Appeal No. UKEAT/0042/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 May 2015

Before

HIS HONOUR JUDGE RICHARDSON

(SITTING ALONE)

T-SYSTEMS LTD — APPELLANT

MRS K LEWIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES WILLIAMS (of Counsel) Instructed by: Messrs Freeths LLP Power House Harrison Close Knowlhill Milton Keynes Buckinghamshire MK5 8PA
For the Respondent	MR FERGUS CURRIE (of Counsel) Instructed by: Messrs Davies & Partners Solicitors 135 Aztec West Almondsbury Bristol BS32 4UB

SUMMARY

DISABILITY DISCRIMINATION - Disability related discrimination

Discrimination Arising From Disability

The Respondent was introducing a new shift pattern and seeking volunteers for redundancy. It was concerned whether by reason of the Claimant's type 1 diabetes she was fit to work the new shift pattern and had commissioned a report on this question. The Claimant was unable to decide whether to accept the new shift pattern or to take voluntary redundancy until the report arrived. The Respondent became impatient at the Claimant's inability to decide and dismissed her peremptorily without any process.

The Employment Tribunal erred in law in finding that the "unfavourable treatment" was a mental process, whereas it should have found that the unfavourable treatment was the Claimant's dismissal. This, however, it did not affect its fundamental reasoning, which was that the Claimant was dismissed for "something arising in consequence of her disability".

The Employment Tribunal was entitled to find that the dismissal was because of "something arising in consequence of her disability". Contrary to submissions on behalf of the Respondent, this phrase in section 15 of the **Equality Act 2010** caused no special difficulty and did not require a restrictive interpretation. **IPC Media Ltd v Millar** [2013] IRLR 707 followed.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by T-Systems Ltd ("the Respondent") against part of a Judgment of the Employment Tribunal sitting in Bedford (Employment Judge Moore presiding) dated 10 October 2014. By its Judgment the Employment Tribunal upheld a complaint brought by Mrs Kelly Lewis ("the Claimant") for discrimination arising out of disability contrary to section 39(2) of the **Equality Act 2010**. The Respondent argues that the Employment Tribunal did not properly apply the provisions of section 15 of the **2010 Act**, which defines discrimination arising out of disability.

The Background Facts

2. The Respondent carries on business in the provision of ICT for IT and telecommunications businesses. The Claimant worked for it through her own company between May 2011 and November 2011. With effect from 23 November 2011 she was employed as a Senior Incident Manager. At first she was based at Bristol. After 1 May 2012 she worked from home.

3. The Claimant suffered from type 1 diabetes. She did not consider herself to be disabled. But the Respondent was aware of her condition and it is common ground that all material times she was in fact a disabled person to the Respondent's knowledge.

4. By the summer of 2012 the Respondent had begun to have concerns about the Claimant. As the Employment Tribunal found, she would work when not required to do so, claiming large amounts of overtime, and would then complain about her working hours, blaming them on the alleged inadequacy of others. In August 2012 a large and important client was concerned that

she said that she worked 145 hours overtime in one month and that the Respondent's organisation was "falling apart". She was admonished for what the Employment Tribunal found to be a significant breach of her duty of fidelity.

5. On 30 August the Claimant suffered a hypoglycaemic episode at work. She was signed off for three weeks with stress. On 26 September, when she was intending to return to work, the Respondent told her that it was necessary to obtain medical evidence of the stability of her diabetes and her fitness to return to work. The Respondent obtained this advice from its Occupational Health advisor. However, in this same timeframe the Respondent was also considering changes to the shift system. On 27 September the Claimant was notified of a consultation concerning these proposed changes. The Respondent wished to obtain a further medical opinion concerning any risks involved in the new shift pattern. It asked her for a consent form. She gave permission for a report, but refused access to her medical records and qualified her permission by asking for prior sight of the questions to be submitted to her GP. The end result, the Employment Tribunal found, was that there was a delay before the requisite opinion was received. The Respondent did not have it at the time of the Claimant's dismissal.

