Appeal No. UKEATPA/0227/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 July 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

DR C HAINSWORTH APPELLANT

MINISTRY OF DEFENCE RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR MARCUS PILGERSTORFER (of Counsel) Instructed by: Dean Wilson LLP 96 Church Street Brighton BN1 1UJ

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is a hearing under rule 3(10) seeking to appeal against a decision made by Employment Judge Kolanko at Southampton who in written reasons of 15 January 2013 dismissed the Appellant's claims of unlawful associative discrimination, said to be contrary to sections 20 and 21 of the **Equality Act 2010,** for want of jurisdiction and ordered her to pay £1,200 by way of costs.

2. The claim initially advanced by the Claimant alleged direct discrimination on the ground of disability and a failure to make reasonable adjustments on the footing not that the Claimant was herself disabled but that her daughter (Ch) was a 17-year old who suffered from Down's Syndrome and for whom schooling could not appropriately be provided in Germany where the Claimant worked for the Respondent. Ch wished to have training. It would be facilitated by her mother being permitted to move her place of work.

3. On 2 February 2012 the Claimant gave instructions to her solicitor to withdraw her claim for associative discrimination relating to reasonable adjustments. Although it was then withdrawn in writing and therefore effective (see rule 24 of the Employment Tribunal Rules) in October 2012 the Claimant sought to amend her claim in order to add it back. The Employment Tribunal refused that application. The Tribunal was invited to regard the application first as a reinstatement of the original claim. Quite properly it refused to accept that. A second basis was that the claim was effectively a fresh claim; the Tribunal refused that principally upon the basis it was not brought as a fresh claim but as a proposed amendment. It seemed to regard the subject matter of the amendment as being excluded from its jurisdiction by reason of the history.

4. It appeared to HHJ David Richardson on the sift that it was arguable whether the approach was correct, it was arguable that, for instance, the claim might have been treated in exactly the same way as any other claim introduced for the first time into an existing application.

5. The Tribunal having rejected the application to amend on that basis did not express any view as to whether it would have been just and equitable to extend time: no question of time limit applies directly in relation to amendments, but it would have been a relevant matter to consider in exercising the Tribunal's discretion, had it thought it had one so far as amendment was concerned. However it did consider one matter which would have resulted in it exercising a discretion, if it had thought it had one, contrary to the Claimant. That was that a failure to make a reasonable adjustment could not be claimed where the employee to whom the failure related was not herself disabled.

The statutory provisions

6. The **Equality Act 2010** defines direct discrimination by section 13:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

7. A relevant protected characteristic is disability. By section 20 of the Act a duty to make adjustments is imposed in certain circumstances. The duty is said to compromise three requirements. They are set out at subsections 3, 4 and 5. The section is one which is definitional. The prohibition upon discrimination which falls within the definition is that which is identified out by section 20(13), which refers to schedule 8 as that applicable to claims within section 20 which fall within the field covered by Part 5 of the Act: "Work".

8. Whereas section 20 is definitional, it is section 39 which imposes the obligations not to discriminate in respect of employees and applicants at work. Section 39(5) refers to a duty to make reasonable adjustments, saying simply that it applies to an employer.

9. Schedule 8 headed "Work: Reasonable Adjustments" describes under Part 2 who is an interested disabled person in respect of a decision to whom to offer employment. That person is one who "is, or has notified A that the person may be, an applicant for the employment". In respect of "employment by A" it is one who is "an applicant for employment by A" or "an employee of A's".

10. Three grounds of appeal against the decision were advanced. The first and the third were stayed by order of Judge Richardson because given the amount of money to which they related he considered that conciliation was the appropriate course, at least before further consideration was given to the appeal proceeding. They were respectively an argument that the Tribunal had jurisdiction to consider the question of amendment and, linked to it, the decision as to costs. He thought, however, that there was no arguable case nor any case which it was reasonable to permit to go to a full hearing on ground 2 which is the central ground in this case. He observed that the argument was that a person could bring a claim of failure to make reasonable adjustments where the Claimant was not herself disabled, but where somebody who was disabled had a relationship with her. (I have avoided in that description using the word "associated" or "associative", given the observations in **EBR Attridge v Coleman** of Underhill J that the words may create their own diversion into examining whether there is an appropriate association, where what matters are the underlying principles relating to whether there is discrimination on the ground of disability for the statutorily prescribed reasons.)

