para 6A **Disability Discrimination Act 1995**. In 2009 he developed symptoms in his back which the treating physicians did not immediately link to the cancer. He died in 2011. The Respondent did not know, and could not reasonably be expected to know of the link and so was not in breach of the duty to make reasonable adjustments for the symptoms in his back. **Ridout** and **Wilcox** applied.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the obligation of an employer to make reasonable adjustments for a disabled employee. This is the Judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. In particular, since we have been addressed by Mrs Peregrine Davies, an occupational nurse, we have ourselves been able to respond because of the expertise of Professor Mohanty on this bench. We will refer to the parties as Claimant and Respondent.

Introduction

2. It is an appeal by the Claimant's representative in these proceedings. He is David Peregrine, and he died at the age of 36 on 3 February 2011. The proceedings are conducted by his mother on his behalf. The Employment Tribunal sat under the chairmanship of Employment Judge R Harper for five days and sent its Reasons on 14 October 2012 following a hearing at Cardiff. The Respondent was represented throughout by Ms Melanie Tether of counsel.

3. The Claimant contended that the Respondent had breached the **Disability Discrimination Act 1995**, as amended by the 2005 Act, these proceedings taking place under that jurisdiction prior to the introduction of the **Equality Act 2010**. The Respondent contended, so far as is live on appeal, that the duty to make reasonable adjustments was not engaged for it did not know, nor could reasonably be expected to know, of the condition which would trigger such obligation. The essential issue, therefore, was to consider the effect of the statute on the circumstances obtaining at the time.

4. The Tribunal rejected the Claimant's case. He appeals through his mother against that. Directions sending this to a full hearing were given in chambers by Mitting J, who said the following, which we sent to the parties yesterday:

> **"The grounds of appeal are arguable. The Employment Tribunal did not expressly refer to paragraph 8 of schedule 1 to the Disability and Discrimination Act 1995, which was directly in point; and does not appear to have had it in mind. Given that it found that the respondents did know that the claimant suffered, or had suffered, from cancer, the duty to make reasonable adjustments would have arisen if, in consequence, he suffered from any impairment even though not substantial, as a result. Given the adverse findings of the Tribunal about the respondent's lack of promptness and the thoroughness in investigating his back condition, it may be that if it had gone on to consider the steps which should have been taken, it might have concluded that the respondents were in breach of their duty to make adjustments under section 4A."**

The legislation

5. The provisions in play here are not in dispute. The definition of disability can be fulfilled in three ways pursuant to Schedule 1 to the 1995 Act as amended. The most common is for there to be demonstrated by a Claimant the four principal elements set out in paragraphs 1, 2, 4 and 5. Alternatively, a person who has cancer is protected by section 6A, which says the following:

> **"(1) Subject to sub-paragraph (2), a person who has cancer, HIV infection or multiple sclerosis is to be deemed to have a disability, and hence to be a disabled person."**

6. Thirdly, a person may be deemed to be disabled by reason of the application of historical legislation; and fourthly, a person may have a progressive condition which includes but is not limited to cancer, in which case paragraph 8 will apply, and this says as follows:

> **"(1) Where—**
>
> **(a) a person has a progressive condition (such as cancer, multiple sclerosis or muscular dystrophy or HIV infection),**
>
> **(b) as a result of that condition, he has an impairment which has (or had) an effect on his ability to carry out normal day-to-day activities, but**
>
> **(c) that effect is not (or was not) a substantial adverse effect,**

he shall be taken to have an impairment which has such a substantial adverse effect if the condition is likely to result in his having such an impairment."

7. The duty to make an adjustment is demonstrated by section 4A:

> **"(1) Where—**
>
> **(a) a provision, criterion or practice applied by or on behalf of an employer, or**
>
> **(b) any physical feature of premises occupied by the employer,**
>
> **places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect."**

8. There is a supplementary provision relating to what is required for reasonable adjustments to be made under section 18B, which is not relevant in this case, for the Tribunal did not need to go that far.

The facts

9. Amazon has a large warehouse in Swansea employing between 900 and 2,500 people, depending on the season. It distributes books, DVDs, CDs and other products people order on the internet. Swansea is what the Respondent calls its "fulfilment centre", and the Claimant was there employed as a fulfilment centre associate. The role is physically demanding, there is much standing, walking and manual dexterity involved in the job. The Claimant initially was engaged as an agency worker, and on 5 July 2009 he began working for the Respondent directly.

