Appeal No. UKEATPA/0378/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 January 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR K CROSSLAND — APPELLANT

CHAMBERLAINS SECURITY (CARDIFF) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR KEITH CROSSLAND (The Appellant in Person)

HER HONOUR JUDGE STACEY

1. This case comes before the Employment Appeal Tribunal on the Appellant's entitlement, pursuant to Rule 3(10) of the **EAT Rules of Procedure**, to an oral hearing to consider whether the Notice of Appeal discloses any reasonable grounds for bringing the appeal. Appeals in this forum are limited to a point of law.

2. This case of disability discrimination was first heard in the Cardiff Employment Tribunal ("ET") in July 2015 when the claim was dismissed. Thereafter there was an appeal to this Tribunal, which allowed the appeal and remitted the case for a re-hearing to a different region before a differently constituted Tribunal and the case was transferred to and heard in the Bristol ET.

3. The proposed Appellant was the Claimant at the remitted hearing in the Bristol ET which was heard before Employment Judge Pirani and members, Mr C D Harris and Mrs E Burlow, on 8-10 May 2017 and a Reserved Judgment was sent to the parties on 22 May 2017. The Judgment was broadly in the Claimant's favour. I shall continue to use the terminology of the Tribunal below and refer to the proposed Appellant as the Claimant and the Respondent to the proposed appeal as the Respondent.

4. The Claimant succeeded in all three of his causes of action under his claims under sections 20 and 21 of the **Equality Act 2010** in his claim of a failure to make reasonable adjustments; and in his complaint of breach of section 15 discrimination (because of something arising in consequence of his disability), and also in his section 27 victimisation complaint. However, on two acts of discrimination the Claimant did not succeed: (1) the Tribunal found

that Respondent was entitled to remove the Claimant from his particular post and that this complaint did not constitute a failure to make a reasonable adjustment and (2) the Tribunal found that the Claimant resigned and was not dismissed, and his complaint of discrimination in dismissal therefore failed. The case was due to proceed to a remedy hearing, which I am told has not yet taken place since the case has been stayed pending the outcome of the proposed appeal.

5. In very brief summary, the factual findings of the Bristol Tribunal, distilled from their clear and succinct findings at paragraphs 31 to 81 of their Judgment, were as follows. The Claimant was employed as a security guard by the Respondent company, which is a small family firm, on a zero hours contract as a seasonal security guard from 29 July 2014. His role was to provide security for Welsh Water at a remote reservoir site and to deter the unauthorised use of the reservoir's large body of water. He worked alone on shifts of between 12-15 hours overnight and drove around the reservoir for approximately 30 minutes in the course of his working week. The Claimant has Type 1 diabetes which he did not disclose to the Respondent. As of June 2014 he had had no record of hypoglycaemic attacks in the previous year, but in 2013 had crashed his car after a dip in his blood sugar level had caused him to blank out.

6. On 10 October 2014 the Claimant had a hypoglycaemic attack on account of low blood sugar whilst at work at the reservoir and was found by the site contractor. He had appeared "completely out of it" wandering around in a disoriented state within 12 to 30m from the reservoir bank, appeared to be wobbling or drunk and incapable of logical thought and an ambulance was called. After that incident he explained to the Respondent that had diabetes. As a result of the incident he was removed from the site by the Respondent and as there were no other vacancies or positions for him elsewhere within the company no alternative work was

immediately found for him. Since he was on a zero hours contract he was not entitled to remuneration if he was not working. The Tribunal found that the Claimant requested his P45 on 21 October 2014 so that he could sign on for state benefits, which he then did from 27 October 2014, and that he had tendered his resignation. The Tribunal, having heard the evidence, decided that he was not dismissed but that he resigned.

7. He then brought a grievance against the Respondent, which was heard on 16 December 2014. The Claimant secretly recorded the grievance hearing. The Respondent wrote with the outcome of the grievance on 22 December 2014 and stated that the Claimant would be offered work in future if it became available, but that January was usually a quiet month and no current positions were available. After the grievance meeting and on discovering the Claimant's extensive litigation history, the Respondent made a private decision not to re-engage the Claimant. The Claimant's litigation and legal history summarised in paragraphs 38 to 43 of the ET's Judgment includes several unsuccessful, and one successful, ET claims against various employers unsuccessfully appealed by the Claimant to the EAT and Court of Appeal, a High Court claim resulting in summary judgment against the Claimant and an unsuccessful libel claim against the University of Glamorgan which led to the Claimant's bankruptcy following a costs order against him. The Claimant has a law degree and completed the BVC.