6. The Claimant's dismissal came about in the following way. On 24 October there was a consultation meeting between the Claimant and a line manager, Mr Tarbitten, about redundancy and the new shift pattern. Mr King saw a note of that meeting. His evidence was that the content of the note was for him the final straw. After discussion with members of the HR Department he resolved to dismiss the Claimant. He sent for her on 14 November and did so. As he candidly told the Employment Tribunal, there was no discussion. The decision was made in advance of the meeting. Its purpose was solely to carry out the decision.

7. The Employment Tribunal made the following findings about this time period, which are of importance to its eventual conclusions:

> **"19. The position that the Claimant was in at the time of her discussion with Mr Tarbitten was one of necessary uncertainty. The Respondents were insisting on medical evidence on the question of her ability to work the new working pattern. Her position was that there was no impediment to her so doing and that she wished to but if the medical report did not support that and she was prevented from so doing then she would wish to take up the offer of voluntary redundancy. Mr Tarbitten did report this to Mr King and it appears from his account that this simple proposition was accompanied by a great deal of rhetoric from the Claimant.**
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> **20. At paragraph 23 of his witness statement Mr King gives an account which shows that it had been made clear to him that medical information pertinent to the point had been sought by the Respondent, that it had not arrived and that the Claimant could not make her decision on whether [to] agree to the new working pattern until the requested information arrived.**
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> **21. At this point in time all other members of the department had agreed to the new working pattern. As he has stated he concluded that the Claimant was impeding progress."**

The Employment Tribunal's Hearing and Reasons

8. The Employment Tribunal hearing took place on 13, 14 and 17 March. Both sides were represented by counsel. The Employment Tribunal identified the issues in the first paragraph of its Reasons. The Employment Tribunal said:

> **"1. … At a Case Management Discussion on the 19th April 2013 it was ascertained that the detriment complained of is the Claimant's dismissal. She argues in the alternative that her dismissal was an act of direct discrimination contrary to S:13 of the Equality Act 2010 or Discrimination arising from a disability contrary to S:15 of the 2010 Act. …"**

9. The Employment Tribunal did not further define the issues relating to discrimination. It said it proceeded on the basis of the Respondent's admission that the Claimant's type 1 diabetes satisfied the statutory definition of disability.

10. After making its findings of fact, on which I have already drawn, the Employment Tribunal proceeded directly to its conclusions. It rejected the complaint of direct discrimination (see paragraph 23 of its Reasons). It upheld the complaint of discrimination arising out of disability. After setting out section 15(1) of the **Equality Act 2010** it continued as follows:

> **"24. … It is of note that this claim, unlike a claim of direct discrimination does not require the Claimant to show that the treatment was less favourable than that experienced by a comparator. The requirement is to show that the treatment was unfavourable. Whilst [there]**

can be little doubt on the facts of this case that the employment relationship between the Claimant and the Respondent was unlikely to have been a long term one; given that throughout its short term the Claimant had sought to change the agreement, had [sought] voluntary redundancy and had tendered her resignation. The Respondent had found her to be disruptive and difficult to manage. There is a clear prima facie case that although the Claimant's misdemeanors were undoubtedly accumulating the balance in favour of dismissal, the scales had not tipped prior to the exchanges concerning the new working pattern. We have concluded that the addition of a factor to that balance is capable of being unfavourable treatment. That factor was the Claimant's inability to agree to the new working pattern.

25. That unfavourable treatment must be because of something arising in consequence of the Claimant's disability. The need or requirement by the Respondent for a medical report relating to the Claimant's ability to work the new working arrangements was related to the Claimant's disability. Its absence precluded the Claimant from making a decision whether to agree to that working pattern or leave the respondents employ by means of voluntary redundancy and we have found as a fact that it was that inability to do so that tipped the scales and resulted in her dismissal by Mr King on the day in question. For these reasons we find that the Claimant was treated unfavourably because of something arising in consequence of the Claimant's Disability.

