Appeal No. UKEAT/0047/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 August 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

F — APPELLANT

(1) G
(2) H — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KASHIF ALI (of Counsel) Instructed by: DLG Legal Services PO Box 1195 Churchill Court Westmoreland Road Bromley Kent BR1 9YG
For the Respondents	MISS RACHEL WEDDERSPOON (of Counsel)

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

In respect of the Claimant's claim for breach of the duty to make a reasonable adjustment, the Employment Tribunal's reasoning on the questions (1) whether the PCP placed the Claimant at a substantial disadvantage and (2) whether it was reasonable for the Respondent to have to make the adjustment or permitting time off work to attend CBT appointments, could not be supported having regard to its findings of fact and the issues between the parties.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by F ("the Claimant") against one aspect of the Judgment of an Employment Tribunal - Employment Judge Ross, Mrs Gill and Mrs Harper - dated 9 November 2016. She had brought proceedings against G and H for disability discrimination, including direct discrimination, discrimination arising from disability, and failure to make reasonable adjustments. She was partly successful in her claims for discrimination arising from disability and victimisation. Other claims were dismissed.

2. The appeal relates to an aspect of the reasonable adjustments claim. The Claimant argued that G was in breach of the duty to make reasonable adjustments because it required her to make cognitive behaviour therapy appointments outside working hours. The Employment Tribunal dismissed this claim, and the Claimant says it erred in law in doing so.

The Background Facts

3. The Claimant was employed by G as a teacher with effect from September 2003. She was promoted to Assistant Head Teacher with effect from 1 September 2012. This was a senior leadership role within the school. H was her Head Teacher.

4. During the year 2014 the Claimant developed depression. She was under the care of her GP. By August 2014 he was writing fit-notes which recommended altered hours, amended duties, and reduced role. The Claimant did not want her role to be reduced, and tended to downplay her illness, but she was offered and accepted a shortened day to allow her to attend cognitive behaviour therapy offsite. This therapy started in about November or December 2014.

5. At this time the Claimant's illness was not improving. In November she was referred to a psychiatrist. In December she saw the psychiatrist who recommended that her dose of anti-depressant medication be doubled. She was unable to return to work at the beginning of the new term. She was referred to a crisis team on 16 January because she was extremely depressed and having suicidal thoughts. Nevertheless, the Claimant returned to work on 19 January 2015. Her fit-note said that she was suffering from depression and might benefit from reduced hours.

6. She was referred to G's Occupation Health service. She downplayed her condition to the physician. Even so, the physician's report, dated 27 January 2015, confirmed that she was likely to be covered by the disability legislation, and that it would be good practice to consider "temporary adjustments and restrictions until her psychological health and resilience improves". It expressly stated that she was likely to require time off work to attend appointments. It said that it would be good practice to allow this. It also recommended consideration of reduced hours with flexibility to work at home.

7. The Claimant continued to downplay her illness to H. She did not take the full amount of reduced hours offered to her by him. She did not want a reduction in her role, but she did wish to attend the cognitive behavioural sessions which took place, I am told, at 9am on Wednesdays.

8. By 13 February, the Claimant had been back at work for four weeks on a phased/ reduced hours basis. H wrote to her to say that he expected her to return to work the week after next - 23 February - on a full time basis. Unknown to him, her condition was very poor, worse than he would have understood from the Occupational Health report.

9. It is important to set out the Employment Tribunal's findings about what happened concerning the Claimant's attendance at CBT appointments:

> **"45. We find that on Friday 13th February the Head Teacher stated "as you now have been back at work for four weeks on a phased/reduced hours basis and as per the … absence management policy I would expect you to return to work week commencing Monday 23rd February on a full time normal contractual hours/responsibilities basis. In the interests of consistency and continuity for the school l would ask now that any ongoing CBT/counselling appointments, if required are arranged outside of normal school hours. I am happy however of course to consider and support any NHS arranged medical appointments that may be necessary for you to attend via the arrangement of your GP or medical specialist during school hours. Please complete an absence request form if required for this purpose".**
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> **46. The claimant responded almost immediately "please clarify regarding being allowed to go to CBT appointments as that is an NHS arranged medical appointment arranged by the GP … The Head Teacher's response to that is confusing. He states "as noted below I am happy to consider unavoidable medical appointments during school hours however regular counselling/ CBT should really be arranged outside of normal working hours. I would appreciate it if that could be arranged if it is required going forwards"."**

10. The Claimant did not return to work on 23 February. She continued to say that she wished to return to work with a flexible arrangement and the ability to attend her CBT appointments.

