Appeal No. UKEAT/0097/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 November 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MRS L S TINSLEY

MR S YEBOAH

THE SECRETARY OF STATE FOR WORK AND PENSIONS
(JOBCENTRE PLUS) APPELLANT

(1) MS S JAMIL
(2) MR W QURESHI
(3) MS N CRITCHFIELD RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR STEPHEN WHALE (of Counsel) Instructed by: Tsol Employment Group Employment Litigation and Advise for Government One Kemble Street London WC2B 4TS
For the First Respondent	MS S JAMIL (The First Respondent in Person)
For the Second & Third Respondents	No appearance or representation by or on behalf of the Second & Third Respondents)

SUMMARY

DISABILITY DISCRIMINATION

Reasonable adjustments

C had a dormant condition of rheumatoid arthritis, which relapsed whilst she was in the employment of R. Her job involved working in a Job centre in Ealing some 1 hour and 20 minutes from home. She had childcare commitments. The added effect of her arthritis, making her slow to get moving in the morning and being fatiguing, made her repeatedly late for work. She asked for a job closer to home. The Employment Tribunal found that she had a disability, that the employer applied a PCP of requiring her to work at Ealing, and that this caused her a substantial disadvantage compared to those who did not suffer her disability. The employer had repeatedly refused a transfer to nearer her home. The ET thought that she had established a prima facie case that such a transfer would potentially be a reasonable adjustment. The employer provided no clear evidence why it had not made it. The ET however went on to say that there had been a refusal to transfer her more than 3 months prior to her ET1, although there was a policy to keep this under review; and also found that the employer had decided it did not want her to work at the branch close to home. The employer argued that this last contention was not advanced before the ET, which had decided it without hearing submissions from R, and that there was no evidence for it. This was rejected on the facts. It also argued that the refusal meant there was no continuing act/state of affairs, as the ET found; and a policy which was not itself discriminatory ((a) keeping the position under review; (b) not wanting her to work nearer home) was not intrinsically discriminatory, yet **Cast v Croydon College** required there to be a discriminatory policy for there to be a continuing act to bring allegations of disability discrimination with time. This was rejected; the focus should be on the law as derived from statute, and the ET judgment read as a whole made permissible findings.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. A Tribunal in Watford, chaired by Employment Judge Heal, for reasons given on 31 October 2012, though dismissing all other claims, upheld a complaint that the Claimant had been discriminated against in respect of her disability by failure to make the reasonable adjustment of transferring her place of work from Ealing to Uxbridge. She had been assigned to work at the Jobcentre Plus in Ealing, which was some one hour and 20 minutes away from her home by bus. Uxbridge was much closer. She had childcare commitments which made getting to work in time to start especially difficult, but this became significantly worse when she suffered a flare-up of rheumatoid arthritis, from which she had last suffered some several years before and which had lain dormant since. That "came with fatigue". It was accepted that from November 2010 she was disabled within the meaning of the **Equality Act 2010** by reason of that condition.

2. There are two grounds of appeal against that decision. One is procedural. The second is substantive.

The law

3. Disability is the only protected characteristic which involves the duty to make adjustments. That duty, which applies in work cases, provides, by section 20(2) that an employer discriminates

> **"..against a disabled person if –**
>
> **[the employer] fails to comply with [a duty to make reasonable adjustments] in relation to [an employee]."**

By section 20(1) a failure to comply with the first requirement, as set out in section 20(3), is a failure to comply with a duty to make reasonable adjustments. As expressed in section 20(3):

> **"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

4. In deciding whether that duty has been broken or fulfilled, section 136 prescribes the way in which the burden of proof should be approached. That is a section which, by subsection (1), applies to any proceedings relating to a contravention of the Equality Act. Subsection (2) provides:

> **"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."**

5. In essence, the Tribunal in the present case found that the employer here had applied a provision, criterion or practice ("PCP") of requiring her to attend work at Ealing. (It found other PCPs of which she complained but did not regard what the employer had done as being a failure to take a step which it would have been reasonable to have to take to avoid any disadvantage arising from them.) The Tribunal held that that PCP placed the Claimant at a substantial disadvantage (paragraph 47). It then said this, in five paragraphs which we shall set out in full:

