Appeal No. UKEAT/0046/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 October 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR A HARRIS

MR B WARMAN

MR N ROBERTS — APPELLANT

NORTH WEST AMBULANCE SERVICE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEXANDER MODGILL (of Counsel) Instructed by: Stachiw Bashir Green Solicitors The Old Bank Building 656 Great Horton Road Bradford BD7 4AA
For the Respondent	MR TERENCE RIGBY (of Counsel) Instructed by: Hempsons Solicitors The Exchange Station Parade Harrogate HG1 1DY

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

Duty to make reasonable adjustments. Reasonableness question answered by Employment Tribunal, on remission following first appeal, in favour of Respondent. No error of law in that approach. Claimant's appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Manchester Employment Tribunal. The parties, as we shall describe them, are Mr Roberts ("Claimant") and North West Ambulance Service NHS Trust ("Respondent").

2. The Claimant commenced his work with the Respondent as an emergency medical dispatcher following a period of training in their control room at BelleVue Ambulance Station, Manchester, in 2008. At all material times he suffered from anxiety and depression. He was disabled for the purposes of the then **Disability Discrimination Act 1995** (DDA). His condition was characterised as social anxiety disorder. His employment ended with his resignation on 1 January 2010. He brought claims of constructive unfair dismissal, disability discrimination and breach of the **Working Time Regulations** before the Tribunal. Following a hearing held on 26-28 July 2010 before a Tribunal chaired by Employment Judge Slater, sitting with Mrs A L Booth and Mr D Wilcox, that Tribunal dismissed all three claims, the last one being withdrawn by the Claimant. Reasons for that judgment were provided on 11 August 2010 ("the first decision").

3. Against the first decision the Claimant appealed. His appeal was initially rejected under EAT rule 3(7) by Silber J on the paper sift, but following a rule 3(10) oral hearing before HHJ David Richardson the appeal ("the first appeal") was permitted to proceed to a full hearing on a single ground identified in the Judge's order dated 24 February 2011.

4. The full hearing came before Judge Richardson and members on 2 September 2011. By a reserved judgment handed down on 24 January 2012 the appeal was allowed and the case remitted to the Slater Tribunal for reconsideration. Specifically, the EAT held, in relation to the

Claimant's complaint that, in operating a policy of hot-desking in the control room, the Respondent had failed to make a reasonable adjustment by ensuring that a particular seat was available for him so as to allay his feelings of anxiety. The EAT added at paragraph 41 that the Employment Tribunal "will look afresh at the matter and be prepared to reconsider the claims before it and reach fresh conclusions".

5. The remitted hearing took place before the Slater Tribunal on 15 and 16 October 2012. By a reserved judgment with reasons dated 19 October ("the second decision") the Tribunal arrived at the same conclusion. His claims failed. Against that judgment, the Claimant now brings this second appeal. It was allowed to proceed to this full hearing by Mr Recorder Luba QC on the paper sift. A cross-appeal raised by the Respondent, conditional upon the outcome of the Claimant's appeal, has also been permitted to proceed to this full hearing.

Reasonable adjustments

6. The facts material to the hot-desking complaint, drawn from both the first and second Tribunal decisions (no further evidence was admitted on the second occasion), are these.

7. The layout of the control room provided 24 work-stations for dispatchers. At busy times all seats were filled. This is a 24-hour operation. The Claimant worked various shifts including the 7am to 7pm shift. Initially he chose to work in the middle row in the control room. However, the proximity to other workers made him anxious. He thought that working on the periphery would help him overcome his anxiety, and the Respondent was prepared to accommodate his wish. The Tribunal found it was not always practicable to keep his chosen seat free on the preceding shift but that the Respondent made arrangements for another

occupant to move when the Claimant came on shift so that he could take up that position. From time to time that happened.

The Tribunal decisions

8. By their first decision (paragraph 55) the Tribunal concluded that the policy of hot-desking was not applied to the Claimant. That was an erroneous approach in law, said the EAT. Following remission the Tribunal found that hot-desking was a PCP applied by the Respondent. It put the Claimant at a substantial disadvantage, having made the appropriate comparison, thus triggering the duty on the Respondent to make reasonable adjustments. The Tribunal concluded that a reasonable adjustment was to make the Claimant's preferred seat available for him to work in from the start to the end of his shift (second decision, reasons, paragraph 62). On the basis of the facts found they concluded that the Respondent had discharged their duty to make that adjustment (see paragraphs 63 to 67). Finally the Tribunal rejected the Respondent's submission that no duty arose, on the basis of the medical opinion of Dr Faith, the joint expert, who was not required by the parties to give oral evidence at the first Tribunal hearings (see paragraph 70). It is that finding which is challenged in the Respondent's conditional cross-appeal. The issue only becomes live in the event that the Claimant's appeal succeeds.

The Claimant's appeal

9. Mr Modgill has organised his challenge to the Tribunal's finding as to the reasonable adjustment claim under three heads, but all are dependent on this proposition: that having identified the reasonable adjustment at paragraph 62 of the second decision reasons, as set out above, whenever the Respondent failed to achieve that target (either because the seat was occupied and the occupant had to be moved or because it was not fully occupied) the Respondent was necessarily in breach of its duty under section 4A of the DDA and the Tribunal

was bound so to find. There is no scope, he submits, for any exception once the duty is defined. In response, Mr Rigby reminds us of the words of section 4A:

> **"...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 take in order to prevent the PCP from having the disadvantageous effect."**

10. In determining the reasonableness question the Employment Tribunal is required to consider the factors listed at section 18B. Here, the Employment Tribunal made relevant findings of fact at paragraphs 36-38 which informed their reasoning at paragraph 63, leading to the conclusion that the Respondent was not in breach of the section 4A duty.

11. We prefer the approach advanced by Mr Rigby. The bald statement of a reasonable adjustment at paragraph 62 is subject to questions of practicability in the context of the facts found and the overall factual matrix. The question is whether, on those facts, this employer, objectively viewed, took such steps as it was reasonable in the circumstances for it to take. The Employment Tribunal answered that question, particularly at paragraph 63, in the affirmative. In our judgment there was no error of law in their approach. They reached a permissible conclusion, that is, one which is not legally perverse. In these circumstances, the challenge to the reasonable adjustment finding fails. It follows that there is no requirement to reconsider the original finding of constructive dismissal. It also follows that the Respondent's cross-appeal is rendered moot.

12. Accordingly we shall dismiss the appeal and make no order on the cross-appeal.