11. There was a meeting on 25 February. H said that "CBT appointments should now be made outside of school hours". He also said that if she preferred, he would be happy to consider a temporary reduction in contract to help facilitate her appointments. This is an important meeting indicative of the stance which H was taking.

12. The Claimant remained off work until 17 June 2015. She had been very unwell, to the extent that she took an overdose in early March. She did not share the extent of her illness with H. The sickness absence policies of G were applied to her.

13. Eventually she returned to work on 17 June 2015 on a phased return. Notably, she was allowed time off for her CBT treatments.

Statutory Provisions

14. The duty to make reasonable adjustments is laid down by section 20 of the **Equality Act 2010**. So far as relevant, this section provides:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
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> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **…"**

15. The applicable Schedule for the purposes of work is Schedule 8; see section 20(13). Schedule 8 provides that, in the case of an employee, the duty is owed by the employer; see paragraph 5. Paragraph 20 then places an important limitation on the duty. As far as relevant, it provides:

> **"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -**
>
> > **…**
> >
> > **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

16. A failure to comply with the duty to make reasonable adjustments is discrimination; see section 21(2) and section 39(5) of the **2010 Act**.

The Employment Tribunal's Reasons

17. The Employment Tribunal hearing took place in September 2016. Both parties were represented by counsel, as they are today. The Employment Tribunal heard from the Claimant, H, and other witnesses for G. It received written submissions from counsel; I have seen those myself. It made findings of fact on which I have already drawn.

18. It is also important to note a finding, which the Employment Tribunal made, on the question whether the Claimant would have avoided her absence from work if she had been allowed time off to take the CBT appointments:

> **"71. The claimant submitted that if she had been allowed to work flexibly and had time off for her CBT then she never would have been absent from work and the stage two trigger would not have been reached. The Tribunal is not satisfied there is evidence to support this contention.**
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> **72. The claimant had continued working at a very high level through 2014 with an adjustment for flexible working including time off for CBT appointments. However by 2015 she was much more seriously ill. She was absent the first two weeks in January 2015 while her mental health deteriorated following two personal issues namely a further miscarriage in November and the serious illness of her partner. She was having regular and persistent ideas of suicide."**

19. The Employment Tribunal set out its conclusions concerning reasonable adjustment in paragraphs 86 to 105. It found that G operated a PCP of requiring an Assistant Head Teacher to be physically present in the school during school hours, and required staff, normally, to attend medical appointments outside school hours.

20. It turned to the question whether this PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. It said the following about the period from February to June 2015:

> **"91. The Tribunal had regard to the facts of this matter. The claimant suffered from depression. She required medical appointments to manage her condition. She regularly attended GP appointments and later psychiatric appointments. Initially she attended counselling which was funded by the school. Later she began Cognitive Behavioural Therapy. We find that theoretically the PCP would place the claimant at a substantial disadvantage in comparison with persons who were not disabled because the intractable nature of her depression and the deterioration of her condition meant that she continued to require Cognitive Behaviour Therapy. We find that a person who was not disabled required medical appointments for example for a short term condition would be less likely to require ongoing medical appointments during school hours.**
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> …
>
> **94. The period of time where the claimant alleges she was placed at a substantial disadvantage in comparison with persons who are not disabled was the period of time from 25th February 2015 to 17th June 2016. This is the period of time the claimant was absent from work (page 347)."**

21. The Employment Tribunal then effectively repeated the findings, which I have already set out, about what occurred in February 2015. It continued:

> **"97. The claimant said in evidence that she was never refused an appointment she requested from the respondent. She agreed she was granted medical appointments in school time to see her treating Consultant. She agreed she attended CBT appointments during her absence from work.**
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> **98. Given that the claimant was permitted to attend medical appointments during school working hours during the majority of 2014 and from May/June 2015 onwards and that she was never actually refused attendance at a CBT appointment, the Tribunal is not satisfied that she was placed at a substantial disadvantage in comparison with persons who were not disabled."**

22. The Employment Tribunal went on, in case it be proved wrong in its finding about substantial disadvantage, to consider the question whether G was in breach of the duty to make reasonable adjustments. It did this on the footing that "the claimant went off sick in February 2015 because she perceived that she was being refused permission to attend CBT appointments in school hours going forward" (paragraph 99).

