Appeal No. UKEAT/0235/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2012

Before

HIS HONOUR JUDGE McMULLEN QC

MR J MALLENDER

MR H SINGH

MR A McLAUCHLAN — APPELLANT

CHUBB ELECTRONIC SECURITY SYSTEMS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR A McLAUCHLAN (The Appellant in Person)
For the Respondent	MR S GORTON (One of Her Majesty's Counsel) Instructed by: DWF LLP Solicitors 1 Scott Place 2 Hardman Street Manchester M3 3AA

SUMMARY

DISABILITY DISCRIMINATION – Direct

VICTIMISATION DISCRIMINATION – Other forms of victimisation

The Employment Tribunal was entitled to find the Claimant had a mental health impairment but it did not have such adverse effect on his day to day activities as to make him disabled at the time of the complaints, although he was later accepted to be within the Act. His claims of victimisation failed on the permissible findings of causation.

HIS HONOUR JUDGE McMULLEN QC

Introduction

1. We will refer to the parties as the Claimant and the Respondent. This is an appeal by the Claimant in those proceedings against the judgment of an Employment Tribunal presided over by employment Judge Pitt sitting for 11 days and a day in private in Newcastle upon Tyne sent with reasons to the parties on 25 August 2011. The Claimant was represented by counsel. The Respondent has throughout been represented by Mr Simon Gorton, QC. The Claimant today represents himself. He relies on a Notice of Appeal drafted by a second counsel.

2. The Claimant made a number of claims in relation to his claim that he was disabled and that mistreatment by the Respondent of him followed his disability were related to his disability and were on the other hand elements of victimisation for having made his contentions about disability. The Respondent contends that the principal part of the case was to do with the date of the onset of the admitted disability and the Tribunal made no error in its decision as to victimisation. Neither of the two examples given by the Claimant was on account of or because of the doing of a protected act under the **Disability Discrimination Act 1995**. Those were the essential issues but the Employment Tribunal did set them out in greater detail (see paragraphs 11 to 15). The summary of the case is this as recorded from his counsel's submission to the Tribunal:

> **"16. The claimant's case was further particularised by Ms Nolan in writing who provided the Tribunal with an opening note and closing submissions. In particular the Claimant's case is that he was disabled from the spring of 2007; that all the ill treatment flowed from this and was because he was disabled; further that he had told his employer that he was disabled.**
>
> **17. The respondent's case at first is that the claimant, although now disabled, was not disabled at the relevant time. At the material time, the respondents did not know or could not be deemed to know of the claimant's disability and that in relation to each allegation in the further and better particulars, that there was no *prima facie* case that reversed the burden of proof, in that there was no evidence that the treatment was on the grounds of disability. Again these were expanded upon in full written submissions from Mr Gorton QC."**

3. The Tribunal dismissed the claims. The Claimant is still an employee of the Respondent. Directions setting out this case have taken a number of steps. Initially the appeal came before HHJ Peter Clark who rejected it under rule 3(7) since the Notice of Appeal was a criticism of factual errors and this was outside the scope of an appeal on a question of law. The Claimant was given the opportunity to submit a fresh Notice of Appeal under Rule 3(8) which is the one drafted by his second counsel. That came before Mr Recorder Luba QC who noted that there were aspects of it which were arguable and that certain parts of the claim were not addressed.

4. I gave case management directions to the Employment Judge to deal with what appeared to be parts of the claim that had not been addressed. Although the Claimant objected to that procedure, what we now have in addition to the judgment is a reply by the judge dated 10 September 2012 dealing with the two aspects of victimisation. The case is thus properly constituted as the amalgam of those two written instruments.

The legislation

5. The legislation in this case is not in dispute. The Tribunal set out the relevant provisions of the Disability Discrimination Act and the **Equality Act** insofar as each was relevant (see paragraph 18 of its judgment). The directions are not in dispute and Mr Gorton has summarised the jurisprudence relating to the various aspects of the claim in his skeleton. In short, section 1 of the DDA defines disability and with the assistance of schedule 1 to the Act, the various components of disability are described. It must usually have lasted 12 months, it must have an effect on normal day-to-day activities and it must be of a substantial adverse effect. Deduced effects are set out in paragraph 6 of the schedule and this deals with medication, to correct the effect.

6. Rules of procedure for the Employment Tribunal are set out in rule 30 which require it to give clear reasons. Substantial guidance is provided in **SCA Packaging Limited v Boyle** [2009] IRLR 749 at paragraph 29 per Lord Rodger and paragraph 44 by Baroness Hale on the meaning of substantial. As to deduced effects, the judgment in **Woodrop v London Borough of Suffolk** [2003] IRLR 111 paragraph 13 is applicable. A Tribunal's duty to give reasons under the rule is embodied in the judgment in **English and Emery Reimbold v Strick Limited**. It must be born in mind that the post-script to that judgment means that it is to be exigible for those who have heard the evidence and heard the submissions and not to be looked at simply in a vacuum.

The facts

7. The Tribunal spent a good deal of time examining what we have called the "alleged mistreatment". These are the individual events in the Claimant's working life which he attributes to his disability. All of that is secondary to the primary question of whether he was disabled under the Act and so, we will take an astringent approach to the central issue.

8. The Employment Tribunal posed for itself the central question as to the nature of the disability at the relevant time. The claim form was submitted on 30 September 2008. The Claimant had been off work since April 2008. The relevant question was whether in March 2007 when he had an accident and from which it seems he dates his claim, he was disabled, but the Tribunal also considered the secondary period that is April to September 2008.