> **"50. Was it reasonable to refuse a transfer to Uxbridge? At the time the Claimant made her first application to transfer her disability was not putting her at a disadvantage. Until 29 or 30 November (we really do not think it matters precisely which day the disadvantage starts), any refusal would not have been unreasonable on disability grounds. However once the disability manifested itself the situation potentially changed. We were told that the respondent maintained what we have called a 'continuing interest list' and that when an application to transfer was made but refused because there was no vacancy then the interest would be recorded so that it could be taken into account if a vacancy arose. The real difficulty we have is that we have not seen such list. It is apparently an organic, changing list and no snapshot of the list exists for any particular time. We do not even know if the claimant was on it nor have we heard from anyone who actually made the relevant enquires, what they asked or what they were told, at least not until Mr Paul Thompson carried out the relevant enquiries at the very end. We have not been shown any documented enquiry, not what it was said the claimant wanted or whether vacancies existed but not for the hours she wanted. What we have from**

the respondent is a bald, second hand assertion that there was no vacancy. If there really was no vacancy we do not think that it would be reasonable to require the claimant to transfer the claimant to Uxbridge. [sic – for the first 'claimant' the Tribunal clearly meant the "respondent"]

51. There is evidence however that the respondent was capable of asserting that there was no vacancy when in fact it had another reason for not wanting the claimant to transfer. That is what happened when the offer of Uxbridge at the outset of the claimant's employment was removed because her husband worked at Uxbridge. The real reason for the refusal was the husband's presence. The asserted reason was no vacancy. That has troubled us. Then there is Lorraine Wiggins' request of the claimant whether she could do increased hours. That suggests that there were vacancies. We find it hard to believe that a JCP office would have no vacancies at all of any sort from 29 November 2010 to 3 May 2011. We have had some difficulty trusting the respondent's bald assertion that there was no vacancy in circumstances when it has nothing to back it. We have also heard contradictory evidence about who was responsible for looking into a transfer. Mr Qureshi says he was not involved. [Mr Qureshi was the Claimant's manager at Ealing. He was not a manager who had responsibility for Uxbridge.] **Ms Wiggins says that it was the manager who was involved in looking into the transfer.**

52. We consider that the claimant has discharged the burden of proving her prima facie case. She has proved disability, she has proved the PCP and she had proved the disadvantage. She has set up a potentially reasonable adjustment. It is the respondent who makes the assertion that it is not reasonable because of the lack of a vacancy but that it has failed to prove. We think therefore that the respondent failed to make the reasonable adjustment of transferring the claimant to Uxbridge."

We pause there to note that at one stage of his argument Mr Whale submitted that if the Tribunal had paused there, then the finding might be unassailable.

53. That therefore brings time into issue for the disability claim or at least this part of it. Mr Whale argues that there were specific one-off refusals to transfer the claimant and he relies inevitably on *Cast v Croydon College* [1998 IRLR 318 CA] which we have read. Although there were specific refusals there was also a policy of keeping the situation under review: what we have called the continuing interest list though that is not the expression that the respondent used. The respondent therefore took upon itself a duty to continually review the situation. The information lies in the respondent's hands. If it could show that it continually reviewed the situation and considered vacancies that arose, checked with the claimant the hours that were suitable, it would be able to show that it was not reasonable to make the adjustment. It has not done so. Because there was or should have been a continuing review of the situation there was an act extending over the period right to the end of the claimant's employment.

54. Our thinking does not stop there however. We consider the evidence shows that the respondent never wanted to transfer the claimant to Uxbridge. The original offer was for Uxbridge but that was withdrawn for reasons that we have already said we find unconvincing. We do not think the respondent ever wanted the claimant at Uxbridge thereafter. Had the respondent been prepared to accept that we think we would have seen a more active search on the claimant's behalf. For example we might have been told about vacancies that were for more hours than the claimant offered. We might have seen discussions with the claimant about whether such vacancies were in fact suitable for her. We might have seen suggestions that she cover temporarily for sick or maternity leave. She might have been sent to talk to the Uxbridge manager about what she could do there. We think we would have seen more than we have seen. We think that every time the claimant asked to transfer she was met with a brick wall of refusal. We think that is because the respondent never wanted her at Uxbridge perhaps because her husband was there and was never going to allow her to transfer. That policy continued to the end of her employment whether or not there were vacancies."

6. The reference to an act extending over a period is a reference to a test in section 123 of the **Equality Act 2010**, which is the only other section of statute to which we need to refer. That provides, so far as material, as follows:

> **"123**
>
> **(1) Proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **...**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**

The Employment Tribunal decision

7. Thus the issue which substantively is challenged is the decision of the Tribunal to hold that the claim was in time because there was a continuing act within the meaning of section 123: that is, that there was conduct extending over a period, which was to be treated therefore as done at the end of the period. If so, the claim would be in time. There would then be no need to consider whether it would be just and equitable to extend time and the Tribunal did not do so.

