Appeal No. UKEAT/0581/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 May 2013

Before

THE HONOURABLE MR JUSTICE MITTING

MS P TATLOW

MR B M WARMAN

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS APPELLANT

MRS J WHITELEY RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR GEORGE BRANCHFLOWER (of Counsel) Instructed by: HMRC Solicitors Office Ralli Quays West 3 Stanley Street Manchester M60 9LB
For the Respondent	MR ALFRED WEISS (of Counsel) Instructed by: Blacks Solicitors 22 Clarendon Road Leeds LS2 9NZ

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

Employee contended that employers failed to make a reasonable adjustment to allow for her asthma when subjecting her to consideration under their absence policy – Employment Tribunal misunderstood and misapplied the expert evidence about the issue – remitted for hearing to freshly constituted Tribunal.

THE HONOURABLE MR JUSTICE MITTING

1. Mrs Whiteley, who we shall call the employee, commenced employment with HMRC, who we shall call the employer, on 23 October 1978. She still works for them. She suffers from asthma. Over the course of just over 5½ years from January 2005 until September 2010 she was absent from work due to sickness on 54 days. All but 13 days of her periods of absence were due to acute upper respiratory tract infections.

2. The employers had a policy of subjecting to consideration absences of more than ten days due to ill health in a rolling year up to the date of consideration. In 2010 the Employers had cause to consider the position of the employee. She had been absent from work for 15 days up to and including 15 October 2010; 1 due to a condition which was nothing to do with upper respiratory tract infection and 14 days due to viral infections and a chest infection.

3. The employer required the employee to keep in touch during periods of absence due to ill health and took careful notes of the symptoms of which she complained. There were references in those notes in respect of two of the periods of absence of the Claimant taking steroids and on all three of taking antibiotics. The periods of absence were five days, four days and five days respectively.

4. If, on consideration, the employer considered that the periods of absence due to ill health exceeded the so-called consideration point of more than ten days, the employee could be subjected to disciplinary processes adverse to her interest, beginning with warnings and leading eventually and in due course to potential dismissal. Nothing of that kind happened here, apart from the fact that a warning was issued which gave rise to no long-term consequence so far because, following the warning, the employee was not absent from work due to illness at all.

5. The employee complained to the Employment Tribunal that the employer had failed to make proper adjustments under s.20 of the **Equality Act 2010** to avoid the disadvantage caused to her resulting from the disability from which she suffered, namely asthma. At the time when the employer's decision was taken it had no medical evidence. All it had were the notes of what she had reported about her condition during the days of her absence. The employer, seeing that there were 15 days of absence in the rolling year, made an allowance for that of 3 days out of the 15, taking the total period of absence which would be considered down to 12, 3 days more than the consideration point.

6. It was common ground before the Tribunal that the action which the employer had taken did amount to a detriment so that if that detriment resulted from the employer's failure to make a reasonable adjustment on account of the employee's absence then her claim would be made out. The Employment Tribunal considered issues of liability only.

7. At the date on which it considered the case, there was some medical evidence. The employee's union had obtained, in response to targeted questions, a report from Mr Collard of November 2011, an Advanced Nurse Practitioner at the Claimant's general practice. The questions posed were as follows:

> **"We would like you to confirm that:—**
>
> - **with Jill Whiteley's underlying medical condition (Asthma) that when she contracts a respiratory illness (be it a common cold, a virus or flu, etc) it would not be unexpected that her asthma would exacerbate that illness.**
> - **that, this, in turn, could prevent a return to work earlier than otherwise might be.**
> - **given Jill's medical history, that in the 6 month period up to and including October 2010 her absence from work totalling 14 days (5 in April, 4 in September and 5 in October) would not be perceived as excessive.**
> - **In periods when Jill is suffering bouts of illness that are respiratory related that absences of say 15 days per annum would not be unexpected or excessive."**

8. Mr Collard's response, having confirmed that the employee suffered from asthma, which was managed with a combination of long-acting inhaler and short-acting reliever inhaler taken as required stated as follows:

> **"[…] People with asthma frequently find that common viral infections (e.g. the 'common cold', flu, etc) make their asthma worse. This worsening may be fairly mild, requiring an increase in their inhaler use, or it may be more severe, requiring a course of steroids. They are also more prone to chest infections requiring antibiotics. These exacerbations generally cause increased shortness of breath, cough and wheeze, especially on exertion. It is not uncommon to need time off work during exacerbations, which are generally more common in the winter months, but may also occur when pollen counts are high. Following an exacerbation it takes time for the inflammation to settle and this may lead to a longer recovery period.**
>
> **I note that between April and October 2010 Mrs Whiteley required 3 courses of antibiotics and two short courses of steroids for asthma exacerbations. This is not an uncommon pattern. It is generally quoted that we all suffer about 6-8 viral illnesses each year, and although some of these will be mild and easily manageable, a few could be expected to cause exacerbations requiring further treatment and a few days away from work. An absence of a few days occurring 3 or 4 times over a year would be typical."**

9. On one view, the last paragraph was ambiguous in that it might be taken to refer to periods of absence that would be experienced by those who did not suffer from asthma, but that is not a natural reading of the paragraph and we do not understand it to have caused any relevant misunderstanding before the Tribunal. What Mr Collard was saying in his final paragraph was that whereas an ordinary person might suffer six to eight viral illnesses each year, in the case of someone who suffered from asthma, some of those would cause exacerbations which might well cause absences of a few days occurring three or four times a year.