9. The Tribunal recorded that on 27 March 2007 he filled in an accident report indicating he had slipped on a ladder and cut his thumb. Thereafter, a number of events occurred. On 22 April 2008 he no longer attended and he remained absent from that time.

10. The central part of the Claimant's case was accepted by the Respondent which was that he does have a disability as diagnosed by Dr Vincenti, the psychiatrist who gave evidence before the Employment Tribunal. It is disputed that it had a substantial adverse effect on his day-to-day activities during the period to which the complaint relates. The Tribunal found that the Claimant was a poor historian of his case. His performance before us today indicates to us that that was a finding which was properly open to it. He has attempted to address us in a disjointed way. We have made every allowance for his mental condition but we endorse what the Tribunal has said about his ability to conduct the proceedings and to give an account.

11. There is a substantial amount of written material which supports the Tribunal's finding. The Tribunal was astute not to rely entirely upon what the Claimant was telling them, principally about the adverse effect that his mental disorder had upon him. It looked in a broader way at the condition as demonstrated by the medical reports, and for that they had the doctors' notes from the GPs surgery, the report and live evidence of Dr Vincenti and medical material from Dr Nano.

12. The short point is that the Tribunal decided as a matter of fact that the mental disorder that he had did not have a substantial effect on his day-to-day activities. It looked at what he could do and what could not do, it did not wrongly focus on the materials.

Discussion

13. We accept in full the written submissions of Mr Gorton in his analytic response to the grounds of appeal. The ground of appeal known as ground 1 contends that the Tribunal did not look at the definition of substantiality. It did carefully look at how substantial the effect was (see paragraphs 19.2 and 19.9 of the judgment). It did not consider that the ability of the Claimant to carry on working was determinative of the condition in the Act. In other words,

just because a person can go on working does not mean that they can carry out day-to-day activities.

14. As to the degree of his disability, the Tribunal made findings based on cogent evidence (see paragraphs 19.5 to 19.22). The Tribunal was also concerned with the work duties which he could fulfil which required memory and concentration but these were not determinative either. The Tribunal correctly focused on what the Claimant could do and what he could not do, except with difficulty. It rejected a large part of his evidence because it was unsatisfactory. The factual conclusion that the Tribunal reached was that the Claimant was functioning at a high level and that this was an inconsistency in the material which he contended was to do with his mental incapacity affecting memory or ability to concentrate. There is no issue as to long-term effect. As to deduced effects, another ground in the appeal, we respectfully agree with Mr Gorton that this ground is misconceived for there was no medication at the time relevant to this pathological cause; it is not necessary for us to dwell upon this matter further.

15. The second ground is essentially a reasons challenge as so many appeals are in this and other courts today. In our judgment, this is **Meek**-compliant and in accordance with the rules. The Tribunal noted various matters to do with the Claimant's ability to work with ladders and that certain of his complaints were resolved as exhibited through the GPs notes.

16. The third ground relates to the failure by the Tribunal to deal with the complaints of victimisation. It will be recalled that these reasons are now found in the replies given in response to the EAT's order. The Claimant was entitled to weigh this ground of appeal because there is a gap in the reasoning. This is to do with two factual matters; the failure to postpone disciplinary hearings against the Claimant in 2008 and the removal from him of his company car. In our judgment, the Tribunal in its replies has given clear reasons as to why the first one

occurred. There was no victimisation on account of whatever complaints he was making relating to the Disability Discrimination Act and the decision not to postpone was taken upon medical advice, this was nothing to do with victimisation.

17. As to the removal of the company car, the Claimant made a good deal in his oral argument to us today about the dates and times but these are matters of fact for the Employment Tribunal. The simple fact was that the Claimant had been away and the lease had expired on the company car and it was still in his possession. It noted the vehicle operating manual which the Claimant says is the wrong date, but the gist of it is set out by the Employment Tribunal. The Tribunal was satisfied on the evidence which it heard that the car was not taken away from him because he had put in a grievance. That is a matter of fact and inference for the Tribunal and we see no error in it. In those circumstances, it is unnecessary for us to deal in any further detail.

18. Because of the Claimant's condition, we indicated that we would take the grounds of appeal as drafted by his second counsel in order to assist him since his skeleton argument of about ten lines simply says:

> **"The Respondent broke the law. Dr Vincenti confirmed that the Claimant had a mental impairment. The occupational physician confirmed that Judge Pitt is not a doctor and the Employment Tribunal erred in law. We hope we do no disservice to the Claimant when we say that that comes nowhere near what is required in a skeleton argument."**

19. For that reason we have taken the grounds of appeal as drafted by his second counsel as being the skeleton argument. In our judgment, the response of Mr Gorton fully answers those grounds together with the response to the request to the employment judge. The Claimant's response to that extends to 10 pages but with respect to him, this simply reargues the matters that he was putting before us. The central question is whether those two matters were

victimisation, the Employment Tribunal on the evidence was entitled to come to the view that they were not. Accordingly, this appeal is dismissed.

20. We take it from the Claimant's conduct before us having announced our decision but without reasons that he wishes to go to the Court of Appeal. In order for us to save him one step, we will take that as an application and we will refuse it.

Postscript

21. At the outset I offered to make any reasonable adjustments for the Claimant's disability, such as breaks. He sought none. After all argument and deliberation I told the Claimant our decision and said it would be put in writing and he need not stay to listen to the oral reasons. He said he would appeal. There was a break after para 11 above for the voluntary departure of Mr McLauchlan from these proceedings and his announcement that he will appeal and complain about what I have said.