Appeal No. UKEAT/0537/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 April 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS P TATLOW

MR B WARMAN

MR M MATINPOUR — APPELLANT

ROTHERHAM METROPOLITAN BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEVIN McNERNEY (of Counsel) Instructed by: Bhayani Bracewell Fountain Precinct Balm Green Sheffield S1 2JA
For the Respondent	MR DAVID CALVERT (of Counsel) Instructed by: Rotherham Metropolitan Borough Council Legal Services Riverside House Main Street Rotherham S60 1AE

SUMMARY

DISABILITY DISCRIMINATION

Reasonable adjustments

Direct disability discrimination

A case was appealed successfully to the EAT, and remitted. The Employment Tribunal came to the same conclusion, but giving more detailed reasons where the EAT had required it. The Claimant appealed again; but raised as grounds of appeal matters which challenged decisions of the Tribunal in respect of which it had repeated conclusions it had reached in the first decision which had not been subject to appeal to the earlier EAT. The Appellant was not permitted to raise these arguments. A ground he was entitled to raise was that the Respondent employer should not have dismissed him since he should have been held suitable for ill health retirement. This was rejected, since the employer did not consider him as suitable, nor had any material at the time of dismissal to think that he was. Observations made about the applicability of **First West Yorkshire v Haigh**.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. In a Judgment delivered on 28 April 2011 at Sheffield, a Tribunal chaired by Employment Judge Shore dismissed the Claimant's complaints that he had been racially discriminated against, of disability discrimination (not just direct, but discrimination related to disability) and failure to make reasonable adjustments, and unfairly dismissed.

2. The Claimant appealed to this Tribunal on four grounds. He did not appeal on what was a plainly arguable point, that the Employment Tribunal had said in the course of its reasons that it was not sure that the council (the Respondent) had applied the PCP of requiring the Claimant to be fit to return to work, and it was also unconvinced that the council had applied the PCP that an agent of the council had declared the Claimant unfit for work.

3. This Tribunal, chaired by His Honour Judge Birtles, in a Judgment of 28 November 2011, accepted three of the four grounds of appeal, but it specifically noted in doing so that ground 2, which was one of the three it accepted, could be read to include a challenge to the Tribunal's findings in respect of three reasonable adjustments, each of which related to the PCPs we have identified. He said:

> **"[…] we do not accept Mr McNerney's submission that ground 2 of the Notice of Appeal can be read to include a challenge to the Tribunal's findings, in respect of the three reasonable adjustments which were put forward (paragraphs 84-91). It is not our function to squeeze submissions made in a skeleton argument into a Notice of Appeal. The Notice of Appeal is the document this Tribunal considers. On any fair reading of the Notice of Appeal, it does not include a challenge to the failure on the part of the Tribunal in respect of the way it dealt with the three reasonably adjustments referred to."**

4. It was argued, the Claimant having succeeded in the appeal, that the matter should be remitted to a fresh Tribunal for a full rehearing (see paragraph 41). The Appeal Tribunal rejected both those points. In paragraph 43, it made it clear that there would be a

reconsideration not a full rehearing, and that it would be performed by the same and not a fresh Tribunal.

5. The order setting out the decision of this Tribunal said, on 28 November 2011 in the third paragraph:

> **"THE TRIBUNAL ORDERS that Grounds 1, 2 & 3 of the Notice of Appeal be allowed and that the matter be remitted to the same Employment Tribunal to reconsider its findings on Grounds 1, 2 & 3 of the Notice of Appeal in the light of the Judgment of the Employment Appeal Tribunal [...]"**

6. Those last words are important. Anyone considering grounds 1, 2 and 3 in the light of that Judgment would be bound to conclude that ground 2 did not extend to any reconsideration of the PCPs or the way in which the Tribunal had dealt with the case in respect of reasonable adjustments based upon those PCPs. The point in ground 2 was that the Tribunal had erred in applying the legal test in relation to the duty to make reasonable adjustments under section 4A of the **Disability Discrimination Act 1995**. The Appeal Tribunal thought, at paragraph 33, that the Tribunal had erred by importing requirements which were not part of the statutory legal test under section 4A of the **Disability Discrimination Act 1995**. Those requirements were in respect of the need for less favourable treatment (which it had identified); the need for the Respondent's treatment to be both material and substantial; and the possibility that a failure to comply with a duty to make reasonable adjustments could still be justified.

