Appeal No. UKEAT/0321/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 November 2012

Before

THE HONOURABLE MR JUSTICE WILKIE

MR C EDWARDS

MR T HAYWOOD

MR T W ESPIE — APPELLANT

BALFOUR BEATTY ENGINEERING SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR NEIL DOWNEY (of Counsel) Instructed by: Neil Myerson Solicitors The Cottages Regent Road Altrincham Cheshire WA14 1RX
For the Respondent	MS LENA AMARTEY (of Counsel) Instructed by: Pinsent Masons Solicitors 141 Bothwell Street Glasgow Lanarkshire G2 7EQ

SUMMARY

DISABILITY DISCRIMINATION – Direct disability discrimination

Where, in selecting for redundancy, the employer had regard to a period of absence during which there were two reasons for absence, one of which was by reason of a disability and one of which was for another medical reason, the Employment Tribunal did not err in law in concluding that the detriment suffered, by counting the period of absence for a medical reason which did not amount to a disability, did not amount to discrimination on account of a disability.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. This is an appeal by Mr Espie against two elements of a decision of the Employment Tribunal held at Liverpool on four days between 16 and 19 January 2012. We should say at the outset that we have been greatly indebted to both counsel, Mr Downey and Ms Amartey, for their very helpful written and oral submissions.

2. The Judgment of the Tribunal was that Mr Espie was unfairly dismissed by his erstwhile employers, Balfour Beatty Engineering Services Ltd, and he was awarded a compensatory award in respect of that in the sum of around £1,100. He appeals against an element of that decision. The unfairness was found to have been on procedural grounds and, as a consequence the remedy was limited. The ground upon which he seeks to overturn the decision of the Tribunal would, had it been decided in his favour, have been more likely to have resulted in a larger remedy. The second decision that is subject to this appeal is the conclusion of the Tribunal that the Claimant was not unlawfully discriminated against on the ground of disability or age.

The facts

3. The factual matrix is significant and can be stated briefly. Mr Espie joined a company called Hayden Young Ltd in 1983. His employment transferred to the Respondent, Balfour Beatty Engineering Services Ltd, in July 2009. By the time he was dismissed, Mr Espie was employed as a contracts manager, of which there were four in the region where he worked. He had been diagnosed in July 2009 with depression and was signed off work by reason of stress or depression from October 2009 until July 2010, when he began a phased return to work. Within that period he also had a problem with his appendix. In March 2010 he underwent an operation

and it was common ground that, if he had not also been absent from work due to depression at that time, he would, in any event, have been absent from work for several weeks because of the problem with his appendix. The period of that absence was covered by a doctor's certificate, which identified two reasons for his unfitness for work: nervous debility and appendectomy, the former being a reference to the depressive illness. It was common ground that the depressive illness constituted a disability.

4. In September 2010 the company decided upon a reorganisation, a consequence of which was to reduce the number of contracts managers within the region from four to three. The employer decided that the pool for selection was to be the four contracts managers, and criteria were applied which had been collectively agreed with the relevant trade unions, the reasonableness of which the Claimant did not take issue. There were a series of consultation meetings. At the second of them, on 19 October, the outcome of the scoring exercise was announced to the four managers. Mr Espie had scored the lowest score. The person who had effectively taken the decisions was Mr Cooke, a regional director, and it was intended that he would have been present on 19 October to explain the outcome of the scores and, by implication, to receive any comments or representations in respect of that. However, Mr Cooke was not present, because of an emergency that had arisen. Neither of the managers who were present was in a position to give clarification as to how the scores had been arrived at. They undertook to convey concerns and to have Mr Cooke respond to them, but the evidence was that Mr Cooke did not contact Mr Espie and did not attempt to provide him with any information on the subject of scoring. That was decided by the Tribunal to have been an element of procedural unfairness.

5. Having received the lowest score amongst four managers, Mr Espie was, therefore, the prime candidate to be made redundant. There was some consideration of the possibility of redeployment, by a Ms Ashton, but, although there were a number of vacancies within the company, she did not consider any was a suitable position for Mr Espie. Accordingly, she did not canvass them with him. Her failure to do so was a second procedural basis for the finding of unfair dismissal and the Tribunal, in respect of remedy, concluded that, had he been offered the possibility of redeployment to any of those vacancies, there was a one in three chance that he would have applied and obtained one of those jobs. It was on that basis that the award was calculated.

6. The ET1, claiming that he had been unfairly dismissed, had raised a number of issues, which related to the bona fides of the entire exercise. It was said that the consultation was a sham, and criticisms were made of the ways in which certain of the criteria had been applied, in particular in relation to competency and potential. The Tribunal concluded that there was nothing unfair, or sham, about the exercise in these respects, and there is no appeal in respect of any of them, nor is there an appeal in respect of the Tribunal's conclusion that this was not a case in which, as the Claimant was alleging, it was unreasonable of the employer not to have bumped an employee out of an otherwise safe position in order to accommodate Mr Espie, who was a long-serving employee.

