Appeal No. UKEATPA/1802/11/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 May 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MR R TAIWO APPELLANT

DEPARTMENT FOR EDUCATION RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

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APPEARANCES

For the Appellant	MR SPENCER KEEN (of Counsel) (Appearing under the Employment Law Appeal Advice Scheme) & MR R TAIWO (The Appellant in Person)

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

SEX DISCRIMINATION – Direct

Multiple claims of sex race and disability discrimination were dismissed by the Employment Tribunal which had carefully case managed the complex issues. No error of law was found to be reasonably arguable. Opinions of appellate judges on the sift confirmed.

HIS HONOUR JUDGE McMULLEN QC

1. In **Haritaki v SEEDA** [2008] IRLR 945 at paragraphs 1-13 I set out my approach to hearings under rule 3; it should be read with this Judgment. That approach has been approved by the Court of Appeal on a number of occasions, for example, **Hooper v Sherborne School** [2010] EWCA Civ 1266 and **Evans v University of Oxford** [2010] EWCA Civ 1240. On the sift of this Notice of Appeal in accordance with Practice Direction paragraph 9, Mr Recorder Luba QC exercised his power under rule 3(7) of the EAT rules. He concluded in chambers that the case disclosed no reasonable grounds for bringing the appeal. Where no point of law is found, s21 of the **Employment Tribunals Act** deprives the EAT of jurisdiction to hear the case. The Appellant was given the opportunity to amend the Notice of Appeal or to have the case heard before a Judge under rules 3(8) or 3(10). I am thus hearing the case on more material than was available to the Appellate Judge and I form my own view of the appeal. The question for me is whether there are any or no reasonable grounds in the appeal. If there is, I will stop the hearing and order a preliminary or full hearing, if there is none, I will dismiss the case.

Introduction

2. It is an appeal by the Claimant in those proceedings against a judgment of an Employment Tribunal sitting between 13 and 21 September 2011, sent with reasons to the parties on 18 October 2011, chaired by Employment Judge Hodgson. The Claimant represented himself and made claims of sex discrimination, race discrimination, harassment on the grounds of disability and failure to make reasonable adjustments. The Respondent was represented by counsel. All claims were dismissed.

3. The Claimant sought to appeal against the judgment and today has two advantages; first he presents a written skeleton argument made by Mr Ogunbiyi, solicitor, on his behalf on 23 May 2013 to which Mr Taiwo has himself spoken; and he is also represented by Mr Spencer Keen of counsel who provides his services free under the ELAA Scheme. They have compartmentalised the approach to today's hearing as is the flexible practice in this court. Mr Keen raised two arguments with me which are not in the skeleton argument nor either of the two Notices of Appeal drafted for the Claimant by Mr Ogunbiyi. The gist is clear and could be made good in writing in due course. Mr Taiwo has addressed me in relation to his skeleton argument and has focused on three points

4. When the Notice of Appeal came before the Recorder on the sift, it had already been the subject of an application for a review which Employment Judge Hodgson himself dealt with and he said that there was no ground to review. So both the substantive judgment and the review judgment came before the Recorder. I hope I will be forgiven in this very complex case if I draw upon the judicial work done by the Mr Recorder Luba in this case for he said the following:

> **"The Appellant has put in a new Notice of Appeal. His covering letter describes it as containing "re-emphasised facts". That is not a proper function of a Notice of Appeal. It should demonstrate what errors of law it is contended that the Tribunal below has made.**
>
> **As foreshadowed by the covering letter, the Notice of Appeal actually seeks to address (at undue length and minute detail) only the *factual* findings made by the Tribunal. The essential thrust is that the Tribunal made findings of fact not based on any evidence or, at least, not warranted by the available evidence. These criticisms made of the Tribunal do not withstand even cursory scrutiny.**
>
> **For example, at para 9, the Notice of Appeal criticises the Tribunal for finding that the Appellant had "behavioural difficulties" and "lacked insight" in the absence of evidence to either effect. As to the former, the Tribunal set out in terms what they meant by their use of that phrase [at 5.4] and it is unobjectionable in that context. As to the latter, the Tribunal saw and heard the evidence of the Appellant and had before them his extensive writings. It was open to them to find that, in their judgment, the Appellant lacked insight. The same paragraph of the Notice of Appeal refers, without any qualification or insight, to a document of 30 handwritten pages prepared by the Appellant as constituting a "summary" of his work."**

