

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

At the Tribunal
On 2 May 2013

Before

THE HONOURABLE MR JUSTICE KEITH

(SITTING ALONE)

MS R SOBHI

APPELLANT

COMMISSIONER OF POLICE OF THE METROPOLIS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR DECLAN O'DEMPSEY
(of Counsel)
Instructed by:
Chelsea CAB

For the Respondent

MR ROHAN PIRANI
(of Counsel)
Instructed by:
Metropolitan Police
Director of Legal Services
New Scotland Yard
London
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SUMMARY

DISABILITY DISCRIMINATION - Disability

A woman who suffered from dissociative amnesia, which had made her forget that she had a previous conviction, and who was reprimanded for failing to disclose it when she applied for a new post, was a “disabled person” for the purpose of a claim of disability discrimination because her condition had a substantial and long-term adverse effect on an activity which related to her active participation in professional life: **Chacón Navas v Eurest Colectividades SA** [2006] IRLR 706 and **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763 followed.

THE HONOURABLE MR JUSTICE KEITH

Introduction

1. The claimant, Ms Rachida Sobhi, is a police community support officer with the Metropolitan Police. In August 2008, she applied to become a police constable. As part of that process, her fingerprints were taken. That revealed that she had been convicted in 1991 of an offence of theft from a previous employer for which she had been conditionally discharged. Her application to become a police constable was refused, and in April 2009, she received a disciplinary reprimand (which was to remain on her file for five years) for failing to disclose her previous conviction when she had originally applied to become a police community support officer and when she had subsequently applied to become a police constable.

2. In November 2009, Ms Sobhi applied once again to become a police constable, this time disclosing her previous conviction. That application was refused in December 2009 on the basis that the reprimand on her file prevented her from being considered for appointment as a police constable. It is said that her previous conviction would have prevented her from being considered for such an appointment anyway.

3. In November 2010, Ms Sobhi brought a claim in the employment tribunal complaining of discrimination on the ground of her sex, her sexual orientation, her religion or beliefs, her age and her disability against the Metropolitan Police and a number of individuals. Leaving aside the individuals, the Commissioner of Police of the Metropolis was treated as the appropriate respondent in respect of the claim against the Metropolitan Police. The current appeal relates only to her claim of discrimination on the ground of her disability. At a case management discussion at the employment tribunal in London Central on 21 January 2011, the acts which were said to have amounted to her discrimination on the ground of her disability, leaving aside an issue of victimisation, were identified as the reprimand she had got in April 2009 and the

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refusal of her second application to become a police constable in December 2009. The first of those allegations was that the Metropolitan Police had failed to make reasonable adjustments, which is shorthand for an allegation that in reprimanding her the Metropolitan Police had applied a provision, criterion or practice to her, which had placed her at a substantial disadvantage in comparison with people who were not disabled, and had failed to take reasonable steps to prevent that provision, criterion or practice from having that effect. The second of the allegations was one of direct discrimination on the ground of her disability, i.e. that in refusing her second application to become a police constable, she had been treated less favourably because of her disability than a non-disabled person would have been. Her case is that when she had originally applied to become a police constable, she had forgotten about her conviction and the facts to which it related as a result of traumatic events in her life.

4. At the case management discussion, it was ordered that there should be a pre-hearing review to decide a number of things, one of which was whether Ms Sobhi had been a disabled person at the relevant time. The pre-hearing review took place before Employment Judge Sigsworth on 12 May 2011. He concluded that Ms Sobhi had not been a disabled person at the relevant time, and her claim of discrimination on the ground of her disability was dismissed. Following the dismissal of that claim, Ms Sobhi withdrew her other claims, but she now appeals to the Employment Appeal Tribunal against the finding that she had not been a disabled person at the relevant time and against the dismissal of her claim of discrimination on the ground of her disability.

5. The employment judge thought that the relevant time at which Ms Sobhi was or was not a disabled person was when the acts which were said to have amounted to her discrimination took place, namely in April and December 2009. Mr Rohan Pirani for the Commissioner suggests otherwise. He says that the relevant time was February 2009 when Ms Sobhi completed the

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security questionnaire in which she had had to disclose whether she had any previous convictions because that was when such disability as she had would have disadvantaged her. That is not a debate into which I need to be drawn because it is not suggested that it makes any difference to the one ground of appeal which I have decided is determinative of the appeal.