23. The Employment Tribunal dealt with this issue in paragraphs 100 to 105. It took into account that, during the time in question, H was unaware how seriously ill she was. She presented a "highly competent and professional face to the world" even though she was very unwell (paragraph 101). H had no information as to the importance of CBT therapy in relation to her illness; see paragraphs 101 to 102.

24. The Employment Tribunal went on as follows:

> **"103. We considered whether the respondent took such steps as was reasonable to have to take to avoid the disadvantage. We have taken into account that the respondent had permitted the claimant to attend medical appointments outside school hours to see her Psychiatrist and had permitted her to work flexibly which included accommodating appointments in the summer term of 2014 and it continued to permit her this flexibility to attend medical appointments in the autumn of 2014. It had permitted it again once from June 2015.**
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> **104. We also considered other adjustments the respondent offered to avoid the disadvantageous effect. The respondent offered the claimant to have shortened hours to enable her to attend appointments and also offered a temporary reduction in contract. Both of these options would have avoided the disadvantageous effect of being unable to attend therapy appointments during school time.**
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> **105. After taking into account that although some members of the senior leadership team would inevitably be absent from the school premises from time to time to attend meetings or training courses it is inevitable that there would be some element of disruption for the respondents when the claimant was absent during school time particularly if that absent [sic] was recurring over a lengthy period of time. It is inevitable that as [the] claimant was an essential part of the respondent's senior leadership team then her ability to be present would**

inevitably have an impact on colleagues. We accept the evidence of the Head Teacher in that regard."

Substantial Disadvantage

25. There are two grounds of appeal, both of which must succeed if the appeal is to be allowed. The first relates to the Employment Tribunal's conclusion, in paragraph 98, that the Claimant was not placed at a substantial disadvantage in comparison with persons who were not disabled.

Submissions

26. In support of this ground Mr Kashif Ali, for the Claimant, submits that the finding in paragraph 98 really misses the point. The issue was whether there was a failure to make reasonable adjustments in the period between February and June 2015. It was irrelevant that G and H may have complied with the duty by permitting her to attend appointments at other times. It is also beside the point that the Claimant was never actually refused attendance at a CBT appointment. It was her case that the reasonable adjustment was to give her permission to attend CBT appointments during school hours. H effectively denied her that permission. This was the immediate cause of her taking sick leave, as the Employment Tribunal's findings of that showed. It was only because she was on sick leave that no specific request was refused and she could attend the appointments. In paragraph 99 the Employment Tribunal showed that it understood the Claimant's case, but it did not address it in paragraph 98. The reason it actually gave bore no relationship to the case for G and H below, which was that the Claimant never showed that the appointments could not be taken outside school hours.

27. In response Miss Rachel Wedderspoon submits that there was no error of law in the Employment Tribunal's Reasons. I think she really made two points. Firstly, if the Claimant

was really unable to arrange her appointments outside working hours, H made it plain that she could request permission to take leave, so she was at no disadvantage. Secondly, the Employment Tribunal found that the Claimant was very ill at the time in question. She was never at school to make an application for leave. There was no disadvantage because she was never fit for work. Here, she relied on the Employment Tribunal's findings of fact, including paragraphs 71 to 72.

Conclusions

28. There is, I think, no doubt about the issue the Employment Tribunal was required to decide. It was whether the requirement of G that the Claimant be physically present during working hours, and that she normally attend appointments outside hours, placed her at a substantial disadvantage in comparison with persons who were not disabled.

29. To my mind, the Employment Tribunal was correct to start from the proposition that it did place her at a substantial disadvantage for the reason it gave in paragraph 91.

30. In her written submissions below to the Employment Tribunal, Miss Wedderspoon argued that the Claimant could have arranged appointments outside school hours. Mr Ali, in his written submission, set out cogent submissions to the contrary. The Employment Tribunal did not explicitly decide this point. In paragraph 98 it moved away from its starting point in paragraph 91 for two reasons.