8. The Claimant seeks in this Tribunal to appeal those limited aspects on which he was unsuccessful before the ET and particularly the finding that he resigned and was not dismissed. I will take each ground in turn.

9. Ground 1 concerns the Tribunal's conclusion that the Respondent's treatment of the Claimant in removing him from the reservoir work was not a breach of the reasonable

adjustment duty set out in section 20 **Equality Act 2010** and therefore did not constitute unlawful discrimination. The issues were identified in the Tribunal's Judgment at paragraphs 5 to 9, the facts are set out in paragraphs 31 to 61 and its conclusion is contained in paragraphs 104 to 114. The conclusion was that no adjustment could reasonably be made to enable the Claimant to continue on the reservoir site safely and the reasoning of the ET is impeccable. Having painstakingly considered the medical and other evidence and analysed the adjustments suggested by the Claimant, and having correctly directed itself as to the applicable law in paragraphs 82 to 91 the Tribunal concluded that the decision to remove the Claimant from the reservoir site was reasonable and that the adjustments proposed "would not have been effective in ameliorating the express disadvantage relied on by the Claimant" (paragraph 114).

10. Neither the Claimant, the Respondent nor the Tribunal could think of anything that could have enabled him safely to continue at the site. Before me today, the proposed Appellant has also explained that the phone signal at the site was atrocious, which would further strengthen the Tribunal's reasoning and not undermine it, as suggested by the Claimant. Lone working by a reservoir in a remote and isolated location would pose a substantial risk to the Claimant if he were to experience another hypoglycaemic attack such as he experienced on 10 October 2014. The Tribunal had made findings based on the evidence about the Claimant's management of his condition and the risk of further episodes (see paragraph 58).

11. The points raised orally today by the Claimant concerning whether the contractor found him by the gate or closer to the water are rather beside the point and not relevant to the Tribunal's consideration. Firstly, the distance was a finding of fact made by the Tribunal which they were entitled to make and precisely where he was within the range of 12 or 30m is

immaterial. Secondly, it was happenstance and chance that he was not closer to the reservoir edge on 10 October 2014 when the episode occurred.

12. The Claimant's second point in ground 1 of his appeal is that the Tribunal's finding that his complaint of section 15 discrimination (discrimination arising in consequence of disability) in relation to the Respondent's decision that the Claimant could no longer work at the reservoir and not offering him other work, was well founded, was inconsistent with its finding against the Respondent on the reasonable adjustment duty head of claim. This is to misread or misunderstand the ET's careful explanation of the distinction between the cause of action under sections 20 and 21 (the reasonable adjustment duty) and section 15. The Tribunal has correctly directed itself as to the applicable law in the case of **Pulman v Merthyr Tydfil College Ltd** [2017] UKEAT/0309/16 - it is necessary for Tribunals to apply the statutory provisions to each claim separately - they are different concepts and comprise different legal tests (see paragraph 97 of the ET's Judgment and also paragraphs 121, 123, and 124). The Tribunal cannot be criticised for adopting and applying the statutory language and relevant case law which differs as between sections 20 and 21 (reasonable adjustment) and section 15, as the Tribunal explains in paragraph 97:

> **"97. … Section 15 includes a justification defence by reference to a concept of proportionality. Section 20 uses a concept of reasonableness instead. They are not necessarily always the same thing."**

The Claimant's attempt to drive a wedge between the conclusions of the Tribunal in relation to the reasonable adjustment duty as distinct from the section 15 obligation discloses no error of law.