26. The immediate aim of the Respondents was to progress the implementation of the new working pattern to which all affected, save for the Claimant, had agreed. We have not concluded that dismissal of the Claimant was a proportionate means of achieving that legitimate aim. There is no evidence of a compelling reason why the matter did not await the medical report and no evidence why the new shift pattern could not commence without the Claimant's participation."

11. The Employment Tribunal did not deal with the question of remedy. It said that its findings "embrace a probability that this employment would have ended by some means at some future date", which must be reflected in any award of compensation. The parties were given liberty to apply if they could not agree the outcome.

Statutory Provisions

12. Section 39(2) of the **Equality Act 2010** delineates the circumstances in which it is unlawful for an employer to discriminate against an employee. It provides as follows:

"(2) An employer (A) must not discriminate against an employee of A's (B) -

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

13. Part 2 of the **Equality Act 2010** defines the forms of discrimination which are rendered unlawful by the Act. Section 15 defines discrimination arising from disability:

> **"(1) A person (A) discriminates against a disabled person (B) if -**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

Submissions

14. On behalf of the Respondent Mr Williams puts the appeal in the following way. He criticises the Employment Tribunal for holding that the unfavourable treatment was anything other than dismissal: this was the way the parties understood the case. He says in any event that the Employment Tribunal's finding relating to "something arising in consequence of B's disability" involved a fundamental misinterpretation of those words. Section 15, he submits, was enacted to prevent disabled persons suffering detriment as a result of the immediate physical and mental consequences of their disabilities. It is expected to encompass the effect of the disability upon the disabled person, not the effect on the employer. The "something arising" must be something over which the employer has no control. In support of his submission he took me to the history of disability-related discrimination in the UK legislation, the explanatory notes to the **2010 Act**, and relevant provisions of the **EHRC Code**.

15. Mr Williams submits that the Employment Tribunal's Reasons involved drawing the wrong line between a section 15 claim and a reasonable adjustments claim. He suggests that the Claimant may have had, if she had pleaded it, a reasonable adjustments claim on the basis that the Respondent should have postponed its decision to dismiss until the report had been received. But, he submits, there was no section 15 claim.

16. Mr Williams further submits that the Employment Tribunal's Reasons involved finding a causative link where there was none. He referred to **London Borough of Lewisham v Malcolm** [2008] 1 AC 1399 at paragraphs 82 to 83 for the proposition that the link between the disability and the "something arising" must not be too remote.

17. On behalf of the Claimant Mr Currie accepts that the Employment Tribunal took a wrong turn in paragraph 24 of its Reasons. At all material times the unfair treatment complained of was the dismissal, not "the addition of a factor". But he submits that the reasoning in paragraph 25 contained all the necessary ingredients for a finding in the Claimant's favour and contained no error of law. He submits that the words of section 15 can bear their ordinary meaning and do not require to be cut down in the way which Mr Williams had suggested.

Discussion and Conclusions

18. The background to section 15 of the **Equality Act 2010** is well known. Two citations from authority will suffice to set the picture. In **IPC Media Ltd v Millar** [2013] IRLR 707 Underhill J said:

> **"17. Section 15 has no precise predecessor in the Disability Discrimination Act 1995, but it does much the same job as was done by s.3A(1) of that Act, which proscribed 'disability-related' discrimination, prior to the decision of the House of Lords in *London Borough of Lewisham v Malcolm* [2008] IRLR 700. We cannot see any difficulties about its meaning and effect. We would only mention, because it is apposite to the issues on this appeal, that, as with other species of discrimination, an act or omission can occur 'because of' a proscribed factor as long as that factor operates on the mind of the putative discriminator (consciously or subconsciously) to a significant extent: see *Nagarajan v London Regional Transport* [1999] IRLR 572, per Lord Nicholls at p.576. (The use of the phrase 'because of' in place of the terminology of 'reason' or 'grounds' in the predecessor legislation clearly does not connote any different test.)"**