31. Firstly, it relied on the fact that the Claimant was permitted to attend medical appointments during school working hours, both before and after the period in question. That is, to my mind, either irrelevant or if anything a point in the Claimant's favour. It is irrelevant

because it does not at all follow that if an adjustment is made before and after the period in question, it was unreasonable to make it during the period in question. If anything, it is a point in the Claimant's favour because, if it is recognised that by reason of her condition she required time off for appointments during those periods, it would tend to show that requiring her to work during the period in question, when she also had appointments, would place her at a disadvantage compared to persons who were not disabled.

32. Secondly, the Employment Tribunal relied on the fact that the Claimant was never actually refused attendance at a CBT appointment. Here it is important to keep in mind the PCP. This was the requirement of G that she be physically present during working hours and, normally, to attend appointments outside hours. This requirement was plainly applied to the Claimant, as paragraph 55 of the Employment Tribunal's Reasons shows, since H said that CBT appointments should be made outside working hours. If CBT appointments were not available outside hours, or available only with difficulty and disruption, that requirement plainly placed her at a disadvantage.

33. I come back to the two submissions which Miss Wedderspoon made today. Neither submission reflects the way in which the Employment Tribunal actually decided the case.

34. The Employment Tribunal did not say that H made it clear that the Claimant could make an application for CBT appointments if she could not arrange them at outside hours, and this seems inconsistent with the wording of the email in February and certainly with the Employment Tribunal's findings, in paragraph 55 of its Reasons, as to what H said on 25 February. In any event it does not, of itself, follow that the requirement to arrange her appointments outside hours would not place her at a substantial disadvantage compared to non-

disabled persons. Such appointments, for example, might be obtainable only with difficulty or with disruption or, of course, not at all.

35. Nor did the Employment Tribunal say that the Claimant was placed at no disadvantage because she was, in any event, unfit for work. It is true that the Employment Tribunal said that she had not proved that if she had been allowed to work flexibly and attend appointments she would never have been absent from work. But it does not follow that she would *always* have been absent from work, and the Employment Tribunal's findings, together with the contemporaneous emails, tend to show that the immediate trigger for absence was the refusal of time off for CBT. Whether this was actually the case is, no doubt, something the Employment Tribunal will be able to consider more specifically since there is no direct finding on the question.

36. For these reasons I do not think the Employment Tribunal's reasoning on the question of substantial disadvantage can stand. It really misses the point of the PCP and the putative reasonable adjustment which were in issue.

Reasonable Adjustment

37. The second ground of appeal relates to the finding in paragraph 105 that there was, in any event, no breach of the duty to make reasonable adjustments.

Submissions

38. Mr Ali submits that, in an important respect, the Employment Tribunal's approach is inconsistent with its findings of fact. It said G and H had no information as to the importance of CBT in relation to the Claimant's illness; but it had found in paragraph 37 of its Reasons that

the Occupational Health report specifically stated she was likely to require time off work to attend appointments and it would be good practice to allow it. The Employment Tribunal did not return to or address this important point in its reasoning.

39. Secondly, he submits, that significant parts of its reasoning were irrelevant. The fact that the Respondent behaved properly in 2014 and again after June 2015, does not answer the question whether it was reasonable for G to have to make the adjustments in question in February 2015.

40. Mr Ali submits, thirdly, that the reasoning of the Employment Tribunal in paragraphs 104 and 105 cannot stand together. In paragraph 104 the Employment Tribunal seems to have regarded the offer of shortened hours or temporary reduction in contract as reasonable adjustments; but they would have had the same impact on colleagues as the reasonable adjustment for which the Claimant contended. It was this impact on colleagues on which the Employment Tribunal relied for its decision in paragraph 105. The only true difference between the measures countenanced in paragraph 104 and the measure rejected in paragraph 105 was financial, and the Employment Tribunal gave no reasoning at all relating to financial impact. Mr Ali also submits that he put before the Employment Tribunal detailed submissions on this question which were not addressed.

41. Miss Wedderspoon submits that the Employment Tribunal's reasoning was permissible and disclosed no error of law or approach. The Employment Tribunal was entitled to find, and rely on its finding, that the Respondent had only limited knowledge of the severity of the Claimant's condition. It was entitled to take in to account the overall picture in 2014 and 2015.

It was entitled to take into account the disruption which would be caused by the proposed adjustment.