11. The judge recorded the submissions from paragraphs 5 to 11 of his reasons. He recited there that the argument for the Claimant was simply that the Claimant could rely upon the direct effect of Directive 2000/78/EC because the Respondent was an emanation of the state. That Directive establishes a general framework for equal treatment. Article 5, headed "Reasonable accommodation for disabled persons" provides:

> **"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."**

12. He recorded the Respondent's submission as being that "direct effect" was untenable and that the only possible relevance of Article 5 of the Directive was if it might give an interpretative route, by which the domestic statute could be construed so as to cover the act alleged. It did not appear that the Claimant through his counsel advanced any actual question of interpretation: he simply made a bald submission that there was direct effect. In the judge's conclusions at paragraphs 28, 29 and 30 the same theme appears. The submission was repeated that Article 5 had direct effect, to the purpose contended for by the Claimant. In paragraph 29 the judge rejected that for two reasons; first he did not think that Article 5 extended to persons who were not in relationship with the employer. Secondly, Article 5 was insufficiently clear and precise in its language. Accordingly, he thought it did not form the basis of a freestanding right in respect of which the Tribunal could adjudicate. He observed:

> **"It is, of course, right that any Directive or guidance contained in such provisions may assist a Tribunal in understanding and shaping the wording of the UK primary legislation but it does not afford any additional basis for bringing a claim to the Tribunal."**

13. The judge was there recognising the possibility that, as a proposition of law, a Directive would be relevant in interpreting the statute, but was not making any decision on that particular

point in this particular ruling. It appears on the face of the Judgment that was because the judge was not invited to do so. Accordingly, since the interpretative argument was not run below it cannot be advanced here, nor was it an error not to consider it more closely, and I address this appeal upon the only basis upon which it could be argued: whether there are reasonable grounds for permitting an argument through on the basis that there is a directly effective right arising under Article 5. I observe, though in passing, that if Article 5 could be construed to the effect contended for, then it would be open in cases generally for the interpretation of domestic statute to be affected by that.

14. Judge Richardson considered that in **Coleman v Attridge** [2008] ICR 1128 p39-42 the ECJ had confirmed that Article 5 applied only to disabled persons themselves and that nothing lent any support to the argument for the Claimant. Accordingly, important though the point was, he regarded it as unarguable. If that is right I am bound to say that the fact that the argument might be said to be important, as Mr Pilgerstorfer argues it is, is no ground for permitting it through to a full hearing - for if it is truly unarguable there it rests, however important it might be if the world were otherwise.

15. Similarly, he argues that there is a reasonable ground for permitting the argument through to a full hearing because there may be force in grounds 1 and 3 which have been stayed. He takes me to **Vincent v Gallagher Contractors** a decision of the Court of Appeal reported in [2003] ICR 1244 in which at paragraph 10 Pill LJ urged appeal tribunals to be cautious before adopting an approach whereby an appeal was permitted to proceed on one ground but not on another.

16. He was not ruling it out but asking for caution. Here if I were satisfied that there were no properly arguable force in ground 2 the fact that grounds 1 and 3 were permitted to go through

to a hearing though stayed would give no additional proper reason in my view for allowing this ground through too. In particular, the process adopted here with grounds 1 and 3 was specifically tailored to those grounds. As it seems to me, I have to consider ground 2 on its own.

17. As to that the question is whether Article 5 has direct effect in permitting someone (the "disabled party") who wishes training, but is not in an employment relationship with the employer, to require a reasonable adjustment to be made in respect of someone who is in such a relationship so that the disabled party can take advantage of the training - which is not itself to be provided by the employer. The Notice of Appeal sets out the basis of the claim in three subparagraphs at paragraph 22:

> **"(a) In a particular case an employer can be under a duty "to take appropriate measures" in domestic terms to make reasonable adjustments "to enable a person with a disability to undergo training".**
>
> **(b) There is nothing within the text of Article 5 that prevents such a disabled person from being a disabled person who although themselves not employed by the employer is associated with an employee. Here the respondent can make an adjustment in respect of a PCP applied to the Claimant so as to enable the disabled person, Ch…, to undergo training.**
>
> **(c) The exception "unless such measures would impose a disproportionate burden" is catered for in domestic law by the assessment of the reasonableness of any proposed adjustment."**

18. The reasonable adjustment argued for here is for the benefit of Ch. It is not said to be for the benefit of the Claimant directly. This is not a case in which it is said in the Notice of Appeal for instance that the Claimant cannot reasonably do her work, because of her relationship with someone who is disabled, without an adjustment being made to that work; it is not the way it is put.

19. The accommodation sought is not to accommodate a person who has an employment relationship with the employer but someone who has not. The question is whether the approach which must be taken respect of Article 5 may reasonably possibly be so broad as effectively to

invite employers of some people to have a responsibility for those disabled persons who are neither in their employment nor applicants to be so.

