Appeal No. UKEAT/0194/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 April 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR B BEYNON

MRS R CHAPMAN

MRS A D WADE — APPELLANT

SHEFFIELD HALLAM UNIVERSITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SINCLAIR CRAMSIE (of Counsel)
For the Respondent	MS JOANNE WOODWARD (of Counsel) Instructed by: Eversheds LLP Eversheds House 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

The disabled Claimant complained that in a restructuring she should not have been put through a competitive interview which was to her disadvantage. A reasonable adjustment would have been to appoint her to the role without going through that process. The role had changed. At interview, she did not meet the essential criteria and was not appointable. The Employment Tribunal correctly held that the duty was engaged but not breached. The adjustment sought was not reasonable as it was tantamount to appointing her to a role for which she did not meet the requirements.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about a contention that a reasonable adjustment was not made for a disabled person, the Claimant in the case. This is the Judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We will refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Claimant in those proceedings against the Judgment of an Employment Tribunal sitting at Sheffield under the chairmanship of Employment Judge Little over two days, sent with Reasons on 13 December 2011. The Claimant was accompanied by her husband, and the Respondent was represented by a solicitor from Eversheds. Today the Claimant has secured through ELAAS the services of Mr Sinclair Cramsie, who has represented the Claimant at earlier incarnations of this case and today is fully instructed. For reasons which will be apparent, the Claimant is not here, and nothing should be read into our Judgment about her absence; she is fully entitled, in the light of her condition, to leave this matter in the most capable hands of Mr Cramsie. The Respondent has instructed Ms Joanne Woodward of counsel.

3. The Claimant made a number of claims, but as refined through the extensive trial management at Employment Tribunal and EAT level there is only one issue: whether or not the duty to make a reasonable adjustment was breached in respect of an interview that the Claimant attended on 24 April 2008. Yes, 2008; here we are on the fifth anniversary of what is said to be the unlawful conduct of the Respondent. If the claim succeeds, it is accepted that the matter should go back to the same Employment Tribunal for a further hearing with a direction on the

law, let us say some time towards the end of this year. In context the Claimant, who had been employed by the university since 1980 and was dismissed in January 2012, now has two further sets of proceedings based upon what must now be the **Equality Act** relating to her protected characteristic of disability.

4. Just standing back for a moment, we reflected with both counsel that this part of the extended grievance the Claimant has with the Respondent is minor compared with the rather more major issues arising out of her treatment following the April 2008 interview her and her dismissal – in other words, extending for another four years of employment – and it does seem to us that a holistic view should be taken of this very extended employment dispute.

The issues

5. The essential issues were set out by the Employment Tribunal. The regime in place was the **Disability Discrimination Act 1995**. The Claimant is disabled by an allergic condition. The Tribunal had identified a relevant provision, criterion or practice (PCP) which engaged the duty of the Respondent to make a reasonable adjustment if the application of the PCP was to her substantial disadvantage. The Tribunal found it was, and there is no appeal against that. The issue is whether or not the adjustment sought by the Claimant was a reasonable adjustment so as to prevent the disadvantage that she had as a result of the imposition of the PCP. The PCP is defined as the requirement that the Claimant attend a competitive interview process.

6. Ms Woodward submitted in writing and orally that that was not a clear description of the PCP: the requirement that the Claimant meet the essential criteria of the job for which the interview was a precursor is the real PCP. Mr Cramsie, we consider most sensibly, did not seek to reply on that point. So, although it is described as the competitive interview process, it

involves both the physical circumstances of the interview, about which we can say a little more with the benefit of the Judgment, and the process itself which required the Claimant to meet the essential criteria for the job for which she was being interviewed and to demonstrate it at that interview.

7. Dividing the issues between the parties, Mr Cramsie submits that what should have happened by way of a reasonable adjustment was that there should have been a much softer assessment process prior to and instead of a competitive interview process in the light of the way in which we have accepted it being defined. That softer process would have been an accommodation of the Claimant's failures to reach the essential criteria that the interview panel identified. For the Respondent, Ms Woodward contends that the Tribunal was correct when it said that the only adjustment that the Claimant had put forward was tantamount to being given the job by reason of her history, and that in itself is not an adjustment if the job involves criteria that the Claimant cannot meet.