10. What Mr Collard did not state, however, in any part of his report was that asthma sufferers were more susceptible to colds, flu and viral infections or to chest infections. In other words, he was not saying that an asthma sufferer would suffer more such infections or would suffer such infections more frequently than would a person who did not suffer from asthma.

11. In paragraph 38 of their determination, the Employment Tribunal set out their conclusions on Mr Collard's report:

> **"In our judgement, that letter sets out important information. We do not think, as Mr Branchflower suggested, that it is in any way unclear as to its meaning. Looked at generally, we conclude that the letter is strong evidence that an asthmatic person is far more susceptible to a viral infection than is a non-asthmatic person, that an asthmatic person is more prone to chest infections and that an absence of a few days, over three or four times a year, would be typical for a person in the position of this Claimant."**

In that passage only the last part beginning "over three or four times a year" was correct. What the Tribunal appear to have found in the earlier part of paragraph 38 is that the employee's asthmatic condition made her more susceptible to suffering relevant infections. That is not a permissible reading of what Mr Collard said.

12. It had a consequence. The employers were contending that their policy of making, as it was put, an "apportionment" - more easily understood as an allowance in respect of a condition such as asthma, which interacted with other conditions - was the appropriate method of dealing with the employee's disability. The Tribunal, in paragraph 40 of its determination, found otherwise:

> **"[…] Had that information been available (as it should have been), we consider that the Respondent would inevitably have concluded that these three absences were directly related to the Claimant's asthma. Accordingly, we reject the apportionment approach for which the Respondent argued."**

What the Tribunal appear to find there is that because, in their view, an asthma suffer, on the evidence, would be more susceptible to relevant infections, and because this employee had suffered the relevant infections, so the periods of absence were "directly related" to her condition of asthma. That, with respect to the Tribunal, was not a permissible finding.

13. Mr Weiss, for the employee, submits that despite that error of approach, the Tribunal nonetheless were entitled to find, and did find, that Mr Collard's evidence established that a period of absence of a few days occurring three or four times a year would be typical for an asthma sufferer and so would explain the three periods of absence taken into account by the employer. If that had been the approach of the Tribunal, then it would have been sustainable. It would not have been necessarily the only approach that an employer or the Tribunal might take.

14. There are, in principle, at least two possible approaches to making allowances for absences caused by a disability that interacts with other ordinary ailments. One is to look in detail and with care and, if necessary, with expert evidence at the periods of absence under review and to attempt to analyse with precision what was attributable to disability and what was not. The alternative approach, which we anticipate will be of greater attraction to an employer, is to ask and answer with proper information the question: what sort of periods of absence would someone suffering from the disability reasonably be expected to have over the course of an average year due to her disability?

15. Accordingly, if the Tribunal had taken Mr Collard's conclusion that periods of absence of a few days three or four times a year were to be expected for an asthma sufferer and applied it to the 15 days under consideration in the relevant year in the case of this employee, that approach would have been permissible. What was not permissible was to adopt the route that the Tribunal did of misunderstanding Mr Collard's report and then wholly discounting, on the basis of their misunderstanding, the relevant periods of absence.

16. In its concluding remarks, the Tribunal appears to have expressed the opinion that what it referred to as the "apportionment method" adopted by the employer was not appropriate in the

case of this employee and that what should have happened is that her periods of absence over the 5 or 5½ years up to October 2010 should have been considered, and only if that led to the conclusion that her periods of absence were unacceptably long should any decision adverse to her have been taken. That seems to us to be, with respect to the Tribunal, a leap too far and to substitute for, what was, in principle, a proper approach to periods of absence for an asthma sufferer, their own preferred approach.

17. We are driven, unfortunately, to the conclusion that the basic error of analysis of the Tribunal led to a conclusion that is not sustainable. In may well be that analysing the same material, or material that may supplement it, a fresh Tribunal will reach the same conclusion as this Tribunal, namely, that the employee was subjected to a detriment because of the employer's failure to take such steps as were reasonable to avoid the disadvantage caused to her by her disability. If that conclusion is reached it must be reached on a properly reasoned basis.

18. We are, in the light of the errors that we have identified, driven to the conclusion that this case must be remitted to an Employment Tribunal to consider afresh. We have considered whether or not it should be remitted to the original Tribunal and have concluded that it should be remitted to a fresh Tribunal to decide again. We do so because of the importance of the case not only to this Claimant, but also to the employer and to the approach which the employer has taken to disability of this kind.

19. Accordingly, and for those reasons, this appeal is allowed and the case will be remitted for rehearing by a freshly constituted Tribunal.