7. The matter was therefore to be reconsidered upon the proper basis under section 4A, but (upon our reading of the order and the Judgment) without altering the Tribunal's approach to the PCPs which it had to consider. The Employment Tribunal, on remission at Sheffield, came to the same overall conclusions as it had done in 2011 in reasons delivered on 17 July 2012.

8. This appeal is against that decision. It raises four grounds. The first of those grounds (ground 1) is that the Employment Tribunal acted perversely in finding, at paragraph 127 of its decision that the Respondent did not apply the provision, criterion or practice of being fit to return to work. Paragraph 127 repeats with greater certainty what had been said by the Tribunal in its earlier decision. We should set out the two versions. At paragraph 85 of the 2011 decision, it said this:

> **"85. We are not at all sure that the respondent applied the provision, criterion or practice requiring the claimant to be fit to return to work.**
>
> **86. We were also unconvinced that the respondent applied the provision, criterion or practice that Dr Senior, as agent of the respondent, declared the claimant unfit for work on 8 May 2009 and at 22 January 2010. Dr Senior was not the agent of the respondent."**

We interpose to say Dr Senior was an occupational health doctor to whom the Claimant had been referred.

> **"87. The respondent did, however, apply the provision, criterion or practice of not allowing the claimant to remain on sick leave pending mediation."**

9. At paragraph 91, having rejected the idea that not allowing him to remain on sick leave pending mediation placed him at a substantial disadvantage in comparison with non-disabled persons, the Tribunal found as a fact that mediation would have been futile in that particular case because it related, in effect, to grievances which the Claimant had earlier raised, in respect of which there had been three hearings and there would be no full adjudication of his grievances as the Claimant thought mediation involved. The Respondent rejected the idea of mediation. It therefore would not have happened.

10. The second decision in 2012 said at paragraphs 125 to 131 as follows:

> **"125. It was suggested in Mr McNerney's further particulars of claim that the respondent had failed to make reasonable adjustments. He says that there were three provisions, criteria or**

practices that placed Mr Matinpour at a substantial disadvantage compared to a non-disabled employee of the respondent:-

84.1 Requiring the Claimant to be fit to return to work

84.2 Being declared unfit to return to work by Dr Senior and again implicitly by letter dated 22 January 2010

84.3 Not allowing the claimant to remain on sick leave pending mediation taking place

126. The EAT specifically stated that the claimant had not included the PCPs in his appeal and did not interfere with our findings. We therefore repeat them here, hopefully with more clarity than in the original reasons.

127. The respondent did not put in place a PCP requiring the claimant to be fit to return to work.

128. The respondent did not put in place a PCP declaring the claimant to be unfit for work on 8 May 2009 and 22 January 2010.

129. The respondent did, however, apply the PCP of not allowing the claimant to remain on sick leave pending mediation.

130. We find that the third PCP did not place the Claimant at a substantial disadvantage in comparison with non-disabled persons. […]

131. […] Our findings of fact show that mediation would have been futile in this case […]"

11. The latter recitation of those findings was thus in more emphatic terms but, as we read the decision, to the same effect. Ground 1 therefore accused the Tribunal of having acted perversely in its second decision by reaching the same decision as it had done in its first decision, which had been open to challenge, which had not been challenged, which was not included in ground 2, which was not therefore subject to remission (which related only to a reconsideration of those grounds) and which, if it had been considered in the light of the reasoning of this Tribunal, it would have been plain was not for consideration by the Tribunal because it formed no part of the appeal.

