Appeal No. UKEAT/0227/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 November 2013

Before

THE HONOURABLE MR JUSTICE BURTON

PROFESSOR K C MOHANTY JP

MR B M WARMAN

MS S K KELLY — APPELLANT

SECRETARY OF STATE FOR JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LEONIE HIRST (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR TOM POOLE (of Counsel) Instructed by: Treasury Solicitors Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE – Return to work

The Tribunal appears to have concluded, in relation to Regulation 18 of the **Maternity and Paternal Leave Regulations 1999**, that because the contract of employment of the Appellant, a Prison Mental Health Lead, described her as a Prison Officer, therefore it must be suitable and appropriate for her to return from maternity leave (after outsourcing of the prison mental services) to be an ordinary prison officer. Remitted for the issue, whether the job offered was suitable and appropriate, to be considered.

THE HONOURABLE MR JUSTICE BURTON

Introduction

1. This has been the hearing of an appeal by the Claimant against the decision of the Employment Tribunal at Bury St Edmunds (Employment Judge Laidler sitting with Mr Coles and Mrs Worby) given after a hearing which lasted six days in November 2012 on 2 January 2013. The Tribunal had to deal with a number of different complaints and claims by the Complainant, who had been a prison officer with the Respondent Secretary of State for Justice at a prison in Norfolk, and had been on maternity leave and came back to find that the job which she had previously carried out as, as her job description described it, a Healthcare Officer (Prison Mental Health Lead – Prison), was no longer available for her to carry on, because the health services aspect of the prison environment had been outsourced to the National Health Service, and the only job available to her, as was found by the Tribunal, and was effectively common ground, was a job as what has been called before us, and without in any way intending any disrespect, an 'ordinary' prison officer. She complained by reference to the **Maternity and Parental Leave Regulations 1999** under paragraphs 10 and 18. The claim in respect of paragraph 10, redundancy during maternity leave, does not arise before us as it is, by common ground, regarded as inapplicable and will not therefore trouble us further.

2. But the issue which was live below, and has been live before us, on an appeal by the Claimant against the dismissal of her claim, is under Regulation 18, right to return after maternity leave. It is, to summarise, an entitlement of an employee returning to work after maternity leave to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her in the circumstances.

"Job" is defined in the Regulations under Regulation 2(1) as:

> **"In relation to an employee returning after... maternity leave... the nature of the work which she is employed to do in accordance with her contract and the capacity and place in which she is so employed."**

The facts

3. There were agreed facts below, which are set out by the Tribunal and which are helpfully summarised by Ms Leonie Hirst, counsel for the Appellant, and accepted in his skeleton argument in response by Mr Tom Poole, counsel for the Respondent, as follows:

(1) (by reference to paragraph 70 of the decision):

> **"The Claimant's 'substantive contractual role' prior to maternity leave was as a prison officer in the specialist role of mental health nurse as confirmed in the job description of May 2005... Since 1997 her role 'had remained as a nursing role with the emphasis on mental health'"**

(2) (paragraph 70 of the decision):

> **"She remained at all times a prison officer on civil service pay and conditions, subject to the rules and regulations of a prison officer, and had yearly control and restraint training)"**

(3) (paragraph 8 of the decision):

> **"However, save for two week's training in 1999, the Claimant had not undertaken discipline prison officer duties. Prison officer duties formed 5% or less of her role"**

(4) (paragraphs 97-98 of the decision):

> **"The Claimant's 'job' and the 'nature of the work she was employed to do' within the MPL Regulations were her role as Healthcare Officer"**

(5) (paragraph 71 of the decision):

> **"The Claimant's contractual hours had been varied on 27th January 2006 to 16 hours per week. From her return to work in April 2006, the days she worked had been Tuesdays and Thursday"**

(6) (paragraph 8 of the decision):

> **"The Claimant had never worked shifts or weekends during her employment with the Respondent"**

(7) (paragraph 98 of the decision):

> **"It was not reasonably practicable for the Claimant to return to her role as Lead Healthcare Officer."**

4. The job description, to which reference was made, is of significance. Her contract of employment was as a prison officer, but her job description reads as follows:

"TITLE	**Healthcare Officer (Prison Mental Health Lead – Prison)/PCT Mental Health Liaison Officer**
ACCOUNTABLE TO	**Governor/PCT** **Head of Healthcare** **Healthcare Operational Manager**
REPORT TO	**Healthcare Operational Manager**
RESPONSIBLE FOR	**Advice and direction to Primary Care Mental Health Link Worker.** **Students/trainees on placement** **RGNs."**

5. The balance of the job description, relating to her role summary "*as a mental health specialist*", set out her key objectives, her roles and responsibilities, her interventions and her liaison role/lead, all related to her responsibility and her performance as a nurse in the mental health field. At the end of the job description, there is the passage "*Prison officer duties as directed*" including "*Control prisoner movement*", but it is a very short passage, and it is effectively common ground before us that this related to what had been described as the 5% of her duties over the 15 or so years that she had worked at the prison when she worked as an 'ordinary' prison officer, and was irrelevant to her 95% job as a mental health nurse.