8. The procedural ground related to the finding which the Tribunal made in paragraph 54. Mr Whale, who appears for the Appellant as he did for the Respondent below, argues that the Tribunal there concluded that there was a policy of not permitting the Claimant to work at Uxbridge because her husband worked there. It is described in terms as a "policy" in the last sentence of the paragraph. It is possible that the Tribunal thought that this finding was relevant to its conclusion. Why else, Mr Whale asks rhetorically, would the Tribunal mention it, though

he accepted in argument that our view, as expressed to him, that the relevance of paragraph 54 to the actual decision was not entirely obvious may well be right. He did not find it easy to explain what precise relevance it had to the underlying argument and issues.

9. He submitted, in respect of this finding, that there were two errors. First, the matter had never been put clearly before the Tribunal so that the Tribunal were in effect making a decision on a contention which was controversial but had not been argued out before them. Secondly, he submits that there was no evidence to support the conclusion. It was thus perverse and wrong.

The Appellant's case

10. We shall deal with the procedural ground first. This ground was initially excluded from the appeal, as permitted to proceed by HHJ Shanks. The matter came before the judicial member of this present Tribunal on an application under rule 3(10) of the Employment Appeal Tribunal Rules. He permitted the matter to proceed, thinking that explanation was required from the Tribunal. The Judge was asked whether the finding at paragraph 54 to the effect that the Secretary of State never wished the Claimant to be at its Uxbridge office, perhaps because her husband was there, and was never going to allow her to transfer, was a finding for which either party had contended in argument. If not, had either party raised it as a real possibility or denied it as such in the course of the presentation of their case evidentially? It was noted that the issue did not appear to be raised in the ET1, nor the Claimant's witness statement, nor was it in the list of issues as a discrete issue.

11. The answers which Judge Heal gave were that "The Claimant did contend for this finding in argument." In summary she said that the Respondent was not interested in exploring adjustments. She cast doubt on the "lack of vacancy" reason for refusing a transfer, suggested that the reason was possibly because her husband worked at Uxbridge, drew our attention to the

lack of evidence about vacancies, and said that vacancies must have arisen. She said she gave the Respondent opportunities to give her a solution, but the Respondent never wanted to give it. That, in our view, accepting Mr Whale's submission to this extent at any rate, falls short of a clear statement that the Claimant contended that there was something in the nature of a policy which was referred to in the last sentence of paragraph 54. It, however, comes very close.

12. Mr Whale relied on **Woodhouse School v Webster** [2009] ICR 818 (CA) for the relevant propositions, that if an Employment Tribunal inclined to an interpretation of the evidence which differed from that contended for by either side, then while it was good practice for the Tribunal to raise the matter with the parties, there was in general no procedural unfairness or injustice in the Tribunal making its findings based on the evidence before it if the parties had had a fair opportunity to address the Tribunal on the substance of the evidence. But in that case, there was no real prospect that further submissions would have made any difference. He submitted that here the Secretary of State was not given a fair opportunity to address the Tribunal on the substance of the evidence and a real possibility that further submissions would have made a difference.

13. We reject that argument. As Ms Jamil pointed out, appearing in person here as she did below, and as our own reading had shown, she raised from the earliest stage after the ET1, and first of all in a Scott Schedule, her view that she was offered a post at Uxbridge only to have it withdrawn before she began to work for the Respondent, because her husband worked at Uxbridge. The Secretary of State had said there was no vacancy, but the true reason was different. The Tribunal, as we have already noted, found that as fact.

14. She built on that when her inclusion of that complaint in the Scott Schedule was commented on by the Regional Employment Judge Gay at a preliminary hearing

case management discussion, by submitting a document in writing which set out amongst other comments five paragraphs, numbered A to E, occupying more than half a page of A4 print, all directed to suggesting that there was no objective reason which had been given for her not being offered a position at the Uxbridge office. She was therefore implicitly, if not expressly, suggesting that there was some other reason. The only other reason that had ever been volunteered was the fact that her husband worked at Uxbridge. The Tribunal found that was the reason for the withdrawal of the original offer. The Tribunal, in paragraph 54, did not go so far as to say that it was the reason for the Respondent not wishing the Claimant to go to Uxbridge, but it offered it as a possibility. Since the evidence had not suggested any other possibility, we do not see that the Tribunal was disentitled from saying what it did, though it seems to us to have no ultimate relevance to the case.