5. Dissatisfied with the Recorder's opinion the Claimant sent in a fresh Notice of Appeal which came before Wilkie J who said the following:

> **"Both Notices of Appeal amount to no more than a wholesale disagreement with the findings of fact to which the Employment Tribunal came. It is a detailed and, often, tendentious, disagreement with virtually each and every facet of the decision and imputes improper and corrupt motives to the Employment Tribunal on no other basis than the Appellant cannot countenance that the Employment Tribunal could, in good faith, have, decided against him. These grounds are unarguable and by their length, lack of any coherent form and outrageous aspersions on the good faith and integrity of the Employment Tribunal are an abuse of process."**

The legislation

6. The legislation in this case is not in dispute. The Tribunal set it out over seven of the 41 pages of this very comprehensive judgment. These are claims prior to the **Equality Act**. There is no challenge to the description of the law which the Tribunal gives. I make this point because the findings against the Claimant on race discrimination were dismissed without appeal. The law relating to the burden of proof, which is a point raised by Mr Keen in his submissions, was the same as was applied to the race discrimination claim.

The claims

7. The Claimant is broadly described as a PA, an administrative officer in the Department for Education and principally he assists Ms Simpson. The background to the presentation of the claims is complicated, the Tribunal regarded it as a complex case.

8. The claims he makes arise first under the **Sex Discrimination Act 1975** for direct discrimination. (I take it paragraphs 2.2 and 7.65 which describe the issue as *would he have been treated differently from a man* to mean *a woman* since the comparator is a woman). That gives rise to two allegations: that the Claimant was not allowed to work at home and the Respondent did not pay for taxis. The Tribunal found against him on both.

9. The Claimant raised claims of direct race discrimination which are not live on appeal; he is black African and was not allowed to wear headphones at work.

10. As to disability discrimination, he Claimant has three disabilities: they arise out of Sickle Cell Anaemia, Arrhythmia, a heart condition, and Asperger's Syndrome. There are what are known as allegations 4 to 8 to do with harassment on the ground of disability. He then raises issues to do with a failure to make reasonable adjustments. There are now three disabilities and four duties. They give rise to ten adjustments.

The appeal and conclusions

11. The Tribunal dealt analytically with each of these allegations dismissing them one by one. The proposition is that amongst all of these allegations the Tribunal got right or at least did not make an appealable judgment in respect of race, but did so in respect of two aspects of the reasonable adjustments claim. I will focus on Mr Keen's submission to me first which relates to the way in which the Tribunal dealt with two adjustments, these are known as adjustments eight and nine and I will deal with these in sequence.

12. Duty 4 was the provision or criterion or practice of putting the Claimant in an environment where he must communicate with colleagues. He had a substantial disadvantage in doing so in that he had problems multi-tasking and his moods make social skills difficult and he appears anti-social. The Tribunal upheld his claim that the duty engages. The question therefore is whether the Respondent had reasonably made an adjustment as to which the Tribunal says this:

> **"7.35 Adjustment 8 - informing or enlightening the claimant's colleagues about the syndrome and the effect of it.**
>
> **7.36 This is a difficult point. In principle it may be appropriate for an employer to inform its employees that a particular individual has Asperger's Syndrome. It may also be appropriate to educate those individuals as to the effect. However, what is less clear is when it will be**

appropriate, how it should be communicated, and what should be communicated. There may be occasions when it is appropriate to have such communication and, equally, occasions when it is not appropriate. We have to consider whether this respondent breached its duty by not telling the claimant's colleagues first of the fact that he may have Asperger's Syndrome and second by seeking to educate them as to the effect.