10. He had a serious medical history, for in 1998 he had a parotid carcinoma and had surgery to remove it. He was thereafter under the care of professionals, and it is not in dispute that the Tribunal applied paragraph 6A and held him to be disabled at all relevant times, for he had

cancer. The Claimant began to suffer pains in his back. He attributed it to either competition in "iron man" events or carrying weights. He did not himself connect the possibility of his back condition to his earlier cancer. His mother did, but, as she told us today, he was 36, did not go to his doctors and suggest such a linkage; that was a matter for him.

11. When he started work, he filled in a form and disclosed the earlier surgery to the medical consultants Mansionhouse, who had been engaged by the Respondent for this purpose, although it is pointed out that they no longer assist the Respondent in this way. The material collected on its induction forms was kept to itself, and the nurse, Nurse Looker, did not disclose the earlier condition to the Respondent. Nevertheless, the Tribunal found, and it is not in dispute, that the knowledge of Mansionhouse was attributed to the Respondent and so it had actual or constructive knowledge that the Claimant was disabled by reason of his earlier cancer.

12. The Claimant was off work for substantial periods of time in late 2009 and early 2010. He sought a risk assessment when he returned to work, but this was not carried out because he was then off work again. He claimed that he had been discriminated against, for a condition had been applied to him with which he could not comply; that is, there was no risk assessment or reference to occupational health or a doctor, and the Respondent failed to make any adjustment to equipment so that he would not experience pain. That is how the Tribunal expressed the PCP required in this case, noting the reservation of the Respondent. The Claimant was diagnosed by Dr Fielding, a specialist oncologist, on 27 April 2010 in respect of the lesion in his back as having cancer. The diagnosis was a metastatic bone cancer; that means it has travelled.

13. There were further investigations. The Claimant submitted his claim form the next day, 28 April 2010. On 11 January 2011 Mr Marnane, a treating consultant, found a linkage between the parotid cancer and the secondary cancers in the Claimant's bones; that is, in his back, and it had now gone to his liver and lungs. Sadly, David Peregrine died on 3 February 2011.

14. The Employment Tribunal made criticisms of the Respondent's response to the Claimant's claims, to his grievances and to the speed with which they handled various matters. However, the simple issue that it had to decide when it applied the law was whether there was an evidential break in the chain that resulted in the claim failing. That is how it expressed it in paragraph 81. The Tribunal acknowledged that there was no evidence at all that the Respondent was aware that the back pain was in any way linked to the cancer, and on the basis of the evidence the Tribunal decided the claim failed and it would not speculate. The essential issue between the parties as cited by Mrs Peregrine Davies in her written argument to the Tribunal and in the Judgment is that Mansionhouse should have made a link between the cancer diagnosed in 1998 and the back problems in 2009. From that position the Tribunal considered whether the duty to make adjustments was engaged, and it said this:

> **"84. The Tribunal entirely agree with the respondent that the respondent could not have been expected to make that link, either themselves or through their agent Mansionhouse Healthcare Ltd and we adopt and repeat some of the points made in Ms Tether's submission on that point:**
>
> **1) Even the claimant thought that his back pain was as a result of an injury or as a result of carrying weights on his back as part of his Iron Man Training.**
>
> **2) Until a diagnosis of metastatic bone cancer was made by Dr Fielding at the end of April 2010, it did not occur to any of the Doctors in the Sketty & Killay Medical Centre that the claimant's back problems might be related to the adenoid cystic carcinoma from which he had suffered in 1998.**
>
> **3) None of the medical certificates issued by the Medical Authorities suggested that the claimant's back problems might be due to cancer.**
>
> **4) Even when bone cancer was eventually diagnosed the Doctors thought it unlikely that it was related to the adenoid cystic carcinoma. The GP notes for 28th April 2010 at page 241 contained two relevant entries. The first records that Dr Joslin discussed the results of the bone scan Mr Peregrine [sic] in which context the note says:**

'Previous parotid tumour 12 years ago – ?? Relevant.'

The second entry is a note of a telephone [sic] to the Oncology on Call Registrar. The note states:

'His opinion is that it is very unlikely for parotid tumour to spread to the bone. Advises await outcome of CT before Onco.'