15. The matter, according to the Judge, raised in the terms in which it was, was thus known as the Claimant's view to the Respondent before the hearing began. It was not, as Mr Whale points out, specified as one of the issues for determination. But here we note that the purpose of setting out the issues is to set out the issues upon which the decision will ultimately depend, the central issues. A list of issues does not mean that there may not be some findings of fact made along the way which are contentious but which are not described as issues. If they were, it would have the tendency of making issues lists far too unwieldy to be managed in a Tribunal within a reasonable time and it would divert the resources of the parties from fighting the case into fighting over what should or should not be in the list of issues. A list of issues, it must be remembered, is a tool towards an efficient hearing. The parties should not create unnecessary inefficiencies and expenditure of time by being too pedantic about its nature: they should remember that they have a duty to co-operate with the Tribunal, and that will inevitably include helping it to observe the overriding objective.

16. Given what the Employment Judge says, the reasons for the Claimant not being sent to Uxbridge were explored by her, so far as she could, at the hearing. There were limits to how far that exploration could go. She could not ask anyone who took the decision about Uxbridge to give the reasons for it, because the Respondent simply called no-one who could have done so to explain. But the submission remained to be made, and in our view, on the findings of fact, the Respondent had a reasonable opportunity of meeting those submissions. We cannot say that it falls foul of the principle expressed in **Woodhouse**.

17. We turn then to the second question, whether there was evidence upon which the findings in paragraph 54 could be based. The evidence, which touched upon the reason for the Claimant not being transferred to work at Uxbridge, was first the decision to withdraw the original offer as made (see paragraph 10). Second, that she had asked for a transfer to Uxbridge in early October (paragraph 15). The Respondent had never explained why that request had not been answered, save by remote hearsay. On 15 December 2010 the Claimant had plainly asked again about whether she might voluntarily be transferred to Uxbridge. That emerges from a response from Miss Wiggins of HR, dealt with at paragraph 20. In January she made a request for an emergency transfer (see paragraph 23). That, again, was not honoured on 4 March 2011 (see paragraph 25). And finally, on 1 April, she was told that "her transfer to Uxbridge had been refused". This was therefore a situation in which there had been repeated requests for transfer. Those requests had either not been acted upon or refused. The Respondent had never produced direct evidence from the relevant manager who refused the request saying why that had occurred. We regard it as generally a sound principle that the evidence of a party is to be judged not just by that which the party produces but by that which it is within its power to produce or to refute. Given that centrally in issue here was the question whether it would be a reasonable step to have to take to transfer the Claimant from working at Ealing to working at

Uxbridge, the Respondent might have been expected, and plainly this Tribunal expected the Respondent, to produce evidence as to why that was.

18. The reasoning set out in the paragraphs we have cited relied centrally upon an absence of any such evidence. Once it had been shown by the Claimant that the Respondent was under a duty, pursuant to the sections of the Equality Act we have set out above, to have to take the step of transferring her if it was reasonable to do so, the Tribunal, in our view rightly, applied the burden of proof. Mr Whale, to his credit, in a careful, skilful argument, which made a number of telling points, accepted that, in effect, it was for the employer, in a situation such as this, to show that it was not reasonable to have to take the step contended for once the Claimant had done as she had done and shown that there was a duty to take some step to avoid the disadvantage from which she suffered by having to work at Ealing. She was propounding a move to Uxbridge. The focus was clear.

19. Accordingly, in our view, the Tribunal was entitled to decide as it did on that evidence – which was a mixture of the history (refusals without clear reasons and an absence of evidence produced to explain it) coupled with the points that the Tribunal made in paragraph 54 as to what would have been the case if the employer had a desire, if it could reasonably do so, to transfer the Claimant to Uxbridge. We would comment that it is unwise of the Tribunal to express itself in the terms which it did by talking of a "brick wall of refusal". It does echo what Ms Jamil said in her submissions, that her employer had turned deaf ears to her requests, but it is perhaps unhelpful to adopt such colourful phraseology when what is actually being expressed is simply that she was not transferred, as a matter of fact, and that the Tribunal inferred, though it did not have to, that that was because the Respondent, who had not advanced a good reason for that failure, did not wish it to happen.

20. Finally, whether there has been a breach of the duty to make adjustments, is answered not by what was in the mind of the employer, or by his intention, but by the objective question of whether an adjustment was made and, if not, but if there was an adjustment which might have been made, whether it would have been reasonable to make it. Here, we return to the first ground. What lies behind it is that there was a duty to take steps under sections 21 and 20(3). No step had in fact been taken. The duty is a duty which persists throughout the entire period of employment. That is why we consider that Mr Whale's suggestion that if the Tribunal had ceased its reasoning at paragraph 52 an appeal would probably have been difficult is well-founded. But, as he observes, rightly, the Tribunal did not do so. The question for us, therefore, is whether, in the reasoning at paragraphs 53 and, because the Tribunal included it, despite our view as to its real relevance, paragraph 54, the Tribunal erred in law when it would not otherwise have done.