12. Ground 2 began with the words:

"Ground 2

The ET applied the wrong legal test when deciding the PCP of not allowing the Claimant to remain on sick leave pending a mediation meeting did not place the Claimant at a substantial disadvantage.

[…]

Ground 3

The ET failed to apply the test of the duty to make reasonable adjustments as set out in *Archibald v Fife Council* [2004] IRLR 651."

13. It went on to argue, in ground 3.2, that **Archibald** was authority for a PCP being the requirement to be fit to do the job an employee is employed to do. Ground 3 was thus predicated entirely upon that PCP having been applied to this Claimant. The Tribunal's finding of fact in its first decision was it had not been. That had not been appealed. It had not been, therefore, before this Appeal Tribunal as part of the grounds which it remitted. In the light of its reasoning, it formed no part of the matters remitted.

14. Ground 4 in the grounds of appeal was that the ET acted perversely in deciding **First West Yorkshire Limited (t/a First Leeds) v Haigh** UKEAT/0246/07 was distinguishable, because First West Yorkshire's terms and conditions required it to consider ill-health retirement. We shall come back to that ground later in this Judgment.

15. There was a challenge at the outset of this appeal to the right of the Claimant to advance it on all four grounds. The challenge was based upon the well-known decision in the Court of Appeal of **Aparau v Iceland Frozen Foods PLC** [2000] IRLR 196 CA. That case is clear authority for the proposition that an Employment Tribunal has no power to consider any matter on remission from the Appeal Tribunal which does not fall within the scope of the remission. The challenge made by Mr Calvert, who appears on behalf of the council, was that in all four grounds the challenge made was against matters on which the Tribunal had no jurisdiction to reach any conclusion different from that which it had reached previously. On the basis that there should be finality in litigation, and it would be an abuse otherwise to deal with it, or on the basis that the jurisdiction of the Tribunal did not extend to making any different conclusions on the matters referred to, these grounds of appeal could not be open to the Claimant. They were outside the scope of the remission.

16. To put those submissions and the answers (to which we shall come) made by Mr McNerney into context, we should say a little about the background, to give colour to the arguments and to aid understanding.

The background

17. The Claimant was a technician employed by the council. Following an incident in November 2008, the Claimant went off work on 8 December 2008 for "stress", being unfit to work as a result. The certificate thus identified the cause of his unfitness but did not specify the condition from which he suffered. His sick pay ended on 9 November 2009. He was referred to an occupational health doctor, Dr Senior. She did not identify any date of return to work but said, in January 2010, that the Claimant might be able to do so in the near future.

18. The Claimant himself told his employer that he could be fit in a couple of months. The doctor plainly envisaged that he would be able to return to work. She recommended a mediation meeting with management prior to returning to work, and observed that it would be a reasonable adjustment to ensure a phased return to work following that mediation. The Tribunal concluded that there was no certainty as to the date of any return to work, although it should be noted that it had evidence that subsequently, after dismissal, the employee was found fit to work from August 2010.

19. The Claimant said to the employer at the time that he would not consider return to work unless and until he was fully recovered, and would not contemplate a job outside the department in which he had previously been employed. The employer, for his part, would not consider mediation, since there had already been three grievance hearings at which the subject matter of the grievance had been discussed.

In its second decision, the Tribunal had centrally to expand upon its reasoning in respect of unfair dismissal and to consider the reasonableness of it. In its first decision, it had said so little that the Appeal Tribunal could not know what its reasoning was and could not be satisfied that it had properly and adequately considered reasonableness. The argument in respect of that covered a number of factors but, centrally, the submission that there was a duty or obligation upon the employer to postpone dismissal so that ill-health retirement could be considered as a possibility for the Claimant. In support of that argument, the Claimant (through Mr McNerney) relied upon the decision of this Tribunal in **First West Yorkshire Limited (t/a First Leeds) v Haigh** UKEAT/0246/07, a decision of 20 November 2007.