13. Grounds 2 and 3 of the proposed appeal can conveniently be taken together since they both concern the Tribunal's finding that the Claimant resigned and was not dismissed. Ground

3 concerns the Claimant's second witness statement, which was prepared after the Cardiff Tribunal and put in evidence before the Bristol Tribunal. The complaint is that he was not allowed to develop his evidence in-chief and that only cursory reference is made to his second witness statement in the Bristol ET's Judgment. I have considered the Claimant's 29-page second witness statement. It is more of a submission and a critique of the Cardiff ET's Judgment rather than evidence that would be of assistance to the Tribunal in reaching its factual findings. It is therefore obvious why little reference has been made to it in the Bristol Tribunal's Judgment since it takes matters no further. In any event in paragraph 30 the Tribunal refer expressly to the second witness statement and have clearly considered it. No lacuna in the Bristol ET's reasoning or in their findings of fact is evidenced and the ground of appeal is unsustainable.

14. The finding of fact - and it was a finding of fact - whether the Claimant resigned or was dismissed was one which was open to the Tribunal to make on the evidence before it. In paragraphs 133 to 136, the Tribunal explains why they have resolved the dispute of fact in the Respondent's favour. The Tribunal had the benefit of all the relevant evidence including the Claimant's covert recording of the grievance hearing and the witness statements of both the Claimant and the Respondent's witnesses, Mr and Mrs Trevivian, and all their oral evidence. The Tribunal did not believe the Claimant's evidence, and the covert recording the Claimant made of the grievance hearing did not support his case. The Tribunal found that:

> **"136. … Both Mr and Mrs Trevivian were consistent in their recollection of the Claimant's request for his P45. Despite the covert recording and the Claimant's extensive questioning, Mr Trevivian did not depart from his stated position that it was the Claimant who requested the P45. At one stage, however, the Claimant seemed to waiver even though he knew he was recording the proceedings and replied "yes, right" in response to "you said you wanted your P45" from Mr Trevivian. On balance, we conclude that the Claimant did resign by requesting his P45 and was not dismissed."**

15. Today the Claimant has referred to the case of **Bates v Brit European Transport Ltd** [1995] UKEAT/309/94, a judgment of Mummery LJ (as President of the EAT), concerning the status of a P45. It does not assist him because it is a clear finding of fact that at that meeting the Claimant resigned and asked for his P45, and there is no suggestion that the Tribunal have led themselves into error by wrongly thinking that a P45 *per se* is conclusive of dismissal and the case of **Bates** is not on point.

16. Ground 4, which asserts that the Tribunal implied that the Respondent was the wronged party, is a further attempt to reargue the case and this Tribunal is a Tribunal for the exploration of errors of law, not findings of fact, unless there are particular grounds, such as perversity or a lack of adequacy of reasons, none of which have been made out in this appeal. In the very clear, meticulous and careful Judgment of the ET, no error of law is identified and the Tribunal was perfectly entitled to reach the findings that they did.

17. To the extent that the Claimant seeks to challenge the case management decisions and powers of the Tribunal, I remind myself that the Tribunal has a wide discretion in accordance with its case management powers and the overriding objective and it is clear from their Reasons that they exercised their powers fairly and in a balanced way and demonstrated considerable sympathy and understanding for both sides in this difficult case.

18. In relation to ground 5, in light of the Tribunal's conclusion that the Claimant resigned and was not dismissed, the allegation that the ACAS Code has been breached becomes entirely hypothetical. In the absence of a dismissal or any other successful claim as is listed in schedule A2 to the **Trade Union and Labour Relations (Consolidation) Act 1992**, there is no award susceptible to an increase. In any event the Tribunal had the benefit of considering all relevant

matters and they were both entitled, and best placed, to reach the conclusion that they did. The statute provides that a Tribunal "may if it considers it to be just and equitable" adjust an award in a claim listed in Schedule A2. The Tribunal clearly had both justice and equity at the forefront of its mind and it was entitled to conclude that had there been an award that was susceptible to a possible adjustment by reason of section 207A, they would not have exercised it in the Claimant's favour.

19. In summary, at the remitted hearing in an exceptionally clear and carefully worded Judgment, the issues were meticulously set out and comprehensively dealt with. At each stage the Tribunal explained their factual findings, why they had been reached and they did so clearly by reference to the evidence before them and the arguments of the respective parties. Their summary of the applicable law is unimpeachable and it is evident from the Judgment that they applied and followed their own self direction. This appeal does not raise a point of law which gives rise to an appeal or any reasonable prospect of success.

20. I therefore direct that no further action be taken on this appeal.