The legislation

8. The relevant legislation is set out in the Tribunal Judgment, and there is no dispute about it; it is section 4A of the 1995 Act as applicable at the time, which provides as follows:

> **"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 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."**

9. The Tribunal also addressed itself correctly on the application of that provision by reference to **Environment Agency v Rowan** [2008] IRLR 20, which is that the section provides for the following (Tribunal Judgment, paragraph 8.2):

> **"(a) The provision criterion or practice applied by or on behalf of the employer or**
>
> **(b) The physical nature of the premises occupied by the employer**
>
> **(c) The identity of non disabled comparators (where appropriate) and**
>
> **(d) The nature and extent of the substantial disadvantage suffered by the Claimant."**

The facts

10. The Claimant is 61. She was employed by the Respondent, a very substantial university in Sheffield, employing 4,500 employees, on 3 November 1980 as an assistant librarian. She was promoted to a subject librarian and senior departmental manager, a term that became known as an information specialist (IS). The Claimant was diagnosed as having the condition that we have described above, and arrangements were made for her to work off-campus in an IS team leader role, and these were adjustments that were made for her in a number of ways, principally working at home.

11. As could be expected in a major public institution, restructuring was going on, and in 2004 a university-wide restructure was carried out. A programme of what is variously described as repositioning, mapping or placing was undertaken, and this is also known as "slotting in". When there is restructuring and the job is the same as it was before, the expectation of the employee doing the job is that he or she will be slotted, placed or mapped into the new role under the new structure. There was such a restructure in respect of the activities done in information and librarian work. The Claimant had not been at work since, we think, 2004, but on 6 December 2005 she was placed on gardening leave and remained so placed until her dismissal on 3 January 2012.

12. A vacancy cropped up in July 2006 for which she was interviewed, but she failed to meet two essential criteria: she lacked the ability to lead teams and to work within the newly restructured faculty of organisation and management. The panel which conducted the interview was not satisfied with the answers the Claimant had given about her leading of teams and her awareness of the faculty organisation and management, and of the subject.

13. In 2008 the same job for which she had been rejected in 2006 arose again. What she wanted was to discuss, prior to going out to competitive interview, which was the process set out in the documentation, how, as she put it, to proceed, for she recognised she had been away a long time. She did raise a question about this and was told that her job no longer existed; it had been deleted. She was at risk, she was to be redeployed and had rights as a redeployee, which were that she would be given priority of consideration for a suitable post. She was told that she was to be interviewed and if she met the essential criteria and adjustments reasonably could be made to meet her condition, she would be redeployed into the post. The formal position of the Claimant at the time and, it appears, up to today is that the job for which she was being considered was the job that she had done since 1986, and we consider that that mindset is what is driving this claim.

14. An interesting practical example of reasonable adjustments occurred, for on 4 April 2008 the Claimant attended the competitive interview, as it was put, and she had an allergic reaction, so the interview in her case was aborted. She met in favourable conditions where the allergy was not to be inflamed on 25 April 2008. At that the panel had before it the essential criteria, of which there were eight. The scoring of the panel was hotly contested, but it is sufficient to say that the Claimant's complaints about the scores had been dismissed by earlier proceedings and

are not pursued. The outcome was contained in the feedback letter that the Claimant had received and of which the Tribunal made the following finding (paragraph 6.13):

> **"... In that document the panel expressed:**
>
> > **'some concern that you saw this post as an extension of your previous role. The strong assumption that nothing much had changed didn't give confidence of forward thinking, adaptability or using your skills in the future.'**
>
> **It also commented that it was looking for the Claimant's understanding and view on what specific needs the Faculty of Organisation and Management might have from a library and information service in terms of business, subject areas and student groups. The feedback also explained that the panel had found no evidence of strategic thinking or vision in the area of ability to manage conflicting demands."**

15. The full text of the document contains a good deal more, but because there was a contest about this matter it may be safe to leave it as it is in the findings of the Tribunal, although we have been taken line by line to the feedback. The Tribunal came to the conclusion, as we have indicated, as to the PCP, upheld the Claimant's claim that she was at a substantial disadvantage by having to go through the interview process, and then the heart of the Tribunal's finding against the Claimant, thus far successful, is this:

> **"9.4 Was it a reasonable adjustment to 'map' the Claimant in to the role without a competitive interview?**
>
> **Here the Tribunal have considered the case of *Archibald v Fife Council* [[2004] IRLR 651], a case referred to us by the Respondent. That decision of the House of Lords indicates that disapplying a competitive interview process can be a reasonable adjustment. However we consider that it is not authority for the proposition that that will always be the case. The question must depend upon the particular circumstances of the case including the extent to which the proposed step is practicable. Practicability is one of the matters which Section 18B says must be taken into account.**
>
> **We consider that the reasonable adjustment for which the Claimant contends is tantamount to requiring the employer to automatically appoint her when it does not believe that she is appointable. We do not accept that that would be a reasonable adjustment. We accept the Respondent's evidence that the Information Specialist role had evolved. It was not, as the Claimant described it in her particulars of claim her further and better particulars [sic] 'original role from 1986 onwards'. Moreover we note that the Respondent had had two opportunities to assess the Claimant's suitability that was both in 2006 and then in the matter we are considering in 2008. We therefore conclude that the Respondent's decision that the Claimant was not appointable was genuine and one which they were entitled to reach.**
>
> **We remind ourselves that there is no complaint before us as to the actual arrangements made for the 2008 interview. Whilst obviously the Claimant did suffer difficulties at the first attempt, those problems were removed by the**

> **Respondent's decision to re-run the interview process for her on a different date and in a different location. We also remind ourselves that the complaint before us today is not primarily in relation to the accuracy of the scoring of the 2008 process. That is despite the fact that the Claimant deals with that issue at some length in her witness statement. In any events, we have made a finding as to the decision made.**
>
> **The conclusion we reach therefore is that although the Respondent was under a duty to make a reasonable adjustment there was no breach of that duty because the adjustment contended for by the Claimant was not reasonable. It follows that the complaint must fail."**

Submissions and conclusions

16. The starting point has to be the Judgment of the EAT in **Project Management Institute v Latif** [2007] IRLR 579, where Elias P, as he then was, and members came to the following conclusions, which both parties rely on before us:

> **"53. We agree with Ms Clement. It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable amendment has been identified.**
>
> **54. In our opinion the paragraph in the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.**
>
> **55. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."**

17. That approach was carefully applied by another division, HHJ Hand QC presiding, in **Jennings v Barts London NHS** UKEAT/0056/12 at paragraph 91. The contention of Mr Cramsie is that there should have been a different approach from the competitive interview process as it is now, we hold, properly defined, because there ought to have been a discussion about the Claimant's difficulties, given that she had been out of the workplace for such a long

time. Ms Woodward contends that the adjustment that could be made and the only one that was put forward was that the Claimant skip all of the essential requirements because the job is there in itself.

18. In our judgment, Ms Woodward is correct in her support of this Employment Tribunal. The first thing to note is that the Tribunal recognised that the Respondent had been through this twice. In 2006 the Claimant failed to meet two essential requirements. The Claimant failed to recognise that the job had evolved and changed, and when considering whether she was to be redeployed into it the Tribunal held it was reasonable for the panel to consider the essential requirements. The simple proposition is that a reasonable adjustment comes to be made to disapply an essential requirement but not where the person fails to meet the essential requirements entirely.

19. Take this very case: the adjustment that was made to the physical environment at the second interview on 4 April 2008 was resolved by a change of venue. What is required under the sole argument put forward by the Claimant was that the essential ingredients of the job should be disapplied. The short summary of the feedback set out by the Employment Tribunal above is amply demonstrated by our detailed consideration of the feedback letter. It may be upsetting to the Claimant and inconvenient for her for to be so summarily described as not appointable, but from the feedback she lacked strategic thinking and vision, creativity and skills for influencing, and those terms occur once or several times under each of the eight criteria. She did not narrowly miss being appointed to this job. For whatever reason, her last experience pre-dated 2004. By 2008 the job had moved on and much more was required of the post-holder. The Claimant's sole contention was that she should not have been put through this process was not an adjustment the Tribunal held to be reasonable, for it would mean giving her the job when

she was not appointable by reason of being found wanting under the majority of these eight essential criteria.

20. In those circumstances, we can see no error in the Tribunal's Judgment. We reject the contention that it has failed to grapple with the essential point that it was asked. The Tribunal, correctly directing itself on the law, went on to make a permissible decision on reasonable adjustments. We would like to thank both counsel very much for completing this case precisely within the envelope of time allocated to it.