19. In **General Dynamics Information Technology Ltd v Carranza** [2015] IRLR 43 I said:

> **"33. Until the coming into force of the Equality Act 2010 the duty to make reasonable adjustments tended to bear disproportionate weight in discrimination law. There were, I**

think, two reasons for this. Firstly, although there was provision for disability-related discrimination the bar for justification was set quite low: see s. 5(3) of the 1995 Act and *Post Office v Jones* [2001] IRLR 384. Secondly, the decision of the House of Lords in *London Borough of Lewisham v Malcolm* [2008] IRLR 700 greatly reduced the scope of disability-related discrimination. With the coming into force of the Equality Act these difficulties were swept away. Discrimination arising from disability is broadly defined and requires objective justification.

34. In many cases the two forms of prohibited conduct are closely related: an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, s.15."

20. Mr Skinner made reference to the Explanatory Notes to section 15. They are to similar effect:

> ***"Background***
>
> **70. This section is a new provision. The Disability Discrimination Act 1995 provided protection from disability-related discrimination but, following the judgment of the House of Lords in the case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43, those provisions no longer provided the degree of protection from disability-related discrimination that is intended for disabled people. This section is aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment.**
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> ***Examples***
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> - **An employee wish a visual impairment is dismissed because he cannot do as much work as a non-disabled colleague. If the employer sought to justify the dismissal, he would need to show that it was a proportionate means of achieving a legitimate aim.**
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> - **The licensee of a pub refuses to serve a person who has cerebral palsy because she believes that he is drunk as he has slurred speech. However, the slurred speech is a consequence of his impairment. If the licensee is able to show that she did not know, and could not reasonably have been expected to know, that the customer was disabled, she has not subjected him to discrimination arising from his disability.**
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> - **However, in the example above, if a reasonable person would have known that the behaviour was due to a disability, the licensee would have subjected the customer to discrimination arising from his disability, unless she could show that ejecting him was a proportionate means of achieving a legitimate aim."**

21. It is always good discipline for an Employment Tribunal to consider separately and make clear findings as to the different elements which combine to make a conclusion that there has been a contravention of the provisions of the **Equality Act 2010**. I will therefore set out the elements which combine to make a finding of unlawful discrimination arising from disability in

the employment field and analyse this case in that way. In a case such as this, where disability and knowledge of disability are admitted, there are five elements.

22. First, there must be a contravention of section 39(2). In this the Claimant relied on dismissal as the contravention of section 39(2) (see section 39(2)(c)).

23. Secondly, there must be unfavourable treatment. The Employment Tribunal did not define, when it listed out the issues, what the unfavourable treatment was alleged to have been. Mr Currie and Mr Williams both say that the unfavourable treatment was alleged to be the dismissal. This is exactly what I would expect. Save possibly in the very rare case where an employee for some reason wishes to be dismissed, dismissal will always unfavourable treatment for the purposes of section 15.

24. The Employment Tribunal, however, said something rather different in paragraph 24 of its Reasons. It said, reading the last three sentences together, that the unfavourable treatment was adding a factor (the Claimant's inability to agree the new working pattern) to the balance in favour of dismissal. I do not think this was the correct approach. Unfavourable treatment is that which the putative discriminator does or says or omits to do or say which places the disabled person at a disadvantage. Here it was the dismissal. Unfavourable treatment is not the mental process which lead the putative discriminator to behave in that way.

25. The **Equality Code** deals with unfavourable treatment as follows:

> **"5.7. For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."**

26. However, although the Employment Tribunal was wrong in its classification of what amounted to unfavourable treatment, this does not take the Respondent's appeal very far. On any possible view the dismissal was unfavourable treatment. Moreover the Employment Tribunal's assessment of the mental processes of the person who dismissed the Claimant will be important in respect of other elements to which I will come.

