Appeal No. UKEAT/0268/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 May 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR A HARRIS

MR T HAYWOOD

MR M GROVES — APPELLANT

THE HOUSE OF COMMONS COMMISSION AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR M GROVES (The Appellant in Person)
For the Respondents	MS LAURA ROBINSON (of Counsel) Instructed by: House of Commons The Legal Services Office 7 Millbank London SW1P 3JA

SUMMARY

DISABILITY DISCRIMINATION – Burden of proof

Burden of proof provisions correctly applied to claim of **DDA** victimisation. Permissible conclusion reached by Employment Tribunal. Post-termination conduct of Claimant relevant to remedy issue; had it arisen at the end of a joint liability/remedy hearing.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. Mr Groves, the Claimant, was employed by the Respondent, the House of Commons Commission, from 27 July 2009 until his dismissal by way of non-confirmation of his appointment following a period of probation on 16 April 2010. He presented a total of four forms ET1 to the London Central Employment Tribunal. The claims were combined and came on for initially an eight-day hearing in March 2011 before a Tribunal chaired by Employment Judge Glennie. After a further three days of deliberations in chambers, that Tribunal dismissed all his claims. Having given oral judgment, they then rejected an application by the Respondent for costs. Their Judgment with Reasons running to 30 pages was promulgated on 13 June 2011.

2. The present appeal was first rejected on the paper sift by HHJ McMullen QC. However, at a rule 3(10) hearing before Langstaff P on 9 May 2012 the President was persuaded by counsel for the Claimant, then appearing under the ELAAS pro bono scheme at that Appellant-only hearing, to permit two grounds of appeal only to proceed to a full hearing. All other grounds were dismissed. An application by the Claimant for a review of the President's Judgment was rejected by an order dated 25 June 2012.

3. The two live grounds of appeal were articulated in the President's rule 3(10) order dated 17 May 2012 in the following terms:

> **"(i) That the Employment Tribunal misapplied the burden of proof in deciding it was satisfied by the employer's explanation that the decision to dismiss by non-renewal of the Claimant's probationary employment was completely uninfluenced by the fact he had complained of discrimination against him on the ground of his disabilities, particularly by regarding the fact that it *could* have dismissed him purely because of his conduct as meaning that it *did* do so.**
>
> **(ii) That the Employment Tribunal found facts relating to the post-termination conduct of the claimant, did not identify clearly its purpose in doing so, and probably took it into account for an impermissible purpose."**

Burden of proof

4. The particular complaint with which this ground is concerned is the Claimant's complaint of victimisation in his fourth ET1 arising out of the non-renewal of his employment appointment (see the issue identified at paragraph 12.2 of the Reasons). This claim was brought under the **Disability Discrimination Act 1995** (DDA), then in force.

5. In order to put the matter in context, the Tribunal directed themselves as to the test of motive and both conscious and subconscious motivation as explained by Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 573 HL (see Reasons, paragraph 22) and the reverse burden of proof provided for in section 17A(1)(c), DDA (paragraph 23).

6. The relevant findings of fact by the Tribunal, which centre on a meeting held on 13 April 2010 at which the Claimant was not present, are to be found at paragraphs 81 to 87. By that time, the Claimant had presented his first ET1 to the Tribunal on 5 April and, as he told Ms Welham of the Respondent by email on 12 April, a second form ET1 and had served on the Respondent a number of DDA questionnaires. All of these were protected acts.

7. The Tribunal found that the Respondent's decision not to renew the Claimant's appointment so soon after these protected acts were done gave the appearance of suspicious circumstances (see paragraph 86). However, on balance they concluded that the reason why his contract was not renewed was his previous conduct. The Respondent had discharged the burden of proving that the non-renewal of his employment appointment was in no way connected with the earlier protected acts either consciously or subconsciously (see paragraphs 120 to 125). This ground of appeal is explained by the President at paragraph 8 of his Judgment given at the rule 3(10) hearing.

8. Having now heard submissions by Ms Robinson, who appeared below, in answer to those of Mr Groves, we are satisfied that the concern expressed by the President at paragraph 8 is not well-founded. The correct analysis is that at paragraph 86 the Tribunal are excluding any suggestion that the Claimant's pre-termination conduct relied on by the Respondent and set out at paragraphs 52, 65, 70, 74, 86.3, 115, 116 and 124 of the Reasons could not amount to a reason justifying dismissal. Had they found otherwise, then the Respondent would not have provided a credible, non-discriminatory reason for dismissal and the claim of victimisation would, Ms Robinson accepts, inevitably have succeeded.

9. However, the Tribunal did not end its analysis there. At paragraphs 121 to 125 it followed each of the required legal steps. First, it found that stage 1 of the **Igen v Wong** [2005] ICR 931 test was passed and that the burden shifted to the Respondent to provide a wholly non-discriminatory reason for dismissal (see paragraph 121). Next, it ruled out conscious victimisation based on its earlier findings of fact (see paragraph 122).

10. Finally, the Tribunal engaged with the difficult question of subconscious victimisation and found that the Respondent did not in any way victimise the Claimant. The protected acts played no part in the decision not to renew his contract. In so doing, they answered the "reason why" question: it was solely due to the Claimant's conduct.

11. Mr Groves has drawn our attention to a number of relevant authorities, but we think that the law is clear as we have stated it to be and was properly applied by the Tribunal. More widely, he submits that the factual matrix, particularly the temporal link between the protected

acts and the decision not to renew his contract, point ineluctably to the conclusion that the protected acts played some part in that decision and that is sufficient.

12. We see the force of his argument before the Employment Tribunal, but we remind ourselves that it is not for us to substitute our judgment for that of the Tribunal, which heard the case over eight days and then spent three days in deliberations. We cannot say that their conclusion was legally perverse. There was no patent misdirection in law. Accordingly, this ground of appeal fails and is dismissed.

Post-termination conduct

13. The reason for this ground being permitted to proceed, albeit with less enthusiasm on the President's part, is explained at paragraph 10 of his rule 3(10) Judgment. What we have now been told is that the hearing below was not limited to the issue of liability but incorporated questions of remedy should it arise. That is why, Ms Robinson tells us, she sought the admission of evidence of the Claimant's post-termination conduct which is dealt with at paragraphs 91-94. It was the basis for her alternative argument that if any of the claims were to succeed, compensation should be limited to loss of earnings for a short period before the claim would have been dismissed fairly and without discrimination on conduct grounds. That alternative case is dealt with at paragraph 128, to which the President does not refer at paragraph 10 of his Judgment.

14. On that basis, we reject Mr Groves' submission that in forming a view of his post-termination conduct the Tribunal's view on liability was somehow clouded. On the contrary, we are satisfied that the Tribunal correctly placed that evidence in the appropriate box marked

"remedy if it arises". It also in the event became relevant to the Respondent's unsuccessful costs application (see paragraph 138). For these reasons, this appeal fails and is dismissed.