20. The argument relies first upon the wording of the Directive. The Directive contains recitals; those at 8, 9, 16 and 27 are relied upon by Mr Pilgerstorfer. Those at 8 and 9 are very broad and general. That at 16 is:

> **"The provision of measures to accommodate the needs of disabled people at the work place plays an important role in combating discrimination on grounds of disability."**

21. That at 27 refers to recommendation 86/379/EEC affirming the importance of giving specific attention to recruitment, retention and lifelong learning with regard to disabled persons.

22. None except possibly 16 helps to know whether the disabled persons to be affected by the employer's actions are to be defined in some respect by the word "employer" i.e. by having a relationship of employment or potential employment with him. Recital 16 suggests that they are.

23. There is no assistance which the Claimant can take from **EBR Attridge v Coleman** in which the Court of Justice of the European Union recognised that a person may be directly discriminated against on the grounds of disability where that disability is not that of the person discriminated against, but that of another with whom that individual is associated. The Claimant here relies upon that: the Tribunal has yet to determine that claim.

24. The emphasis is placed however by Mr Pilgerstorfer upon the width of various concepts. A width is to be given to the definition of disability; for that see the case of **Ring**, the case of **European Commission v Italy** and observations throughout **Coleman**.

25. "Reasonable accommodation" has a width to it. The recent decision, not yet authoritatively translated into English, of **European Commission v Italian Republic** C132/11, a decision of 4 July 2013, was to the effect that Italy had not properly implemented Article 5 of the Directive because it had to place all employers under obligation to make reasonable accommodation for all disabled persons. The breadth of this approach therefore is relied upon by Mr Pilgerstorfer. However, that seems to me to take the argument no further; no employers may be omitted, all those with disabilities may be encompassed and a wide scope may be given to the need to make reasonable accommodation but none of those begins to answer the question whether accommodation may be made to (A) in respect of the needs of (B).

26. The observations made by HHJ Richardson were acknowledged by Mr Pilgerstorfer to have some force in the course of his argument. He accepted realistically that although the language as used in **Commission v Italy** was very wide the court probably did not have in mind an employer having an obligation towards the general public.

27. In my view the case of reasonable accommodation creates situations which calls for a different analysis than that in respect of direct discrimination or harassment. Both those acts may be done upon the basis of disability even if the disability is not that of the person suffering a detriment. Reasonable accommodation is designed within employment for the purposes recognised by Article 5: to have access to, participate in, advance in employment or to undergo training. Given that the person who must provide the accommodation is the employer, defined as such, the scope of Article 5 is plainly related to employment by that employer.

28. In common with Judge Richardson and the Tribunal Judge before him, it seems to me that the case is not an arguable one despite the immensely attractive and skilful way in which

Mr Pilgerstorfer has advanced it. If I were wrong on that then I would have difficulty too with the question whether Article 5 was unconditional and sufficiently precise to permit its application by way of direct effect. Mr Pilgerstorfer says with a superficial attractiveness that it does no more than do the words used in the Equality Act to the describe the duty to make reasonable adjustments. Therefore, in effect he argues that because the obligations within the Equality Act are themselves sufficiently precise, so too must Article 5 be. The difficulty with that argument is it ignores the qualifications and specific limits within which the duty to make adjustments is expressed in the Equality Act; see in particular subsections 3, 4, and 5 and the link, so far as work is concerned, created by section 39 and schedule 8.

29. Far from one being an avatar of the other, Article 5 is far more broad and far more general than is the duty within the Act. It seems to me that the words themselves in Article 5 do not have sufficient certainty to permit the direct effect in the present circumstances upon which the Claimant would have to rely. Accordingly, it seems to me that the Judge was entitled to reach the view he did.

30. The question before me is not however whether I think the Judge was correct but whether I think it is arguable that the Judge was not or rather that there is some reasonable ground for the appeal to be heard. Although much impressed, as I have indicated, with the way in which Mr Pilgerstorfter has advanced the application, I have come to the conclusion that had he been advancing it at a full hearing I would not have needed to call upon the Respondent to respond. That gives me, it seems, a context within which I must say, in line with those who have commented before, that the case is a step too far on the law as it stands.

31. For those reasons this application is disallowed. The position remains that with the claim as a whole proceeds before the Tribunal. Unless there have been intervening proceedings about

which I have not been told, grounds 1 and 3 remain stayed, subject to the plea for conciliation by Judge Richardson which I endorse.