20. In the course of the decision of the Appeal Tribunal delivered by His Honour Judge David Richardson, the Tribunal set out general guidance as to the standards by which reasonableness might properly be assessed. At paragraph 40 it said:

> **"40. As a general rule, when an employee is absent through ill health in the long term, an employer will be expected, prior to dismissing the employee, to take reasonable steps to consult him, to ascertain by means of appropriate medical evidence the nature and prognosis for his condition, and to consider alternative employment. An employer who takes such steps will generally meet the standard set out in section 98(4).**
>
> **41. Where, however, an employer provides an enhanced pension on retirement through ill health, it seems to us that an employer will also be expected to take reasonable steps to ascertain whether the employee is entitled to the benefit of ill-health retirement."**

21. Mr McNerney told us that one of the important aspects of doing so is that an employee's benefits under any pension scheme, the trustees of which may admit him to ill-health retirement, may be greater if he is in work at the time that the application is made, rather than out of it as a result of dismissal. Mr McNerney, in response to the pre-emptive strike upon his appeal which Mr Calvert attempted to make in respect of jurisdiction and abuse, argued that the starting point had to be the order made by the Appeal Tribunal of 28 November 2011.

22. The Tribunal, on reconsidering its decision, had to apply the correct legal test. The basis for success in the appeal was that it had failed properly to do so in its first decision. Accordingly, the analysis of the facts which had meticulously been found by the Tribunal was open again to it. He asserted that the errors of which he complained did not exceed the jurisdiction, if they were errors. The scope of the remission was wide. The task of the Tribunal was to apply the proper tests.

23. The second decision was a fresh decision. It offered a fresh opportunity to address any errors coming out of the legal tests applied. He invited us, as a third point, to look at the grounds, that the way in which the Tribunal expressed itself in respect of the PCPs was, as it recognised, with greater clarity (or it might be said, greater confidence; or it might be said, without the same lack of certainty) than it had in the first decision, but it was expressed differently. The finding the Tribunal came to was a result of the task it had been given. Every aspect of it, therefore, should be open to criticism before us as a fresh appeal.

Discussion

24. We cannot accept Mr McNerney's arguments. The Tribunal found as a fact, albeit a fact which involved a degree of assessment of other facts, that it had not been established on balance of probabilities that the two of the three PCPs asserted as the foundation of the Claimant's claim had in fact been applied by the employer. As we have already pointed out, that conclusion was not within the matters argued on the appeal, to which the remission was restricted. It was not open to the Tribunal to revisit those findings and make different ones.

25. Although the language is more robust, in essence, as Mr McNerney in his submissions recognised, it came to the same conclusions. He said, in his grounds of resistance to Mr

Calvert's arguments, in a perhaps telling phrase in answer to the cross-appeal, paragraph 8, that the ET, while reciting their original findings as to whether or not PCPs were applied and if they would have created substantial disadvantage to the appellant, *again* (we emphasise that word) failed to apply the correct legal test to those findings.

26. That was something which, as this Tribunal observed, was open to appeal before it. It was not appealed. It was not part of the matters remitted. The width of the remission order was not sufficient to include re-argument of those matters which had been determined. Further, if we were wrong on that, we accept Mr Calvert's arguments made in his skeleton that there needs to be finality in litigation. A party must appeal those points, just as it must appeal findings of fact which it says are misconceived or perverse, arising out of one hearing if it is in a later hearing to contend that there has been some error. The matters raised are matters which, as was pointed out by the use of the word "again", were not matters which arose fresh and for a first time in consideration of the grounds of this appeal, which we have considered at grounds 1 to 3.

27. As to ground 4, there is a similar point made by Mr Calvert. He argues that what is attacked in the appeal is the way in which the Tribunal treated **First West Yorkshire v Haigh**. He is right to note that the Tribunal dealt with that case with its second decision in terms which are very similar to those it used in its first decision: compare paragraph 108 of the second decision with 100 in the first decision. He argues therefore that it was not open to the Claimant before us to challenge the decision of the Tribunal on the basis that it had perversely misunderstood **First West Yorkshire v Haigh** and had therefore misapplied it.