The meaning of “disabled person”

6. The statutory provisions on the topic are well known. The starting point, of course, is the definition of “disabled person” in section 1(1) of the **Disability Discrimination Act 1995** (“the 1995 Act”):

“Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he had a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.”

The impairment which Ms Sobhi was conceded to have had was a mental one. It was dissociative amnesia, which is a form of mental illness which involves the breakdown of, or disruptions in, someone’s memory. The Commissioner conceded that at the time she had completed the security questionnaire in February 2009 she had been suffering from that condition. The Commissioner questions whether at the time she completed the security questionnaire she was aware that there were gaps in her memory relating to events which occurred in 1991, and whether she should therefore have said that she did not know whether or not she had had any convictions at that time. The issue which the employment judge addressed was whether, on the assumption in Ms Sobhi’s favour that she had been unaware that there were any gaps in her memory of events which occurred in 1991 (as to which the employment judge made no finding), her condition was one which had “a substantial and long-term adverse effect” on her “ability to carry out normal day-to-day activities”.

7. Schedule 1 to the 1995 Act contains a set of provisions which supplement section 1. It identifies, for example, what a mental impairment can include, and when the effect of an impairment is long-term. For present purposes, it is what the Schedule says about when an impairment is to be taken to affect someone's ability to carry out normal day-to-day activities which is relevant. Para. 4(1) of the Schedule provides that an impairment is to be taken to affect someone's ability to carry out normal day-to-day activities only if it affects one of eight specific capacities. The only capacity which is relevant to the present case is that set out in para. 4(1)(g): "memory or ability to concentrate, learn or understand".

8. The employment judge was obliged, of course, by section 3(3) of the Act to take into account the guidance issued by the Secretary of State about matters to be taken into account when determining whether someone is a disabled person to the extent that it appeared to the employment judge to be relevant. In view of the dates of the acts alleged to have constituted the alleged discrimination, the relevant guidance is the one issued in 2006. Para. B1 of the guidance says that someone's disability has a *substantial* effect on their ability to carry out normal day-to-day activities if its effect is more than minor or trivial.

The nature of Ms Sobhi's disability

9. Ms Sobhi gave evidence in the employment tribunal and she was cross-examined by Mr Pirani, but the principal evidence about her condition which the employment judge had was a series of reports on her since August 2009 by a consultant neuropsychiatrist, Professor Michael Kopelman, together with his answers to a number of questions asked of him by the Commissioner's lawyers. In his reports, he set out what Ms Sobhi had told him about what had been happening in her life at the time when, as she was subsequently to discover, she had been convicted of theft and given a conditional discharge. He thought that she had been suffering from depression at the time. He said that her loss of memory related only to "her ability to

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recall events around the time of her arrest and conviction in 1991". He thought that her amnesia in respect of those events was likely to be genuine in the light of the "traumatic circumstances" of her life which she had described to him. He added that he did not think that the "relatively small gap" in her "past remote memory" affected the day-to-day functioning of her memory, or that it had "any implications for her ability to perform well as a police constable now, when she is much more settled in her life". He did not express any view about whether she had been aware in February 2009, when she had completed the security questionnaire, that she had any memory loss for events which had occurred in 1991.

10. Professor Kopelman also diagnosed Ms Sobhi as suffering from moderate depression when he saw her – not as a result of the traumatic events in her life in the past, but because of the circumstances which had caused her application to become a police constable to be refused and the difficulties she was encountering in becoming a police constable. In February 2011, Professor Kopelman was saying that he thought that her depression had lasted for over 12 months by then, and that it was then compounded by "considerable agitation and anxiety relating to" the issues around her employment. He thought that her agitation and anxiety compromised her memory and her ability to concentrate, but that her depression did not have a substantial and long-term effect on her ability to carry out normal day-to-day activities. That no doubt – in part at least – is why it is not her depression which is said to constitute her disability for the purposes of her claim of disability discrimination. In any event, it would have been difficult for her to rely on it if her disability had to be considered by reference to her condition in February 2009, because her application to become a police constable had not been refused by then. As the employment judge put it in para. 5 of his judgment:

"These symptoms of depression were brought about by her discovery of the amnesia and/or the treatment of the [Metropolitan Police]. They were not a cause of that treatment. Depression did not cause her disadvantage, and, indeed, is not relied upon [by] her as so doing."