21. What Mr Whale takes from **Cast v Croydon College** is this. The application of a discriminatory policy or regime pursuant to which decisions may be taken from time to time is an act extending over a period. There can be a policy, even though it is not of a formal nature or expressed in writing, and even though it is confined to a particular post or role. He argued that the application of such a discriminatory policy or regime pursuant to which decisions might be taken from time to time was an act of discrimination, and that a decision by an employer might be an act of discrimination whether or not it was made on the same facts as before, providing it resulted from a further consideration of the matter and was not merely a reference back to an earlier decision. He submitted that the policies which the Tribunal had identified in paragraphs 53 and 54 were not discriminatory. This was not a case, therefore, in which the **Cast** principle could apply. That looks for a discriminatory policy not a non-discriminatory one.

22. We agree that on the face of it there is nothing discriminatory about such a policy as referred to in paragraph 53, while keeping the situation under review. We do not think there is anything necessarily discriminatory about the policy expressed in paragraph 54 of not wishing a woman and her partner to work together in the same office.

23. Mr Whale urges that there was here a distinct cut-off point. There was a refusal. That is the way in which the Tribunal described it in paragraph 2 of its decision and again in paragraph 31. Where there is a refusal then time should run from that point.

Conclusion

24. We do not agree. First, there is a great difference between the factual scenario which gave rise to the decision in **Cast** and that in the present case. **Cast** concerned an allegedly discriminatory policy. The present case does not. It concerns whether or not the employer fulfilled a duty which it is common ground that the employer had. Secondly, the focus should not be too closely upon the word "policy". As Mummery LJ explained in **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96, [2002] EWCA Civ 1686 at paragraph 52:

> **"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

25. Reference to a "continuing state of affairs" is helpful in the present context, where the issue is whether in the words of section 123, "conduct extends over a period", and failure to do something is treated as occurring when the person in question decides on it. Those concepts

here apply to a duty which is a continuing duty. If there is such a duty it requires to be fulfilled on each day that it remains a duty. Throughout the employment of the Claimant it did so. The problem for the Respondent here was that a move of the Claimant to Uxbridge was, on the face of it, not unreasonable. It was therefore, in practice, for the Respondent to show why, in the particular circumstances of this case (or for that matter the changed circumstances after 1 April 2011, when the Claimant went off ill and when she understood that her fixed-term contract would not be renewed as from the following August) the proposed step would not have been one which it was reasonable for the employer to have to take. To look for a policy which is itself discriminatory is to be diverted from the enquiry necessary here.

26. In any event, we think that the Tribunal's reasoning, viewed broadly, was this. In paragraph 52 the Tribunal acknowledged that a move to Uxbridge was potentially reasonable. Those are its words. In the next sentence it notes that the Respondent had failed to prove otherwise. At paragraph 53 it merely emphasises the continuing nature of the duty. It does so noting that the employer had itself said, in a letter contained at page 91 in our bundle, that there was the possibility of review. By referring to the policy of review, the Tribunal at one swipe took away from the word "refusal" the end-stop upon which Mr Whale had relied and qualified the way in which it had been used twice earlier in the decision. A Tribunal Judgment must be read as a whole. It seems plain to us the Tribunal here were regarding the refusal as not being a refusal once and for all. The Tribunal was saying that the duty in effect, not only continued to exist but the Respondent recognised that it did so, and it was the Respondent's obligation to consider throughout the remaining period how it should be discharged. There was no evidence about that; hence the words "The information lies in the Respondent's hands". The Tribunal complained that the employer could have, if it had produced the evidence, satisfied it that it was not reasonable to make the adjustment. But we read paragraph 53 as demonstrating a continuing duty which continued not to be honoured and therefore there was such an act as

brought the claim within time. Paragraph 54 is strictly unnecessary to that analysis, as we have already commented. But where the Tribunal was saying, at paragraph 53, the employer said it would review that matter, but gave no reason why it still did not transfer the Claimant, this links to paragraph 54, where the Tribunal said that in any event it thought that probably the Respondent simply did not wish to. Viewed broadly, stepping back from the decision, that is how we read those paragraphs. Given that, we see no basis in law for thinking that the Tribunal was in error, as Mr Whale valiantly but, ultimately, unsuccessfully, has argued before us.

27. For those reasons, this appeal must be, and is, dismissed.