28. We have much greater difficulty in accepting this as falling outside the scope of the remission or as necessarily being covered by any question of abuse by effectively having a second bite at the cherry. First, there is no clear statement by this Tribunal that Mr McNerney

sought to argue in respect of unfair dismissal before it a point in respect of **First West Yorkshire v Haigh** which he could not advance because it was not in the Notice of Appeal. The reason for that is, as we see it, clear. The first Tribunal had simply said far too little about unfair dismissal for an appeal court to understand what its conclusion was in respect of reasonableness. Although it may be an artefact of form in the way in which the Judgment was presented, the Tribunal had discussed **First West Yorkshire v Haigh** in any event, not in respect of the case of unfair dismissal, where Mr McNerney now sought to pray it in aid, but in respect of the disability discrimination case.

29. Further, as it seems to us, the question is one of law. When it was put to Mr Calvert that if the argument that he advanced was correct it would have the consequence that if, between the first and second decisions of the Employment Tribunal, there had been some appellate endorsement or consideration of **First West Yorkshire v Haigh** which had changed the legal landscape, no reference could be made to it, he admitted that he had difficulty in meeting the point. It is not the same, as we see it, as a finding of fact or a conclusion of mixed fact and judgment which relies upon other findings of fact. It is purely a matter of law.

30. Since the scope of the remission in respect of unfair dismissal was very wide, largely because the Tribunal was invited to reconsider its decision and set out (as it had not done) its consideration of reasonableness, we do not feel able to preclude Mr McNerney from arguing the fourth ground which he presents before us.

The fourth ground

31. The fourth ground is in these terms:

> **"1. That the ET have acted perversely in deciding First West Yorkshire v Haigh UKEAT/0246/07 was distinguishable because First West Yorkshire's terms and conditions required it to consider ill-health retirement.**
>
> **2. In Haigh at paragraph 43 of their decision the EAT found that consideration of the possibility of ill-health retirement was a matter of good industrial relations practice and not an outcome of a contractual obligation as suggested by the ET in this case.**
>
> **3. In misapplying Haigh the ET failed to approach correctly the question of the reasonableness of the decision to dismiss insofar as it was alleged the decision was unfair because of a failure to investigate possible ill-health retirement."**

32. The way in which **First West Yorkshire v Haigh** was applied needs to be put in context. The Tribunal began its consideration of unfair dismissal in the material respects at paragraph 106. It said:

> **"We find that in the particular circumstances of this case, there was no obligation or duty upon the respondent to consider ill-health retirement for the claimant."**

33. That is a conclusion. It is then, as we read the Judgment, a conclusion for which the Tribunal went on to give several reasons. The first was at paragraph 108, there being no 107. It said:

> **"108. The facts in this case are entirely distinguishable from that in First West Yorkshire. First West Yorkshire Limited's terms and conditions required it to consider ill-health retirement. The relevant provisions in the respondent's policy were contained in paragraphs 10 and 11 on page 483. The only grounds upon which an employee of the respondent in this case could qualify for an ill-health retirement was if medical opinion confirmed that the employee had a condition that was deemed permanent (up to age 65 years) which was preventing the employee from returning to their job.**
>
> **109. Having presented his entire case on the basis that Mr Matinpour was ready to return to work within two months of 28 January 2010, Mr McNerney then sought to have his cake and eat it by suggesting the Tribunal had no evidence before it that Mr Matinpour would be fit to return to work before the age of 65.**
>
> **110. Given that Mr Matinpour was declared to be fit by his GP in or around August 2010, it is a wholly unsustainable argument, which we reject. If we are wrong for taking the position into account retrospectively, we find that the respondent was entirely reasonable to not consider Mr Matinpour for ill-health retirement in January and February 2010, as there absolutely nothing that should have suggested to them that he would not have been fit to return to work by the age of 65. Indeed, it had a report from an occupational health expert that said he should be able to return in the right circumstances.**
>
> **111. We do not find the failure to go to Mr Matinpour's GP for a prognosis and/or date for likely return as making the dismissal unfair. The respondent had medical evidence and a vague statement from Mr Matinpour that he might be fit "in a couple of months". It was reasonable, in our opinion for the respondent to come to the conclusion that the claimant was not going to be fit to return to work, after an absence of fourteen months, for a further undefined period [...]"**