7. The sole ground of appeal in relation to the unfair dismissal concerns the pool for selection. In his ET1 Mr Espie had suggested that the pool of selection should have included a number of other types of manager, in particular project managers and senior project managers, within the pool, rather than restricting it to contracts managers. His ground for so saying was expressed in the following terms:

> **"Each of these roles, whilst having different job titles, carry out very similar work in practice. Consideration should have been given to including them in the pool for selection."**

8. The Employment Tribunal dealt with this issue fairly briefly in their decision at paragraphs 17 and 18, in which they said:

> **"17. Firstly, it was alleged that the pool for selection had been improperly identified and in particular that it should have been extended to employees other than contracts managers, for example, project managers, senior project managers and operations managers.**
>
> **18. Mr Espie accepted that these were not interchangeable jobs and the fact that an employee might possess an ability to undertake one would not necessarily mean that he was able to undertake any of the others. In the absence of any such 'reciprocity' we were not in a position to conclude that it was unreasonable for the Company to restrict the pool in the way that it did."**

The appeal

9. The grounds of appeal are to the effect that the Tribunal erred in law in that they ought not to have considered only interchangeability or reciprocity of the jobs but, instead, ought to have had regard to a number of factors, such as, for example, how different the two jobs were, the relative length of service of the respective employees, and the qualifications of the employee in danger of redundancy. Those are factors that were identified by the Employment Appeal Tribunal in **Fulcrum Pharma (Europe) Ltd v Bonassera** UKEAT/0198/10 as being factors that may be relevant for the Tribunal to consider when considering the issue of whether the pool from which selection was drawn was a reasonable one. Those factors, in fact, derive from an earlier decision of the Employment Appeal Tribunal in **Lionel Leventhal Ltd v North** UKEAT/0265/04, which was a case concerning the failure sufficiently to consider alternative and subordinate employment.

10. In addition, although not placed before the Employment Tribunal, the Appellant relies on passages in the Judgment of the EAT in **Capita Hartshead Ltd v Byard** UKEAT/0445/11, and

in particular the passage at paragraph 31, where the EAT pulls the threads together, identifying the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy. They to some extent, replicate well-established principles, for example: that it is not for the Tribunal to decide what they would have thought fair but whether the dismissal lay within the range of conduct that a reasonable employer could have adopted (**Williams v Compair Maxam Ltd** [1982] IRLR 83); there is no legal requirement that a pool should be limited to employees doing the same or similar work; the question of how the pool should be defined is primarily a matter for the employer to determine; and it would be difficult for the employee to challenge the decision where the employer has genuinely applied his mind to the problem **Taymech v Ryan** UKEAT/0663/94. There are two passages from paragraph 31, which set out the EAT's views in the following terms:

> **"(d) the Employment Tribunal is entitled if not obliged to consider with care and scrutinise carefully the reasoning of the employer to determine if he has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, and that**
>
> **(e) if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."**

11. As we have indicated, the attack by the Appellant on the decision to dismiss him by reason of redundancy was comprehensive. He criticised a number of the ways in which the criteria were applied and claimed that the exercise was somewhat of a sham. The Employment Tribunal had to consider all of these matters and came to the view that the exercise had been conducted in good faith. The sole argument put forward by the Claimant as to why the pool should have been wider was based on his assertion that the jobs done by the project managers the senior project managers and the operations managers, were the same, or very similar, in practice. Mr Downey has sought to argue that, where the Employment Tribunal used the word

"reciprocity", as it explained it, in paragraph 18, they failed properly to address that argument. In our judgment, that is a semantic argument of no substance. We are satisfied, even though they express themselves briefly, that the Employment Tribunal, in considering the arguments in respect of the size of the pool, did have in mind and did apply their minds to whether the pool was genuinely considered and were scrupulous in not themselves deciding what the pool should have been. They considered whether the pool was within the range that a reasonable employer could have adopted. In our judgment, therefore, this ground of appeal does not succeed.

12. The second ground concerns the finding that there was no disability discrimination. That arose in respect of the criterion for selection under the heading, "Attendance/Time-keeping". This criterion was based on the number of days of absence, whether short-term absences or, as was relevant in this case, a continuous period of absence. There were three levels of performance against that criterion. The conclusion that Mr Espie's absence rated "poor" under that criterion was based on the fact that he had had more than two weeks' continuous absence. If he had not been characterised as being poor under that particular criterion, it was common ground that, on either of the other two levels for that criterion, he would not have been selected for redundancy, because his score would have been higher than the others had he received the highest grading under that criterion, or, if he had received the middle grading, his score would have been equal to that of one of the others and, by reason of his length of service, he would have not been selected for redundancy because that factor would have acted as a tie-breaker. The evidence was that the employer disregarded the absence from October 2009 until July 2010 by reason of depression, which constituted a disability, but concluded that his grading against this criterion was poor because he had more than two weeks' absence by reason of his appendectomy and the period for recovery. The employer came to that conclusion notwithstanding the fact that it fell within the period of absence by reason of depression. The

appellant's argument was that, by so doing, the employer had discriminated against Mr Espie pursuant to section 15 of the **Equality Act 2010**. Section 15 provides as follows:

> **"(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and—**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

13. The Employment Tribunal addressed this issue in two places in their Judgment. In respect of the unfairness contention, and they did so at paragraph 25, which reads as follows:

> **"It was suggested that the guidance note indicated that this criterion was restricted to considerations of lateness and frequest [sic] short term absences, not a one-off lengthy period of absence related (as in this case) to emergency surgery. However, we accepted the evidence on behalf of the company that, despite what might be read into the wording, they had actually applied the criterion in a consistent way across the employees. Mr Espie had had more than two weeks' absence counted against him by reason of his appendectomy and recovery and accordingly his attendance was scored as 'poor' (we are bound to remark, in this context, that in any event the Company had mistakenly ignored a further period of absence that would have counted against Mr Espie during the relevant period)."**

14. We have investigated that last sentence and it is common ground that in September 2010 – that is, after his return to work from his lengthy absence due to depression – Mr Espie had had a period of absence of greater than two weeks by reason of a knee injury, which was entirely unrelated to his depression, and that is the absence to which the Tribunal was referring at the end of paragraph 25.

15. They returned to the question of attendance when dealing with the disability discrimination claim, and they do so in paragraphs 41 and 42 in the following terms:

> **"41. As we have mentioned, there was a period of several weeks during which it was apparent that, whichever condition he had had (in relation to depression or his appendix), he would have been absent from work.**
>
> **42. It was clear to us that that poor score was not because of something arising in consequence of the disability but rather the problems that Mr Espie had with his appendix. Accordingly, the score was appropriate. To put the matter another way, the 'unfavourable treatment' was by reason of problems with the appendix and had nothing to do with depression."**

16. We have referred to the terms of section 15. There is also guidance given in the Equality and Human Rights Commission's Equality Act 2010 Code of Practice on employment, within which paragraph 5.8 of the Code reads as follows:

> **"The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability."**

17. And paragraph 5.9, which reads:

> **"The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability."**

18. Mr Downey has criticised the Employment Tribunal for not referring explicitly to the Code of Practice but, as Ms Amartey has pointed out, it has been long established, since the **Retarded Children's Aid Society Ltd v Day** [1978] ICR 437, that there is no error of law in the Employment Tribunal failing explicitly to refer to the Code of Practice where they have already referred to the statutory provisions themselves and, in any event, the Code of Practice in this particular case does no more than express the same principles in slightly different, or alternative, terms, and, in our judgment, that, of itself, cannot be a successful ground of appeal.

19. Mr Downey's argument is also on the substance. It is common ground that, looking at section 15(1)(a) and applying it to this case, the following analysis applies: A treated B unfavourably – in this case, the unfavourable treatment was the giving of a "poor" grading under that particular criterion – because of something. The "something" is said by Mr Downey to be the period of absence during the relevant period. Ms Amartey says that the Employment Tribunal has found, and it was entitled to find, that the "something" was absence by reason of

appendectomy during that relevant period, because the evidence was that the Respondent had deliberately disregarded any absence by reason of depression, the disability in question. Mr Downey argues that the absence being certified as being for two reasons – the disability and the appendectomy – it necessarily follows that the "something" arose in consequence of the disability and that, accordingly, the Employment Tribunal has erred in concluding that the unfavourable treatment did not arise because of "something" arising in consequence of the disability.

20. On the other hand, Ms Amartey says that the findings of fact of the Tribunal were that the unfavourable treatment arose because of Mr Espie's absence by reason of the appendectomy and that the Employment Tribunal was correct in concluding that the "something" was not in consequence of or connected with the disability. On the contrary, it was specifically and deliberately not in consequence of or in connection with the disability, because the period of absence by reason of disability disregarded. It was only the fact that, during the relevant period of absence, there was an additional, separate and independent cause of the absence that gave rise to that period of absence being counted and, therefore, giving rise to the unfavourable treatment.

21. In our judgment, the Employment Tribunal had to make specific findings of fact, and it did so at paragraph 25 and in paragraph 42. Their findings, in respect of disability discrimination, mirrored their earlier findings of fact in respect of the fairness of the dismissal. The "something" was the fact that Mr Espie had had more than two weeks' absence by reason of his appendectomy. That "something" did not arise in consequence of a disability but, rather, arose from the problem that Mr Espie had with his appendix. Given that those were the findings of fact and given the way in which the Tribunal applied those findings of fact to the

relevant statutory provisions, in our judgment Mr Downey has not succeeded in demonstrating that the Tribunal erred in law in the way that it applied section 15 (1)(a).

Conclusion

22. It follows that this ground of appeal must also fail, and the appeal is dismissed.