42. I asked Miss Wedderspoon what practical difference there was between offering reduced hours, so that appointments could be attended, as H did, and giving time off for that purpose. Miss Wedderspoon was not able to point to any significant difference apart from cost. I asked whether cost was an issue at the Employment Tribunal. Miss Wedderspoon was inclined to accept that it was not, and, certainly, it is not an issue that is raised explicitly in the Employment Tribunal's reasoning or in the submissions of the parties.

Conclusions

43. The key reason which the Employment Tribunal gave in paragraph 105 for finding that time off during working hours was not an adjustment which it was reasonable for G to have to make was the disruption it would entail. However this is, to my mind, inconsistent with the Employment Tribunal's reasoning in paragraph 104, where it spoke with approval of an adjustment by reducing hours. Even more important, it is inconsistent with H's willingness, in February, to make an offer of reduced hours so that the Claimant could attend appointments.

44. As I have mentioned, Miss Wedderspoon could not explain to me what, apart from cost, would be the difference between offering a reduction in hours and granting permission to attend the appointment during school hours. The only difference would be cost; but cost, I am satisfied, was not an issue which played any significant part in the hearing before the Employment Tribunal or in the reasoning of the Employment Tribunal.

45. Against this background, the key finding of the Employment Tribunal in paragraph 105, to my mind, cannot be supported. I do not think it addressed the key issue in the case. If it was reasonable for G to have to offer reduced hours, why was it not reasonable for G to have to allow time off during working hours?

46. Mr Ali told me that, given the timing of the appointment at 9am on a Wednesday, there would be very little cost impact, so far as G is concerned. Whether that is the case is not central to my judgment today. The key point is the mismatch between the Employment Tribunal's reliance on disruption and its apparent approval, in paragraph 104, of H's willingness to offer reduced hours so that appointments could be attended.

47. The Employment Tribunal in paragraph 103 said that it took into account the steps which G took prior to and after the period in question. Again, I do not see why those were of any real significance in deciding whether it was, or was not, a reasonable step for G to allow time off work to attend appointments during the period in question.

48. I wish to say a word about the question of knowledge. The Employment Tribunal did not refer to paragraph 20 of Schedule 8. There was no issue before the Employment Tribunal to the effect that G lacked the knowledge that the Claimant was likely to be placed at the requisite disadvantage. That knowledge, of course, includes constructive knowledge - not only actual knowledge, but knowledge which G ought reasonably to have. I do not find it at all surprising that Miss Wedderspoon had taken no point on knowledge. The advice from the Occupational Health adviser would place that knowledge upon G.

A

49. While, therefore, I do not go so far as to say paragraph 101 and 102 are irrelevant, they are in no way central to the question whether the adjustment was one it was reasonable for G to have to make.

B

50. For those reasons, I conclude that the Employment Tribunal's decision on these questions cannot stand.

C

51. They are not questions where I can substitute my own judgment; that would involve a degree of factual evaluation which is not permitted to the Employment Appeal Tribunal; see **Jafri v Lincoln College** [2014] ICR 920. The matter must be remitted.

D

52. This leaves the question whether it should be remitted to the same Employment Tribunal or to a different constituted Employment Tribunal. I have no doubt that it should be remitted to the same Employment Tribunal. My reasons are as follows.

E

53. Firstly, this was only one point in a case which involved a significant number of points for the Employment Tribunal to determine. Its overall reasons are of a good standard. I see not the slightest reason to doubt its professionalism. I see no reason to doubt, especially in a case where it has decided points both for and against each party, that it will conscientiously reconsider its decision on the question of reasonable adjustments.

F

G

54. There are also many practical advantages in returning it to the same Employment Tribunal. It has received substantial evidence. It has the advantage already of submissions from the parties; although it will no doubt allow them, given the lapse of time, to make further submissions. It will not need to take evidence; it will have its evidence and notes from earlier

H

occasions. It will, I think, help both the Employment Tribunal and counsel if they address carefully in their written submissions the points which the Employment Tribunal need to decide.

55. The Employment Tribunal must, of course, look at the matter afresh.

56. There is also the advantage that the Employment Tribunal is, in any event, seized of the question of remedy. It may be possible to deal with further submissions on this point and remedy at the same time; but I leave it to the parties to discuss that matter and, if necessary, to raise it with the Employment Tribunal.

57. It follows, in short, that the appeal will be allowed, and the issue of reasonable adjustment remitted to the same Employment Tribunal for further consideration.