The case law

6. The leading case on the subject was identified by the Tribunal and cited by them at length, namely **Blundell v Governing Body of St Andrew's Catholic Primary School** [2007] ICR 1451. The Tribunal set out the relevant paragraphs in relation to Regulation 18 at paragraph 65 of its decision. Again, in her skeleton argument, Ms Hirst summarises what she submits to be the principles to be derived from **Blundell**, which did not seem to us to be materially in issue between counsel before us. In paragraph 5 of her skeleton she draws from **Blundell** as follows:

> **"5.1 The contract of employment is not definitive. The 'nature of the work' relates to the contract, but encompasses the job description and terms and conditions which may not be included within the contract itself [§51];**
>
> **5.2 'Capacity' within Regulation 2 is a factual label, 'descriptive of the function which the employee serves in doing work of the nature she does' [§52];**
>
> **5.3 'Place' is also a factual label, not subject to purely contractual considerations [§53];**
>
> **5.4 The MPL Regulations aim 'to provide that a returnee comes back to a work situation as near as possible to that she left. Continuity, avoiding dislocation, is the aim' [§53];**
>
> **5.5 The level of specificity with which 'nature', 'capacity' and 'place' are addressed is likely to be critical, and are essentially questions of factual determination and judgment for the tribunal at first instance [§54-55];**
>
> **5.6 However, in determining those questions, the tribunal should have in mind the purpose of the legislation** [namely to protect the employee] **[§56];"**

The Employment Tribunal decision

7. The Tribunal, in a lengthy decision because it was setting out sufficient facts in order to resolve not only this claim but others also, reached its conclusion in relation to this aspect in the last paragraphs of the decision, and, in particular, at paragraphs 97, 98 and 99, with a conclusion at paragraph 100. The decision reads as follows:

> **"97. The Tribunal is satisfied, in relation to this aspect of the Regulations, that, applying *Blundell* paragraph 51 and also the end of paragraph 53, the nature of the work was as Lead Healthcare Officer.** [It is clear that that was what they concluded her job was] **Referring to those paragraphs in Blundell, it is clear that, in relation to the nature of the work, the contract is not definitive. If it was, then it is suggested in that case that the Regulations would say so. The paragraph goes on to say that one must look at the job description and the terms and conditions of employment, and also it is important, as set out at the end of paragraph 53, to look at the fact that a woman returning from maternity leave would suffer 'the dislocation and**

> **unsettling need to familiarise herself with that workplace at a time when she was vulnerable and still learning to accommodate the needs of her newborn alongside those of work'.**
>
> **98. In this context, therefore, the tribunal is satisfied that 'job' did encompass her role as Lead Healthcare Officer. However, it was not reasonably practicable for the Claimant to return to that job."**

The Tribunal accepted the evidence of Governor Reilly in that regard because of the contracting out of the healthcare work to Serco.

> **"99. The tribunal then needs to look at whether the role that was offered to the Claimant was suitable and appropriate for her, and the Tribunal has to find that the Prison Officer role, being her contractual role for which she was trained, paid at that grade and for which more training was to be given, was both suitable and appropriate. In the letter from Mr McCaskie, he made it clear he was considering and taking into account the Claimant's part-time hours. She had been encouraged by Mr Burton to make a work-life balance application which she did not do. The point made on her behalf that this role would not utilise her specialist nursing skills is acknowledged. However, that does not unfortunately detract from the <u>conclusion</u> that her contractual position was as a Prison Officer and it must therefore be both suitable and appropriate for her to return to that in all the circumstances."**

The Claimant's case

8. Ms Hirst submits that the Tribunal plainly erred in law in relation to its conclusion in that regard. She refers to the first sentence of paragraph 99 in which the Tribunal says that "*the Tribunal <u>has to</u> find* (our underlining) *that the Prison Officer role...was both suitable and appropriate*". Mr Poole submits that that is an unfair interpretation of that sentence, and there is of course a good deal of authority, particularly in this Appeal Tribunal, that the words of Employment Tribunal Judges and Chairmen should not be construed as if they were Holy Writ: they are not statute, and a realistic approach should be made to understanding them. He submits that the phrase could well mean simply that the Tribunal had to take that matter into account in reaching a finding. But if there were any doubt about the interpretation of that sentence, and of what the Tribunal believed it was doing, it is in our judgment wholly resolved by the last and conclusory sentence at the end of paragraph 99, which we read again:

> **"..her contractual position was as a Prison Officer and it <u>must</u>** (our underlining) **therefore be both suitable and appropriate for her to return to that in all the circumstances."**

