Appeal No. UKEAT/0119/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 September 2016

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS D LEE APPELLANT

HSBC BANK PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ADAM OHRINGER
(of Counsel)
Bar Pro Bono Scheme

For the Respondent

MS REBECCA EELEY
(of Counsel)
Instructed by:
Pinsent Masons LLP
1 Park Row
Leeds
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SUMMARY

DISABILITY DISCRIMINATION - Disability

PRACTICE AND PROCEDURE - Review

PRACTICE AND PROCEDURE - New evidence on appeal

Initial finding that the Appellant was not disabled confirmed by the Employment Judge at the Reconsideration Hearing after admitting fresh evidence (GP surgery notes not produced to the Appellant before the initial Employment Tribunal hearing). Appeal against the Reconsideration Decision dismissed; GP certificates that the Appellant was unfit for work are not determinative of the substantial effect question. Decision not perverse.

Application to admit (further) fresh evidence on appeal refused. That material could have been adduced below. **Ladd v Marshall** test applied.

HIS HONOUR JUDGE PETER CLARK

1. This is the second occasion on which this litigation has come before me. I begin with its progress. The Claimant, Mrs Lee, was employed by the Respondent bank as a cashier from 1 February 1996 until her dismissal effective on 6 August 2014. She commenced proceedings in the Liverpool Employment Tribunal by a form ET1 presented on 20 November 2014, complaining of unlawful disability discrimination and unfair dismissal. A question arose as to whether or not the Claimant was disabled within the meaning of section 6 of the **Equality Act 2010**. That issue came before Employment Judge Ryan at a Preliminary Hearing held on 27 March 2015. By a Judgment with Reasons dated 23 April, that Judge held that she was not disabled. The Claimant applied for a reconsideration of that decision. Employment Judge Ryan held a Reconsideration Hearing on 5 August 2015 at which he admitted additional medical records that had not been made available to the Claimant by her GP's surgery for the purposes of the original Preliminary Hearing. He heard oral evidence from the Claimant again, she having given evidence before him at the earlier hearing. By a Judgment with Reasons dated 9 September he confirmed his earlier decision that she was not disabled.

2. Against that reconsideration decision she brought the present appeal (the disability appeal) then acting in person. It was initially rejected by HHJ Eady QC on the paper sift for the reasons given in a Rule 3(7) letter dated 11 January 2016. Dissatisfied with that opinion, the Claimant exercised her right to a Rule 3(10) oral Hearing. That application came before HHJ David Richardson on 13 April 2016. On that occasion the Claimant had the benefit of representation under ELAAS pro bono by Mr Ohringer of counsel. He prepared amended grounds of appeal, three in all, replacing those drafted by the Claimant in person. At the Appellant-only hearing HHJ David Richardson was persuaded to allow the matter to proceed to

this all-parties Full Hearing on the amended grounds of appeal only. He also posed certain questions to Employment Judge Ryan under the **Burns v Royal Mail Group plc** [2004] ICR 1103 / **Barke v SEETEC Business Technology Centre Ltd** [2005] EWCA Civ 578 procedure, to which the Judge responded in a document dated 19 May 2016. That is the hearing before me today, at which Mr Ohringer again appears for the Claimant and Ms Eeley of counsel represents the Respondent as she did below.

3. Meanwhile, the unfair dismissal claim came on for hearing before Employment Judge Franey on 1-4 September 2015. His Judgment with full Reasons is dated 22 September and has been included in the bundle for the present disability appeal hearing. The principal issues for Employment Judge Franey were: what was the Respondent's reason or principal reason for dismissal; was it an automatically unfair reason, as the Claimant contended, or a potentially fair reason, conduct or some other substantial reason, as the Respondent asserted? The Judge accepted the reason advanced by the Respondent, namely the Claimant's failure to attend a psychological capacity assessment ("PCA") at the request of the Respondent. As to the second question, of fairness, he applied the **British Home Stores Ltd v Burchell** [1978] IRLR 379 test and concluded that dismissal for that reason was fair.

4. Again, the Claimant applied for a reconsideration, which was refused by Employment Judge Franey. Against that reconsideration decision she appealed (UKEATPA/0941/15/JOJ). That appeal was rejected by Langstaff J on the paper sift. Again, she applied for permission by way of a Rule 3(10) oral Hearing. That application came before me on 6 July 2016. I dismissed the application for the reasons that I gave on that day.