27. Thirdly, there must be "something arising in consequence of the disability". I see no reason why this phrase should not be given its ordinary, natural meaning. Like Underhill J in **Millar** I consider that the words give rise to no real difficulty. I reject Mr Williams' submission that the something must in all circumstances be something over which the employer has no control or that it is limited to effects on the disabled person alone, not the employer. I see no warrant for cutting down the ordinary meaning of the words.

28. Again, I find the **Code** helpful. It provides as follows:

> **"5.9. The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet."**

29. Nor do I see any requirement for any special causation test. It is a question of fact and degree for an Employment Tribunal to decide whether something arises in consequence of disability. No doubt it is likely that, if there are many links in the chain of causation, an Employment Tribunal will conclude that one is not really the consequence of the other (see the discussion by Baroness Hale in her dissenting judgment in **Malcolm** at paragraphs 82 to 83). But the application of a straightforward statutory test can be left to the good sense of the Employment Tribunals without any particular gloss upon it.

30. There is one important point to bear in mind about the phrase "something arising in consequence of the disability". If this is to play its part in a finding of discrimination under section 15 it must be part of the employer's reason for the unfavourable treatment. There is no point in identifying something which played no part in the employer's reasoning. This leads on to the fourth element.

31. Fourthly, the unfavourable treatment must be because of the something arising in consequence of the disability. On this question the comments of Underhill J in **Millar** point the way. The question is whether the something arising in consequence of the disability operated on the mind of the putative discriminator, consciously or unconsciously, to a significant extent. The burden of proof provision contained in section 136 of the **Equality Act** may be in play. This provision, in the context of section 15, is also discussed in **IPC v Millar** (see paragraphs 23 and 31).

32. Finally there is the question of justification. Unfavourable treatment on the prescribed ground will not amount to discrimination if the putative discriminator can show that the treatment is a proportionate means of achieving a legitimate aim. In this case there is no challenge to the Employment Tribunal's finding that the Respondent did not establish justification.

33. With this analysis in mind, I return again to the Employment Tribunal's Reasons. Central to that reasoning is paragraph 25. In this paragraph the Employment Tribunal ran together its finding as to "something arising in consequence of disability" and "because of". This is not inherently surprising. The two elements, though they may benefit in some cases from separate analysis, are very closely connected.

34. In the second sentence the Employment Tribunal makes reference to the Respondent's need or requirement of a medical report as being related to the Claimant's disability. It seems to me that Mr Williams' submissions involved emphasising this sentence to the exclusion of the Employment Tribunal's overall finding in paragraph 25. It is, however, always important to read the Reasons of an Employment Tribunal in the round. I read paragraph 25 in the following way. The "something arising in consequence of the Claimant's disability" is the Claimant's inability in the absence of a medical report to make a decision whether to agree a new working pattern or accept voluntary redundancy terms. This, it will be recalled, was not because the Claimant considered herself incapable of working the new pattern but because of the risk that the report which the Respondent had required might lead the Respondent to that conclusion, in which case she wished to be able to take voluntary redundancy.

35. This feature, the Claimant's inability to make a decision on whether to agree a new working pattern, was the feature which, on the Employment Tribunal's findings, tipped the scales and resulted in dismissal by Mr King on the day in question. In other words, it was in part because of this factor that she was dismissed at the time and in the manner she was. The Employment Tribunal went on to find that there was no justification for Mr King's impatience. He could have implemented the working pattern and awaited the medical report.

36. I see no error of law in the Employment Tribunal's reasoning. It was entitled to find that the Claimant was unable to decide about voluntary redundancy before she knew whether, by reason of the medical report the Respondent had commissioned, she was soon going to lose her job anyway. This medical report was required by the Respondent to assess the impact of the type 1 diabetes which was her disability and which might, depending on the medical report, have affected her continued employment. I see no legal impediment to the Employment

Tribunal's finding that her inability to decide about voluntary redundancy in the absence of this report was something arising in consequence of her disability. It follows that the appeal will be dismissed.