11. That was the evidence, then, on which the employment judge reached the conclusions which he did. He acknowledged in para. 5 of his judgement that Ms Sobhi had been substantially disadvantaged by her amnesia in respect of her conviction in 1991 when she completed the security questionnaire as part of her application to become a police constable. But he went on to say in para. 6 of his judgment:

“The fact is, there is no substantial adverse effect on [Ms Sobhi’s] ability to carry out normal day-to-day activities by reason of this amnesia over certain events in 1991. Such does not affect the day-to-day functioning of her memory, as Professor Kopelman has concluded. She can function perfectly well as a [police community support officer], and no doubt would do so as a regular [police constable]. There is absolutely no evidence that her normal day-to-day activities outside the work place are adversely affected by the dissociative amnesia. [Ms Sobhi] has given no examples of what she cannot do, which is where I should focus, because of that condition on a day-to-day basis.”

It would have been more accurate, I think, for him to have said that Ms Sobhi could give no such examples other than the impact which her failure to recall her conviction had had on the way she completed the security questionnaire.

“Normal day-to-day activities”

12. A number of grounds of appeal have been advanced by Mr Declan O’Dempsey on behalf of Ms Sobhi, but the core ground is that the employment judge wrongly focused on the one occasion when Ms Sobhi’s dissociative amnesia demonstrably disadvantage her, namely when she completed the security questionnaire which she had to complete in order for her application to become a police constable to be processed. That did not mean that her dissociative amnesia did not have a substantial effect on her ability to carry out normal day-to-day activities, and to the extent that the employment judge thought that it did, he is said to have erred in law because he should have held that Ms Sobhi’s normal day-to-day activities included trying to remember things – in other words, the use to which she put her memory.

13. I do not think that the employment judge's focus was out of kilter. Although the employment judge noted the one occasion when Ms Sobhi's dissociative amnesia demonstrably disadvantaged her, the employment judge did not equate the requirement for her amnesia to have had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities with her amnesia having put her at a substantial disadvantage. He was alive to the issues which the 1995 Act required him to address when it came to determining whether or not she was a disabled person. The way the employment judge expressed his conclusion in para. 6 of his judgment admits of no other view. Nor can it be said that using one's memory (which is something we all do every minute of every hour of every day while we are awake) is the sort of activity contemplated by section 1. The sort of activity contemplated by section 1 is an activity which you use your memory for. The particular activity which might be said to have been affected by her amnesia was the application she made to become a police constable.

14. The real question, therefore, is whether it was open to the employment judge to conclude that applying to become a police constable did not amount to Ms Sobhi's normal day-to-day activity. If the matter had been free from authority, I would have been inclined to think that it had been open to the employment judge to conclude that applying to become a police constable did not amount to Ms Sobhi's normal day-to-day activity. Ms Sobhi's application to become a police constable was an entirely normal thing for a police community support officer to do, but I am sceptical about whether it could be characterised as a day-to-day activity. It was a one-off activity, and the use of the words "day-to-day" in section 1(1) of the 1995 Act tend to show that one-off activities are not to be taken into account in determining whether someone is to be treated as disabled. That mirrors what the guidance says at para. D4:

"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."

15. This analysis is said to be inconsistent with the approach of the Employment Appeal Tribunal in **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763 (Elias P (as he then was) presiding). In that case, a police officer with dyslexia was found to be significantly disadvantaged when compared with his colleagues when taking examinations for promotion. The Employment Appeal Tribunal said at [38]:

“Where it is not disputed that the employee is suffering a substantial disadvantage because of the effects of his or her disability in the procedures adopted for deciding between candidates for promotion, the only proper inference is that those effects must involve a more than trivial effect on his ability to undertake normal day to day activities. It would fundamentally undermine the protection which the Act is designed to provide were it otherwise.”

The important point is that although the activity in which Mr Paterson was disadvantaged was the taking of examinations for promotion, it was the impairment of his ability to carry out his normal day-to-day activities like reading and comprehension which his dyslexia had a substantial and long-term adverse effect on. I would have been inclined to think that Ms Sobhi’s loss of memory did not have a substantial and long-term adverse effect on her normal day-to-day activities in that sense because her loss of memory could not have been more limited, related as it was to only one aspect of her past.