7.37 Here we take the view that the respondent has not breached its duty. We reach that conclusion for a number of reasons. There was no formal diagnosis of Asperger's Syndrome. There was no agreement at the relevant time as to the actual effect. <u>There was no agreement as to what information should be given to employees</u> and what they should be asked to do. The respondent did start to explore the matter. There was some suggestion that colleagues should be educated. The occupational health report of 17 May 2010 makes the suggestion that the line manager and colleagues should endeavour to understand the effect of the Asperger's Syndrome. However <u>that report was not clear as to what exactly should be communicated and by whom</u>. The respondent did obtain a report from the National Autistic Society. However, that report was not obtained until December 2010. We do not consider that it was necessary to obtain a report before then particularly having regard to the amount of time the claimant was off ill when the respondent did make effort to obtain other medical evidence. That report itself suggests that any communication should be through an expert. <u>The respondent did not have the claimant's disclosure without his authority</u> and without a clear understanding of the parameters could risk an allegation of harassment and could also potentially cause the claimant distress. Finally, given that his main problem was with Ms Simpson and she did know of the possible Asperger's Syndrome, we doubt that telling others would have led to a change in the environment which would have led to a lessening of the relevant effect. We do not accept that there was any particular problem caused to the claimant by the interaction with others who did not have specific knowledge. In the circumstances, we do not consider that this respondent has breached the duty in this case." [<u>emphasis added</u>]

13. Mr Keen argued the point that there was a failure to apply the burden of proof in that having engaged the duty the Tribunal failed to recognise the effect of the disadvantage on the Claimant and called for an explanation from the Respondent. I reject this.

14. I drew to Mr Keen's attention the finding that the Claimant had not given authority to disclose anything to anybody about his condition. Mr Keen indicated that he would wish to make an amendment to the Notice of Appeal to argue he did. Mr Taiwo himself gave evidence in the form of an address to me, which said that he did. I am not able to resolve this matter but I put to Mr Taiwo that he had not raised this in his Notice of Appeal. He said he had. We looked at the first Notice of Appeal drafted by Mr Ogunbiyi, and signed by the Claimant. It goes through the paragraphs in the judgment with which Mr Taiwo disagrees. The paragraphs I have cited do not occur. He said that he had made manuscript additions; he did, I have seen those. They do not deal with the fact that he did not authorise communication. I therefore am

highly sceptical about this and would not be minded to allow an amendment. It would require remission to the Employment Tribunal.

15. However, I can deal with it on the merits. The finding by the Tribunal is a complete answer, if he did not give authority to disclose to his colleagues that could not be a reasonable adjustment, but the Tribunal backs this up in two ways; first Ms Simpson herself did know of the possible Asperger's Syndrome. This part of Mr Keen's submission is entirely to do with the condition of Asperger's and not the other two conditions. The second finding by the Tribunal is that it doubted whether telling the others would have led to a change in the environment which would lead to a lessening of the relevant effect. That is the correct test. Would it alleviate the disadvantage? The Tribunal decided that this particular problem was not caused by the lack of knowledge of others of his condition and so in my Judgment no question of law arises about this.

16. I turn then to the second argument of Mr Keen, and I should say that I have considered in relation to adjustment 8 and adjustment 9 two authorities Mr Keen put before me today, **Noor v The Foreign Commonwealth Office** UKEAT047010 and **Jennings v Bart's** UKEAT0056/12. Adjustment 9 is not allowing the Claimant to wear his own noise cancelling headphones. The straightforward finding of fact is that he was and that therefore cannot survive. What he was not allowed to do was to wear them all time and the Tribunal makes its conclusion which argues cogently that wearing them all day was not feasible. The Tribunal found that taking the step the Claimant sought would not have prevented the effect in relation to the disadvantage he had. It was a balancing exercise. And so in respect of the only two grounds in an inchoate amended Notice of Appeal which Mr Keen raises I see no reasonable prospect of success.

17. I then turn to Mr Taiwo's arguments. The first is one which suffuses his skeleton argument, drafted for him by his solicitor, which is that the judgment was perverse. With respect, he has not paid attention to what Mr Recorder Luba QC and Wilkie J said about this. I agree with and apply what the former said. Just taking, as he did, a few examples shows that there was evidence before the Tribunal, contrary to the argument that there was not and therefore the case cannot be said to be perverse.

18. The second argument is as to the description in shorthand of the Claimant's condition. He says this affects the tone of the judgment and stigmatises him.