We leave aside the use of the word "*return*", when in fact she had never been an 'ordinary' prison officer, save for the first two weeks of her employment when she was carrying out training: it is acknowledged that throughout her period as a lead healthcare officer and as a nurse she would, from time to time, assist by carrying out the job of a prison officer but that it took no more than 5% of her time. But leaving that aside, it is quite plainly a conclusion that it was suitable and appropriate for her to become an ordinary prison officer because "*her contractual position was as a Prison Officer*". That does appear to us to be a decision by the Employment Tribunal which was wholly trammelled by her job title as a prison officer in her contract of employment, and to ignore all that which the Tribunal had carefully built up and referred to, in particular in the references to **Blundell** and above all in paragraph 97 of the decision to which we have referred. Effectively, the Tribunal appears to have fettered its discretion by concluding that, effectively, once a prison officer, always a prison officer, and did not ask itself the right question. It seems to us that it may well be that because the Tribunal was dealing with a number of matters, about which there has been no complaint made nor appeal, it may have lost sight of this particular claim, as is always a risk where a Tribunal is dealing with a number of applications, and it should not be criticised in that regard. Had it only had this one claim to deal with, it appears to us that the decision could have been a relatively short one, and concentrated on a relatively short question: (1) was the same job which she had done for 15 years still available to her on return to maternity leave? Answer: plainly not. (2) Was the job offered of prison officer without any mental health or nursing involvement suitable and appropriate? That was the issue to be decided, and it seems to us could not be decided simply by reference to the job title, and certainly not without taking fully into account the job description.

9. Ms Hirst asks us not only to set aside the decision and to allow the appeal, which we consequently do, but also to substitute our own conclusion that the job that the Appellant was

offered was suitable and appropriate. She submits that the only basis on which she was objecting to the job and upon which the Respondent was justifying the job was by reference to her refusal to take it on, on the one hand because it was not suitable to her, and on the other hand, on the position of the Respondent, that she was a prison officer and therefore that it must be suitable and appropriate, and we have, unusually, been taken through some of the witness statements.

10. It is certainly right to say that the Respondent's attitude was that, as the Appellant was employed as prison officer at a prison officer grade, and paid on the basis that she was a prison officer and had all the emoluments resulting from that, which would be considerably higher, it was submitted, than that of a nurse in the National Health Service normally, and that she had obtained or received annual training on restraint etc, therefore she had nothing to complain about and should now revert to being, as they would put it, and - as perhaps influenced the Tribunal in using the word *return* - an 'ordinary' prison officer, as per her contract; and consequently that, once the fetter is removed, there is, Ms Hirst submits, nothing to counter the argument that the job was not the same, and was not suitable and appropriate, simply by reference to the job title.

Conclusion

11. We see the force of that argument. However, we are satisfied that it is not open to us, when asking ourselves as to whether this job was suitable and appropriate, to answer it in the way Ms Hirst requests. Of course we leave aside the authorities, which require that this Tribunal only substitutes its own judgment when it is sufficiently satisfied that there is no other arguable alternative to that which it is presented to it by an Appellant. Had the Tribunal addressed the issue as to whether the job was suitable and appropriate, it seems to us that it would have addressed at least the following factors:

(1) The job involved no nursing, which is what the Appellant was qualified for and had done for 95% of her time during the previous 15 years. If she were not to do any continuing nursing, it would be bound to affect the professional qualification which she had as a nurse.

(2) There appears to have been the risk that she would have to work at weekends contrary to how she had operated, again, for the previous 15 years. There is a reference in the decision to Mr McCaskie's suggestion that it might well be, although there was no guarantee, that she would not ordinarily need to work at weekends. That would need to be taken into account as to whether the job that she was now to do was appropriate or suitable.

(3) However, on the other side of the coin, there was the fact that she was well used to a prison environment and to coping with prisoners, much more so than a nurse brought in from the outside who would find this environment, I am sure, a very difficult one, because she had worked as a prison officer and had the training and had, in particular, spent 5% of her time over the previous 15 years acting as a prison officer.

(4) There is the fact, which Mr Poole does rely on, that she had been paid and graded and received benefits as a prison officer, and so why, it is asked, should she not carry out that which she has been paid for, albeit she has not done it before, at any rate for 95% of her time?

(5) There is the issue of training. She had regular annual training and more was offered, so that the position she would now be working in would be one for which she would be, or be capable of being, qualified.

12. All those matters seem to us to be matters which could and should have been considered by the Tribunal before it answered the question, as it did, that the job that she was now being offered was suitable and appropriate. In those circumstances we do not feel it is possible for us to substitute our own conclusion. We are satisfied that the job she was coming back to was not that which she had left on maternity leave, but we cannot say that the Tribunal to whom the matter was referred would be bound to find, as Ms Hirst submits, that it was not suitable and appropriate for her simply because she would no longer be a mental health lead in the prison.

13. Accordingly we allow the appeal and remit the decision to the Employment Tribunal. Both counsel have agreed that it would in this case be right to remit it to a fresh Tribunal and so we do not address that issue, or its pros and cons, but accept the consent of the parties in that regard.