34. Mr McNerney is right, not only in our view, but by concession of Mr Calvert, in saying that the Tribunal did not correctly state the facts in **First West Yorkshire v Haigh**. There, the terms and conditions did not require First West Yorkshire to consider ill-health retirement. It should be pointed out, as both lay members in this Tribunal were keen to do, that in general, ill-health retirement is not a decision for an employer; it is one for the trustees of any pension scheme which is applicable. The process is costly and expensive to the scheme. Applications are therefore admitted cautiously, with considerable effort being made to ensure that they meet the applicable criteria, whatever they may be. The Appeal Tribunal did not require the employer to consider ill-health retirement in **First West Yorkshire v Haigh**, but to take reasonable steps to ascertain whether the employee would be entitled to the benefit.

35. However, we consider that Mr Calvert is right in his submissions to argue that whatever the factual error as to **First West Yorkshire v Haigh**, it had no material consequence in this Tribunal's decision. The reasons for the decision are clear. What the Tribunal was addressing in paragraph 108 was whether there was any basis upon which this employer at the time could reasonably have anticipated that the Claimant might be eligible for ill-health retirement. It is plain that unless the circumstances are such that an employer should think that an employee is or may reasonably be suitable for ill-health retirement, it has no duty to delay dismissal for further consideration of his case in order to consider a matter which, on the information before it, it has no reason to think might arise.

36. The whole burden of paragraphs 108 to 111, it is submitted in effect by Mr Calvert, is that the Tribunal accepted the evidence that the employer here had no reason to think that the Claimant was a suitable candidate for ill-health retirement. It could not therefore be unreasonable, in the context of section 98(4) not to delay the dismissal so that it could be

considered. Thus it took the view, as a matter of fact, that Mr Matinpour was not unfit for any work, and indeed, not unfit for his own work on any permanent basis. It took the view that there was no medical opinion which confirmed that he had a condition which might have made him eligible for the scheme (paragraph 108).

37. Paragraph 111 is saying it was reasonable for him to come to the conclusion that he was not going to be fit to return to work for a further undefined period. It was not suggesting that the Respondent would think that he was unfit for work on any permanent basis. Cases in which **First West Yorkshire v Haigh** is pressed into service in the argument will differ widely on their facts. It is an important factual matter whether there is in a particular case any real reason to think that an employee is or might be eligible for ill-health retirement. If there is not, then it is entirely reasonable for an employer not to consider it. It cannot be otherwise. The focus of a Tribunal's decision must be upon the employer's actions at the time, in the light of what the employer knew at the time.

38. Although this Tribunal should not properly have had regard to what had happened after dismissal in August 2010, it dealt with the alternative if it were wrong to take that into account. No error therefore exists there. Overall, the Tribunal set out detailed reasoning, by contrast to its first decision, for concluding that the Claimant was not unfairly dismissed by reason of capability. We would add this, again with the benefit of the input of the lay members, that frequently a dismissal will be stated as being by reason of capability because it is preferable from the employee's point of view or as his union would see it, that it should be so expressed, rather than "capability as a result of ill health", which can be seen to give rise to greater difficulty in obtaining any subsequent employment.

39. Be that as it may, for the reasons given, we have concluded first, that the first three grounds cannot, on the basis of jurisdiction (or if that be wrong, on the basis of abuse of process) be argued before us. The fourth ground we dismiss on its merits. The appeal is dismissed.

40. Finally, we must express our gratitude to both counsel for their focused and succinct and appropriate submissions.