5) In the same vein Dr Rolles' report of October 2010 (after the ET1 was filed) to be found at pages 220a and 220b stated;

'It was clear that at the time of diagnosis in April 2010 the back pain was due to the cancer. In hindsight it may have been responsible for the back pain from the beginning. However, it is worth noting that metastasis to the bones is uncommon for this particular cancer, and that non-malignant back pain is very common in the general population.'

6) We turn to page 267 of the bundle which was a document which was produced late into the proceedings. It is a letter dated 3 November 2010 from Leo Abse & Cohen Solicitors who had been instructed by the claimant to 'claim damages in connection with a repetitive strain injury to our client's lower back developed in the course of his employment with Amazon'. The description of the claimant's injuries on page 268 are shown as:

'Ongoing back pain and sciatica with the narrowing of lower vertebrae leading to problems with the spinal discs.'

It is clear therefore that the instructions which had been given to the solicitors as late as November 2010 by the claimant suggested that even he saw no link between the lower back pain and the cancer.

85. In those circumstances, we find that the respondents case is compelling that they had no knowledge, informed as it was by the Medical Authorities, that the lower back pain that was being reported was, in any way, at all linked to the cancer and no evidence has been placed before this Tribunal to show that they had that knowledge, either directly or through their agents knowledge [sic] or advice.

86. Therefore the duty to make reasonable adjustments did not arise and in those circumstances there is no breach because there is no duty, and therefore this claim is dismissed."

The Claimant's case

15. With that summary of the written submission, Mrs Peregrine Davies does not shrink from making the criticism that Nurse Looker at Mansiohouse was incompetent, that she should have made it clear that there could be a link, and that is the basis of her case. We hope we do no disservice to Mrs Peregrine Davies, who effectively is a litigant in person, addressing her short and succinct skeleton argument in putting it that way.

The Respondent's case

16. On behalf of the Respondent, it is contended that the Tribunal was right to look for a link and it was open to it as a question of fact to find that there was none.

The legal principles

17. The legal principles in this case derive first from the discussion in **Royal Bank of Scotland v Ashton** [2011] ICR 632 of the question of whether or not an adjustment should be objective or should simply involve (in our case) a failure to carry out a risk assessment. Langstaff P said the following:

> **"12. Mr Linden QC, who appears for the employer, submits that these provisions show clearly that the steps which are required of an employer are practical steps. They are intended to help the disabled person concerned to overcome the adverse effects of the relevant disabilities, at least to the greatest extent possible, so that he or she may fulfil a useful role as an employee. We accept that, as both he and Mr Morton for the Claimant submit, the focus of the provisions as to adjustment requires a tribunal to have a view of the potential effect of the adjustment contended for. The approach is an objective one.**
>
> **13. It follows, says Mr Linden, and we accept, that it is irrelevant to the questions whether there has been or whether there could be a reasonable adjustment or not what an employer may or may not have thought in the process of coming to a decision as to whether adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned. […]**
>
> **24. Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was concerned. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making of a failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."**

18. As to the question of knowledge and the application of the duty, Underhill J, President as he then was, in **Wilcox v Birmingham CAB Services Ltd** [2011] EqLR 810 reviewed all of the relevant authorities and said this under the heading of "Knowledge" (paragraph 37):

> **"With all respect to Ms Andrews, that submission makes no sense. The disadvantage referred to in section 4A(1) is, necessarily, a disadvantage arising from the employee's disability (because, that is, the 'PCP' or physical feature in question creates a disadvantage for someone with that disability) – yet if the Respondent did not know that the Appellant was disabled how could it know that she was disadvantaged by the disability. The submission depends on**

divorcing the passage quoted from [*Eastern and Coastal Kent Primary Care Trust v*] *Grey* [[2009] IRLR 429] from the context of the issue in that case. The point being made there was that even if the employer knew (actually or constructively) of the disability he was still not liable unless he knew (actually or constructively) that the employee was disabled by it. This was clearly explained by Lady Smith in the more recent judgment of this Tribunal in *Secretary of State for Work and Pensions v Alam* [2010] ICR 665; see at paras. 14-20 (pp. 670-2). The commentators seem to have got into a rather a [sic] pother about these cases. *Alam* is described in *Harvey on Industrial Relations and Employment Law* as having 'disapproved' *Grey* (see paras. L [405] and Q [953.02]); and Ms Andrews in her skeleton argument invited us to 'give guidance as to which competing EAT decision is correct'. In our view there is no conflict between the two cases, properly understood. It seems to us perfectly clear, in context, what was meant in *Grey*, and we can see no room for any real doubt about the effect of section 4A(3)(b). However, to spell it out, an employer is under no duty under section 4A unless he knows (actually or constructively) *both* (1) that the employee is disabled *and* (2) that he or she is disadvantaged by the disability in the way set out at section 4A(1). As Lady Smith points out, element (2) will not come into play if the employer does not know about element (1).”