5. Against that background I now turn to the present appeal. At the Preliminary Hearing Employment Judge Ryan accepted that the Claimant suffered from moderate anxiety and mild depression resulting in disturbed sleep, which in turn caused tiredness and heightened emotions, having an intermittent effect on her breathing, which, unbeknown to the Claimant, amounted to panic attacks. He noted that the medical records produced to him did not bear out the effects on the Claimant's day to day activities as she described them. He did not find the Claimant to be a reliable witness, noting inconsistencies in her evidence. As to medication, he found (see paragraph 2.8) that during the relevant period between so-called medical suspension by the Respondent on 20 February 2014 until dismissal effective on 6 August the Claimant relied on herbal relaxants, having found the antidepressants prescribed for her to be ineffective. Having correctly directed himself as to the relevant law (paragraph 3.1), the Judge concluded that the adverse effect of the Claimant's condition on her day to day activities was not substantial. It was not trivial but was minor; to adopt the well-worn definition of "substantial" within the statutory formula. She was not disabled.

6. On reconsideration, the Judge addressed the Claimant's challenge to his earlier finding that she had not been taking her prescribed medication at the relevant time. Notwithstanding the fresh evidence that he had admitted, the Judge reached the same conclusion as before based on the whole of the Claimant's evidence and the medical records before him, namely that she did not take the prescribed medicine, previously diazepam and latterly duloxetine, during the relevant period between February and August 2014, thus there was no deduced effect to take into account. He noted that from her medical suspension by the Respondent in February 2014 until April or May 2014 she continued to do an eight-hour Saturday shift for a different employer. He confirmed his earlier decision.

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7. In advancing the first ground of appeal, that Employment Judge Ryan erred in law in failing to consider that the Claimant's medical absence from work was itself a substantial adverse effect on her ability to carry out normal day to day activities, Mr Ohringer relies on the undoubted fact, as appeared from the GP records before the Employment Judge, that during the relevant period the Claimant's GP, Dr Misra, certified her unfit for work. That state of affairs is slightly muddied by the Claimant's so-called medical suspension after 20 February 2014. However, the reasons for that suspension, set out particularly at paragraph 76 of Judge Franey's unfair dismissal decision Reasons, related to the Claimant's failure to consent unconditionally to a PCA, the Respondent's eventual reason for dismissal, so that Judge found. Mr Ohringer does not rely on the fact of the medical suspension as opposed to the "fit notes" issued by Dr Misra.

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8. In support of this submission he has referred me to a passage in the judgment of HHJ McMullen QC in **Rayner v Turning Point and Ors** UKEAT/0397/10/ZT, 5 November 2010, unreported, at paragraph 22, where he said this:

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> **"22. It seems to me, if a condition of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that that is in itself evidence of a substantial effect on day-to-day activities. The Claimant would have been at work and his day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities. It is of course a matter of fact for the Employment Tribunal to determine."**

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9. I entirely accept that analysis. However, I emphasise that a medical certificate is capable of indicating a substantial effect for the purposes of the statutory definition of disability; it is not conclusive. The substantial effect question remains one of fact for the ET. As to that question of fact, I agree with Ms Eeley that Employment Judge Ryan took into account the whole of the evidence, including the oral evidence given by the Claimant at both hearings before him, as well as the medical records. Based on the evidence, the Judge was not

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persuaded that the Claimant was an accurate historian (see especially paragraph 2.4 of the Preliminary Hearing Reasons and paragraph 6 of the Reconsideration Reasons). Having made that assessment, as he was entitled to do, the Judge concluded that whilst the Claimant's condition had an effect on her day-to-day activities it was not substantial. Specifically, as I have said, it was more than trivial but only minor. That was a conclusion plainly open to him, in my judgment. It follows that ground 1 fails and thus, as Mr Ohringer accepts, ground 2 is rendered moot.

10. Ground 3 is a perversity challenge. Again, I agree with Ms Eeley that the issue as to the true date of the document, apparently dated 4 April 2014 (EAT bundle, page 146), is something of a red herring. It is clear from the Judge's answer to the first question posed by HHJ David Richardson that at the Reconsideration Hearing it was common ground that the document ought to have been dated 2013. It is equally clear that Employment Judge Ryan placed no reliance on that document in reaching his finding as to the Claimant taking her prescribed medication in 2014. More generally, I am quite satisfied that the Judge was entitled to reach the factual conclusion that he did as to the taking of medication on the whole of the evidence. Accordingly, this ground of appeal also fails.

11. Finally and for completeness I should mention an application made by the Claimant to admit fresh evidence on appeal, that application having been adjourned to this hearing by HHJ David Richardson. I considered the material contained in the supplementary bundle *de bene esse*. It seems to me that without exception the evidence there contained could with reasonable diligence have been adduced if not at the Preliminary Hearing before Employment Judge Ryan then certainly at the Reconsideration Hearing. Mr Ohringer does not argue to the contrary. It

follows that the Claimant fails that limb of the threefold **Ladd v Marshall** [1954] EWCA Civ 1 test, and so I have not admitted that evidence.

12. For these reasons, this appeal fails and is dismissed.