16. However, there are two other passages in the Employment Appeal Tribunal’s judgment in **Paterson** which suggest that this analysis may be wrong. First, the Employment Appeal Tribunal said at [66]:

“... carrying out an assessment or examination is properly to be described as a normal day to day activity.”

In other words, the fact that an activity is performed only intermittently does not make it any the less a day-to-day activity. That could be something which distinguishes **Paterson** from Ms

Sobhi's case. Mr Paterson would take examinations for promotion at various stages of his career. Applying for promotion by taking examinations to achieve that was something which Mr Paterson did intermittently. It could be said to be unlike Ms Sobhi's application to become a police constable, which was a one-off activity.

17. Secondly, though, the Employment Appeal Tribunal concluded in **Paterson** at [78] that, for the reasons given in [72]-[77], it was bound by the decision of the European Court of Justice in **Chacón Navas v Eurest Colectividades SA** [2006] IRLR 706. The relevance of that is that the 1995 Act is the domestic implementation of Framework Directive 2000/78, and in **Chacón Navas** the European Court of Justice held at [43] that "the concept of 'disability' [in the Directive] must be understood as referring to a limitation which ... hinders the participation of the person concerned in professional life". The European Court of Justice went on to say at [50] that Art. 5 of the Directive meant that "employers are to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer." That led the Employment Appeal Tribunal in **Paterson** to conclude at [67] that in order to give effect to the law of the European Union, section 1 of the 1995 Act had to give

"... a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of [Mr Paterson's] disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life."

18. I see the force of all that. All the more so now that the European Court of Justice in **HK Danmark v Dansk Almennyttigt Boligselskab** [2013] EUECJ C-335/11 only last month reaffirmed the principle in **Chacón Navas** by reference to the need for the Directive to be interpreted in a manner which is consistent with the United Nations Convention on the Rights of Persons with Disabilities. You look to see whether the impairment which the worker has

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may hinder their full and effective participation in professional life on an equal basis with other workers.

19. What all of that means is this. Although Ms Sobhi's loss of memory was limited to just one aspect of her past, her loss of memory in that respect had an adverse and long-term effect on any activity of hers which required her to recall whether she had any previous convictions. One of those activities was applying to become a police constable. That was an activity to which the definition of disability in section 1(1) of the 1995 Act should be treated as applying because, despite its language, a person must be regarded as a disabled person if their condition has a substantial and long-term adverse effect on any activity of theirs which relates to their effective participation in professional life. Such an activity must include Ms Sobhi's application to become a police constable.

20. There is an anomaly here which I find difficult to resolve. Ms Sobhi was either not aware of her disability or not aware of the impact of her disability on her ability to recollect her conviction when she applied to become a police constable. Nor, of course, was the Metropolitan Police. But since she was required to disclose her previous conviction when applying to become a police constable, and since that requirement might be said to have placed her at a substantial disadvantage in comparison with people who could remember any previous convictions they had, and who therefore disclosed them on the appropriate form, the Metropolitan Police would have been under a duty to take such steps as were reasonable to prevent that requirement from having that effect. It is a little difficult to see what steps they could have taken if they did not know of Ms Sobhi's memory loss. That might suggest that her memory loss was not the kind of disability which the Directive contemplated.

Conclusion

21. There are, as I have said, a number of subsidiary grounds of appeal, but none of them need to be considered in the light of my conclusion on this core ground of appeal. It follows that Ms Sobhi's appeal must be allowed, the employment judge's finding that she was not a disabled person must be set aside, as must his order that her claim of discrimination on the ground of her disability be dismissed, and the case must be remitted to the employment tribunal for it to consider whether in February 2009 when Ms Sobhi completed the security questionnaire, she knew of her amnesia relating to various events that occurred in 1991, because if she did, that goes to the question whether she should have said that she did not know whether there was anything in 1991 which she had to disclose to the Metropolitan Police. The answer to that question, as well as what this judgment says about what constitutes normal day-to-day activities, may have an impact on what the appropriate finding should be as to whether the effect which her amnesia had on her ability to carry out her normal day-to-day activities should be characterised as substantial. I shall hear from the parties on whether that remission should be to the same employment judge or a different one, but at present my strong inclination is that it should be remitted to the same employment judge.