19. There the Tribunal did spell out what was actually or constructively known and how important that is. One of the cases cited by Ms Tether that goes into this compendium is the Judgment of Morrison P and members in **Ridout v TC Group** [1998] IRLR 628, who said the following:

“23. The industrial tribunal had occasion to construe that sub-section and, in our judgment, they were correct in the way they approached the matter. Subsection (6) requires the tribunal to measure the extent of the duty, if any, against the actual or assumed knowledge of the employer both as to the disability and its likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled. This was a case which, in our judgment, fell within s.6(1)(b). In other words, it was a case which was concerned with the physical feature […].

24. It seems to us that they were entitled on the material before them to conclude4 that no reasonable employer would be expected to know without being told in terms of the applicant, that the arrangements which he in fact made in this case for the interview procedure might disadvantage this particular applicant for the job. As it was said in argument, this form of epilepsy is very rare.

25. Furthermore, it seems to us that the industrial tribunal was best placed to judge whether the disabled person had been placed at a substantial disadvantage in comparison with persons who are not disabled. That is a judgment which has to be made by the fact-finding tribunal. […]”

Discussion and conclusions

20. Applying those authorities to the case before us, we prefer the argument of Ms Tether and have decided to dismiss the appeal. Mrs Peregrine Davies has done the best she can but has not been able to do any more than simply disagree with the authorities cited above. We bear in mind she is a litigant in person but consider that her opinion on the applicability of these

authorities to the facts of the case does not destroy the firm foundation Ms Tether puts forward. In our judgment, the way that this is spelled out by Underhill J makes the solution to this case clear.

21. Mrs Peregrine Davies continued to focus upon the route by which her son achieved the status of disabled, but, as we pointed out, that was a point she won at an early stage. The Respondent conceded – of course it would do – that the Claimant was disabled by reason of his 1998 cancer, and it was not necessary for him to go through other routes to prove that he was disabled; he was. The question was one of linkage.

22. The finding by the Tribunal that the Respondent could not reasonably be expected to know of the link and did not know of the link between the back pain and the cancer was one of fact for it to decide (see **Ridout** above). That being so, we can see no error in the Tribunal's finding. Given Mrs Peregrine Davies' challenge to the competence of one of the advisers in this case, it has to be seen in the context of the other findings about the professionals made by the Employment Tribunal. In particular we consider most relevant is Dr Rolles, the oncologist; even he is saying that metastasis to the bones is uncommon for this particular cancer, and she accepts that. All of the people engaged in this were of the same view: it was unusual, they did not spot it and did not put two and two together, as Mrs Peregrine Davies says. But whether that can be a failure by the Respondent is a question of fact to be determined by the Employment Tribunal. In our judgment, the Tribunal was correct to focus upon whether the duty was engaged. It is engaged only if the statutory provisions are met as to knowledge and the Tribunal cannot be faulted in the finding that it made.

23. We turn finally in relation to the opinion given by Mitting J sending this case to a full hearing. He did not know that the reason why paragraph 8 in Schedule 1 to the Act was not mentioned was because it was not live. There had been case management directions, and the issue did not arise; understandably, because there was an easier route to the establishment by the Claimant of his status as disabled, and that was through paragraph 6A. So, with respect, having considered most carefully the reasons for this being sent, it seems to us that Mitting J did not have the full picture in mind when he did so. Miss Tether tactfully says it would have been most helpful to have seen this opinion in advance because the premise could have been addressed. The practice now is that reasons are given and sent to parties with directions when a case is sent to a hearing.

24. In those circumstances, we would very much like to thank Mrs Peregrine Davies for her very helpful and courageous submissions to us today, which cannot have been easy. This case is now over, and we hope she can now put the matter behind her.