19. Dr Parker was a treating consultant haematologist. He put material before the Tribunal but he could not attend. The Claimant contends this is unfair because the Respondent could not question him. I pointed out to Mr Taiwo the illogicality of this proposition. The Tribunal, as Mr Recorder Luba noted, seemed to have accepted, as did the Respondent, the material from Dr Parker. The Claimant can have no complaint of unfairness that Dr Parker was not produced to the Tribunal to be challenged by counsel for the Respondent. I spent some time explaining this Mr Taiwo because on countless occasions he reminded me that he had been a litigant in person at the Tribunal.

20. That led to the finding by the Tribunal in paragraph 5.14 as follows:

> **"In this case, the tribunal has not had the benefit of a specific medical report. This is unfortunate as the claimant's condition is complex. Nevertheless, we do have information which is of assistance to us. The letter from Dr Parker of 20 November 2009 records that the small vessel disease impacting on the claimant's brain could lead to impairment of is ability to make judgements and his work performance. Small vessel disease is a well recognised cause of dementia in old people. The sickle cell anaemia has caused small vessel disease at an early age. Exactly how this relates to the Asperger's Syndrome symptoms, if at all, is unclear. On our overall reading of all the medical evidence we take the view that none of the medical practitioners appear to be certain as to the exact causation. However, what is absolutely clear is the claimant has underlying difficulties which affect his judgement and his functioning. We can refer to this generally as "behavioural difficulties.'"**

21. The words "behavioural difficulties" are offensive to the Claimant. He does not disagree with the full version which is that he has underlying difficulties which affect his judgment and his functioning. Had the Tribunal used that phrase throughout there could be no complaint. Having explained what it meant by behavioural difficulties I can see no criticism of the Tribunal since it knew from the material produced by Dr Parker what that referred to. It is a question perhaps of tone, of style, of language but no error of law arises.

22. The Claimant also raised with me the sex discrimination claim. This is hopeless. (I made the textual correction above.) This is the finding of the Tribunal:

> **"7.66 Allegation 1 - not allowing the claimant to work at home and allegation 2 - not paying for taxis for the claimant to come to work.**
>
> **7.67 These allegations can be considered together. The claimant has cited one comparator. We find that Mrs Funmi Osazuwa was not a statutory comparator as her circumstances were different. She had musculo-skeletal difficulties affecting her back and her limbs. That condition did not arise out of Sickle Cell Anaemia. Her impairments were not the same. Her case was considered individually. Adjustments were made. The respondent paid for taxis. We do not know exactly how difficult it was for her to get to work on public transport. However, the claimant falls far short of establishing he was in the same position physically. She was also allowed to work from home. However, there is no indication whatsoever that she had any basic difficulty with her duties. She was in a fundamentally different position. We find that she is not a comparator.**
>
> **7.68 When constructing a hypothetical comparator we would have to consider someone in the same circumstances as the claimant who was female. Those circumstances would include the same impairments which had the same effect. This would include the behavioural difficulties. There is no credible evidence on which we could concluded that a woman in those circumstances would be treated any differently. The difference in treatment is not established. There is nothing to suggest any treatment was on the grounds of sex. Further, we are satisfied the respondent has produced an explanation which in no sense whatsoever is on grounds of sex. That explanation relates entirely to the behavioural difficulties as exhibited by the claimant which caused the problems managing him, which we have explored."**

23. That is a complete answer to the sex discrimination claim and the Tribunal was correct, in my judgment, to have dismissed it.

24. In conclusion, this was a difficult case, the Tribunal handled it in a masterly way so that the Claimant could understand in relation to this case which has been much before the Employment Tribunal in case management so that he could see how his various disabilities

were dealt with in accordance the allegations made. Broadly speaking the factual basis of the allegations were not accepted and the ingredients of the statutory torts were not fully found and so this case was correctly dismissed by the Employment Tribunal. For my own reasons, I respectfully agree with the two appellate judges in this court. No point has a reasonable prospect of success.

25. I am grateful to Mr Keen for assisting me in this case and to Mr Taiwo for adding his additional points. The application is dismissed and with it the underlying appeal.